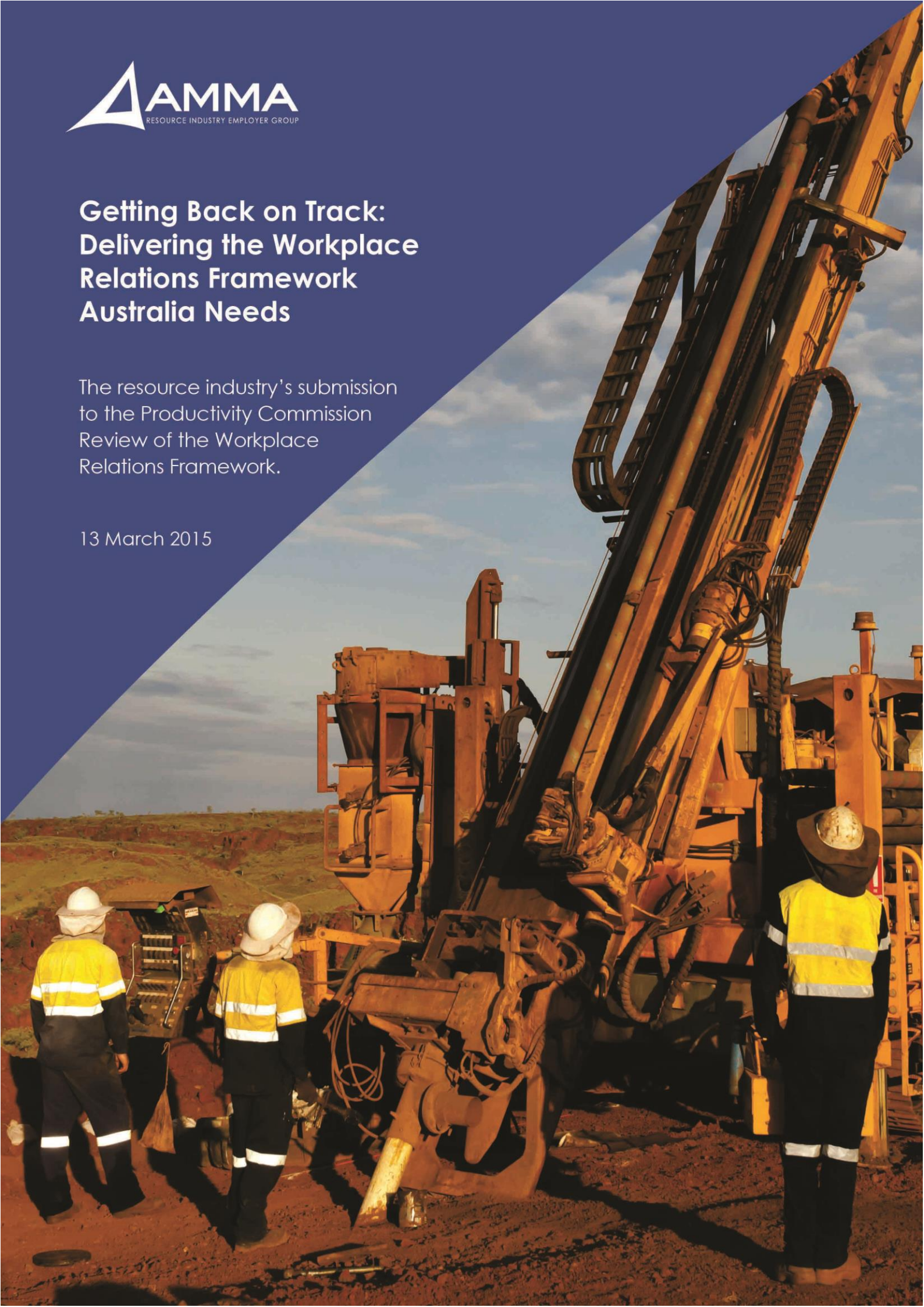


Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs

The resource industry's submission
to the Productivity Commission
Review of the Workplace
Relations Framework.

13 March 2015



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 96 years, AMMA's membership covers the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA's dedicated work is to ensure that Australia's resource industry is an attractive and competitive place to invest and do business, employ people and contribute valuably to Australia's well-being and living standards.

The resource industry is and will remain a major pillar of Australia's economy. The sector directly contributed \$155 billion to Australia's GDP in 2013-2014 and, factoring in the full direct and indirect effects of resources activity, generates about 18 per cent of GDP in total. It is forecast that Australian resources will comprise the nation's top three exports in 2018-19.

AMMA members across the resource industry are responsible for a great deal of employment in this country. In 2013-2014, the industry directly employed 269,000 people in resources extraction and 190,000 people in resources-related construction and manufacturing – directly representing 4 per cent of total employment in Australia. When considering the flow-on effects of our sector, an estimated 10 per cent of the national workforce, or 1.1 million Australians, are employed as a result of the resource industry.

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ABBREVIATIONS

AAWI	Average Annualised Wage Increase
ABCC	Australian Building and Construction Commission
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AHRC	Australian Human Rights Commission
AHRI	Australian Human Resources Institute
AIRC	Australian Industrial Relations Commission
ALRC	Australian Law Reform Commission
AMMA	Australian Mines and Metals Association
ANZSIC	Australian and New Zealand Standard Industrial Classification
AWAs	Australian workplace Agreements
AWOTE	Average Weekly Ordinary Time Earnings
AWU	Australian Workers Union
BCA	Business Council of Australia
BOOT	Better Off Overall Test
CAA Act	<i>Conciliation and Arbitration Act 1904</i>
Cat. No.	Catalogue Number
CFMEU	Construction, Forestry, Mining and Energy Union
COIL	Committee on Industrial Legislation
CPI	Consumer Price Index

DEEWR	Department of Education, Employment and Workplace Relations
EM	Explanatory Memorandum
FW	Fair Work
FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWA	Fair Work Australia
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
GDP	Gross Domestic Product
GFC	Global Financial Crisis
IFA	Individual Flexibility Arrangement
IC Bill	Workplace Relations Amendment (Independent Contractors) Bill 2006 (Cth)
IR Act	<i>Industrial Relations Act 1988 (Cth)</i>
IRR Act	<i>Industrial Relations Reform Act 1993 (Cth)</i>
IRR Act (No. 2)	<i>Industrial Relations Amendment Act (No. 2) 1994 (Cth)</i>
ITEA	Individual Transitional Employment Agreement
LSL	long service leave
MFP	Multifactor Productivity
MGA	Master Grocers Australia
NDT	No-Disadvantage Test
NED	nominal expiry date
NES	National Employment Standards
NWRCC	National Workplace Relations Consultative Council
OEA	Office of the Employment Advocate
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational Health and Safety

PC	Productivity Commission
RBA	Reserve Bank of Australia
s.	section
TCF	textile, clothing and footwear
Work Choices	<i>Workplace Relations Act 1996 (Cth)</i> as it existed subsequent to the amendments made by the <i>Workplace Relations Amendment (Work Choices) Act 2005 (Cth)</i>
WR	workplace relations

EXECUTIVE SUMMARY

- Our workplace relations system should provide efficient, transparent and effective regulation of work and contribute to making Australia an attractive place to invest, do business and create jobs in a changing, globalising world.
- The Productivity Commission has a historic, 'once in a generation' opportunity to get the workplace relations system back on track and better able to deliver what Australia needs to meet current and future challenges.
- This must include addressing the problems created by the *Fair Work Act 2009* and its growing inconsistency with the needs of workplaces, employers and employees.
- Backed by practical experiences and evidence, this submission identifies goals for reform and makes recommendations for workplace relations framework that will deliver stronger, more productive, more competitive and harmonious workplaces.

The economic case for reform is clear, and becoming urgent (Part 2)

- A viable, growing, prosperous and internationally competitive resource industry is vital for the Australian economy.
- However, Australia is becoming a less competitive and costly place to do business, and 'mining' productivity has declined by more than 45% in the past decade.
- If we do not pursue reforms to better support multifactor and labour productivity in the resource industry and broader economy, our living standards will decline.
- Australia now ranks as one of the least competitive and most costly places to employ compared to fellow OECD and other competing nations.
- Investment and jobs in Australia are at risk from fundamental problems in our workplace relations system that negatively impact on attracting investment which in turn detracts on employment opportunities.

Major economic evidence – The KPMG Report

- To deliver the right options for policy makers, the economy and community, the PC requires the best possible ideas and evidence, and evidence of genuine substance.
- AMMA commissioned leading global economic consultancy KPMG to examine:
 - The socio economic contribution of the resource industry to Australia.
 - Competitive pressures on the Australian resource industry.
 - Impacts of reforming key aspects of the existing workplace relations framework.

- KPMG's comprehensive report [Workplace Relations and the Competitiveness of the Australian Resources Sector](#) - has been lodged to accompany this submission.
- It shows that the benefits of key reforms in this submission to the resource industry alone could add up to \$30.9 billion to Australia's GDP and create up to 36,000 additional jobs.
- If these reforms were fully implemented, they could collectively support:
 - Real GDP growth of 2%;
 - Total national employment growth of 0.3%;
 - Household consumption growth up to 1.8%;
 - Economy-wide investment growth up to 4.1%; and
 - Exports growth up to 1.5%.

Reform priorities for the resources industry

- Resource employers identify six (6) priority areas to reform the current *Fair Work Act 2009* that will yield particular benefits for employers, employees and the community.
 - Balanced, sensible rules for taking legally **protected industrial action** (Part 4).
 - Balanced and effective rules for **unions to enter workplaces** (Part 5).
 - Accessible, reliable and competitive options to regulate workplace relations on new projects through **greenfields agreements** (Part 3.4).
 - Ensuring **agreement content** / strikes are restricted to employment claims (Part 3.5).
 - Providing useable **individual agreement** making options (Parts 3.2 and 3.3).
 - Reducing artificial and inflated litigious risk through **adverse action** claims, while protecting employees from unlawful and discriminatory treatment (Part 7.4).

The bargaining framework (Part 3)

- Enterprise bargaining has gone backwards in its relevance to the changing needs and priorities of employers and employees in Australian workplaces.
- Current bargaining rules are flawed, artificially empower non-representative unions, and encourage agreements that do nothing to meet our pressing productivity challenges.
- Evidence shows the current agreement making process contributes significantly to project delays, cost-escalations and investment being lost in the resource industry.
- Significant reforms are required to better equip Australian businesses to be more productive and competitive, and better support incomes and living standards.

- A range of practical bargaining options should be available:
 - Collective bargaining both with and without union involvement (Part 3.5).
 - Greenfields agreements for new projects that are practical and genuinely support the creation of major resource infrastructure in Australia (Part 3.4).
 - Individual statutory agreements (Part 3.2).
 - A genuinely useable and reliable form of the existing Individual Flexibility Arrangements (IFAs), (Part 3.3).

Industrial action and disputes (Part 4)

- Industrial action/disputation is major problem in the resource industry, particularly major resource sector construction projects that are extremely capital and labour intensive and highly exposed to adverse outcomes from industrial disputes.
- Small delays and disruptions can have significant impacts on total costs and timing forecasts of completion, thus can severely impact investor confidence and Australia's reputation as a safe place to invest.
- Recent disputes, such as the Teekay Shipping case of 2014, shows how threatened or actual industrial action in the resources supply chain can significantly impact major producers/exporters, and thus state royalties and federal taxation.
- The system should recognise how industrial action damages employers, employees, third parties and Australia's reputation as a stable and competitive destination to invest.
- AMMA seeks more balanced rules for the taking of legally protected industrial action to minimise the wide impacts and see more matters resolved without damaging strikes.

Union access to workplaces (Part 5)

- Unions should be able to enter workplaces, but this cannot be an unfettered right and there must be suitable controls and responsibilities to prevent misuse / overuse.
- The current system is being actively misused. Flaws and imbalances are driving excessive visits, and unnecessary disruptions and costs that are damaging to businesses.
- Once the Fair Work laws were implemented, the Pluto LNG Project went from having zero union visits for the two years prior, to experiencing 450 union visits within 10 months.
- BHP Billiton recorded 1,896 union visits to its workplaces in 2009-2011, and estimated that the cost of these visits were approximately \$1,145 per visit (KPMG report pg. 87).
- AMMA recommends a range of reforms in this area, centring on:
 - Requiring unions to have an appropriate connection to the workplace, and to be responding to specific member invitations and concerns.

- Stronger obligations for officials to behave lawfully, follow directions, not disrupt work.
- Permission to legally enter workplaces being a privilege, carrying responsibilities, and being revocable if misused.

The safety net (Part 6)

- Australia has an employment safety net in name only, falling well short of the minimum standards required to both protect employees and encourage bargaining.
- There is significant confusion and overlap between awards and the National Employment Standards (NES), which is harming compliance, employees and employers.
- If awards are to remain part of the system, reform should be towards greater standardisation and codification into legislation, and awards regulating fewer matters.

Employee protections (Part 7)

- The best employee protection is working for a productive, competitive, sustainable enterprise that can do business, grow and employ in Australia.
- Employment protection measures (unfair dismissal, adverse action, workplace bullying) must be balanced, proportionate, and practical and navigable for employers.
- The FW Act's unfair dismissal rules have had the effect of encouraging speculative claims and have seen the FWC encroach on what should be left to managerial decisions.
- The adverse action provisions encourage unmeritorious claims, which are difficult and costly to defend due to the 'guilty until proven innocent' reverse onus of proof.
- Reforms in this area should look at containing the number of unmeritorious claims, defining clearly the required nexus between a workplace right and the alleged adverse action, and capping the currently unlimited compensation for successful claims.

Institutions (Part 8)

- Australia needs a new, properly organised system of tribunals focused on employment, including an Employment Tribunal to replace the current Fair Work Commission (FWC).
- This would ensure Australia's employment institutions are better focused on the widely accepted priorities of job creation, competitive industries and productive workplaces.

Other workplace relations matters (Part 9)

- All workplaces should have access to casual work through legislation.
- There should be no scope for employees to unilaterally convert casual employment to full time or part time employment.

- Temporary skilled migration is a migration policy matter, not relevant to this review.
- Enterprise agreements should not be used to discourage temporary skilled migration.
- Laws on contractors do not need to change, and no single statutory definition should be attempted.
- Labour hiring does not require dedicated consideration or additional regulation.
- Anti-contracting and anti-labour hiring agreement clauses should be outlawed.
- The primary role of competition policy in workplace relations should be prohibition of secondary boycotts by trade unions.
- The PC should not seek to extend the application of competition law into employment, and should instead focus on getting our workplace relations laws back on track.

Recommendations (Part 10)

- AMMA's detailed recommendations are listed in Part 10, by part/chapter.

1. INTRODUCTION – GETTING BACK ON TRACK

1. AMMA is Australia's national representative of employers in the resource industry. AMMA and its members are major users of the Australian workplace relations (WR) system principally through the Fair Work Commission (FWC) and the courts. Together with its members, AMMA regularly deals with bargaining and industrial action impacting on multi-billion dollar operations employing many thousands of Australians and contributing significantly to taxes and royalties.
2. For almost a century, the resource industry through AMMA has been at the forefront, if not front line, of WR in Australia, from the seminal cases that initially spread the award system, to driving fundamental cultural change in the 1980s and 1990s.
3. AMMA has a strong legacy of contributing to the evolution of the Australian workplace relations system, consistent with resources being one of the drivers of Australia's export and economic performance. When flow-on employment impacts are taken into account, an estimated 10% of the national workforce, or 1.1 million Australians, are employed as a result of the resource industry.
4. AMMA is also a key participant in workplace policy debate in Australia at the highest levels. Along with ACCI, the ACTU, BCA and a limited group of other major national organisations, AMMA is a member of the National Workplace Relations Consultative Council (NWRCC), the key forum for policy and legislative engagement on WR at the national level.
5. AMMA's guiding vision is to ensure Australia's resource industry is an attractive and competitive place to invest and do business, employ people and contribute to the nation's well-being and living standards.
6. This can usefully be extended to the WR system as a whole. Australia needs a workplace relations framework that ensues our nation is an attractive place to invest and do business, employ people and which better contributes to the nation's well-being and living standards. A workplace relations system should also set minimum standards for employment through an effective employment safety net. (Below we set out principles for an improved WR system in Australia that better delivers on the terms of reference for this inquiry).
7. The resource industry welcomes this inquiry into Australia's current workplace relations (WR) framework, and alternatives that could better meet Australia's current and forecast labour market, economic and social challenges.
8. Such an inquiry is long overdue, and could not be more timely or important for the Australian economy and community. It comes at a time of growing economic pressures on Australia, and projections of substantial demographic, debt and other economic challenges that are impacting on, and will further impact on, all Australians.

9. As we stress throughout this submission, the PC¹ inquiry also comes as the Australian resource industry faces particular challenges that are impacting not only on profits or returns, but also employees, communities and the wider Australian economy. There is an urgent national economic and social imperative to ensure the range of economic settings in Australia, including how we regulate work, support a growing economy that can generate more and more sustainable jobs.
10. This inquiry needs to be a turning point that charts a course to get the Australian workplace relations system back on track. To be clear:
 - a. There are significant flaws, inefficiencies and imbalances in the current system, created by the *Fair Work Act 2009* (FW Act).
 - b. These problems need to be fixed with urgency, or Australia will risk the problems that must inevitably flow for declining competitiveness and productivity.
11. The PC asks submitting parties to consider *whether the current system is well suited to contemporary (and evolving) workplace needs for Australia in an increasingly globalised economy.*²
12. Resource employers are at the forefront of operating in the global economy and competing with operators working under very different workplace relations systems. It is absolutely clear to our industry that the current system is not the correct one to meet either current or changing workplace needs for either employers, employees or the community (including jobseekers).
13. Significant and unacceptable problems proliferate through various parts of our national WR system that are damaging business operations and the creation of jobs in this country.
14. There are significant flaws in the FW Act, at both the technical or applied level, but also in its more fundamental failure to properly engage with larger national challenges, and our changing society and workplaces.
15. The FW system is increasingly failing Australia in key areas as set out throughout this submission, just as employers predicted at the time of its creation, and the then-government ignored. This is in substantial part due to the 2009 "Fair Work" changes:
 - a. Reversing two decades of bipartisan consensus on the direction of workplace reform in Australia, and previously established fundamentals such as an enterprise driven system and decentralisation from the industry to enterprise level.
 - b. Deliberately reregulating key areas of work, and creating new powers for trade unions representing an ever-diminishing proportion of Australian employees.

¹ Note that we have used the abbreviation PC throughout for the Productivity Commission, to avoid confusion with the Fair Work Commission (FWC)

² Issues Paper 1, p.10

- c. Being over-ambitious and executed without a proper understanding of their impact.
 - d. Being precisely the wrong policy and economic approach for any country to take during the early to mid-phase of the GFC. That any country could reregulate its labour market at that point of the economic cycle is extraordinary.
 - e. Being the product of political opportunism, rather than a detailed and fundamental review of what work and workplaces, employers and employees, actually need. This is a fault the PC now has an opportunity to correct.
16. The PC has the opportunity to consider a significantly improved WR framework for Australia's future which will continue to be world leading in the protection of employees and the provision and enforcement of minimum terms and conditions of employment. This is also an opportunity to better meet the economic and labour market challenges we face by using a more modern and effective framework that delivers on its regulatory purpose.
17. The PC seems aware of where policy ideas will come from in this process, and that the best and most effective WR framework will be a "hotly contested" matter³. It notes two very different views on whether the current system is flawed and needs reform, or whether it is operating acceptably.
18. Incongruent views between, at its simplest, business and unions are not going to change, and Australia has never had, nor will it have in the near future, some corporatist utopia of grand national consensus on WR policy and regulation (although we had a constancy in policies for enterprise bargaining prior to the 2009 changes). A grand consensus is not the PC's challenge in this review, and instead the PC needs to engage with the future shape and form of an improved WR system on its merits.
19. The PC also has the opportunity to give workplace regulation a clearer sense of direction and purpose, and to engage with the direction and purpose of the WR framework for the future.
20. It is time to get away from the "pendulum" in Australian WR policy in which controversial changes to legislation are reversed following any change of government. It is time to put an end to notions of swing and swing back in how we regulate work, and to instead put in place fundamental markers for the direction of workplace policy in the medium to longer term.

³ Issues Paper 1, p.10

21. Finally in introduction, it is also worth considering opposing views and prescriptions in context. The problems AMMA identifies in this submission are genuine, concerning, and are having the impact we claim. The alternatives we propose do need to be progressed as a matter of urgency for the reasons we set out.
22. However the actual scope for workplace policy change in Australia is quite narrow; we are not going to become a non-minimum wage country, nor abolish the unfair dismissal jurisdiction outright, nor reduce the existing safety net. Agreements will continue to be registered, we will continue to have a role for tribunals etc.
23. The PC seems aware of the narrow scope of debate in Australia and some of the fundamental systemic matters that have effectively been determined:

At the end of this period of considerable change, there remains some continuity. Safety net arrangements remain a fundamental part of the system (through awards covering a wide range of industries; National Employment Standards that must be reflected in all agreements; and a regularly re set minimum wage). There are still elaborate laws and administrative processes governing employment relations in all but a few pockets of the economy, and multiple specialist agencies still oversee the system. Even as the system has moved towards much greater use of enterprise bargaining, the requirements for review and registration of each agreement and the circumstances under which negotiations may proceed have remained within the (adapted) legal structure.⁴

24. What the PC can take from this is to be very sceptical of claims the sky will fall if particular parts of the existing system are reformed, or, in the case of awards (see 6.2), consolidated into other parts of the system. Australia will continue to be a highly regulated place to work in global terms, and there is massive scope to reform our regulation of work without any genuine threat or loss to employees or our social cohesion. In fact the best things we can do for social cohesion, living standards and jobs is to increase productivity and competitiveness.

Putting the positives in context

25. The PC identifies at pp.12-15 of Issues Paper 1, various positives in the performance of the current system, or in the performance of the economy that coincided with the WR system of recent decades. The following should be noted in relation to this:
 - a. The problems with our WR system should not be exaggerated, our system is functional and supports the employment of 11.6 million Australians. Our concern is that within the practical scope to alter the system, it is not performing as well as it could, and without changes, more fundamental concerns are likely to emerge.
 - b. AMMA's concerns are not with the WR system of the past two decades; in a very real sense Australia was on the right track pre-Work Choices and pre-FW Act. Our concerns are prompted by the policy reversals in the 2009 FW

⁴ Issues Paper 1, p.9

package of amendments, which are not consistent with the system that yielded the positives the PC notes⁵.

- c. Improvements in Australia's macroeconomic environment do support a conclusion that the previous bipartisan commitment to enterprise bargaining was positive, which makes the 2009 changes and the current state of the system more extraordinary.
- d. The positives the PC notes in Issues Paper 1 appear to overwhelmingly be products of the pre-FW system, not the FW changes. The benefits of decentralisation in minimising inflation predated the election of the previous government.

Historical context

- 26. The PC notes in its introductory issues paper⁶, the importance of the historical context of our WR system and how it evolved, charting some key points in its evolution.
- 27. Resource employers would make the following points on this:
 - a. The current system under the FW Act cannot be treated as simply part of the broad post-1980s move away from centralised conciliation and arbitration, it is actually in key areas an interruption and backwards step. As we put it in this submission – the FW changes saw Australia leaving the track on proven and effective workplace reform, and we need to get our laws back on track for the future.
 - b. The FW changes in 2009 were discordant and discontinuous of the agreed, and we argue proven, foundations for the operation of the Australian WR framework.
 - c. Specifically, the 2009 changes re-regulated and re-centralised determination above the workplace level, reversing the shared fundamentals of an enterprise bargaining-driven system put in place and built on by the Coalition.
 - d. A key outcome of this review has to be returning to a genuine system of enterprise determination and a wider WR system that supports and encourages enterprise determination.
- 28. It's quite correct that Australia changed direction markedly in the 1990s, and this broad direction (enterprise bargaining, the safety net, decentralisation and deregulation) remains the right one for our system.
- 29. The PC has an opportunity get things back on track and consider how to reverse the reversals in the FW Act, and move towards a system which is more fundamentally coherent, internally consistent, and which can endure and support long term growth, prosperity and employment.

⁵ Issues Paper 1, pp.12-15.

⁶ Issues Paper 1, p.8

ECONOMIC IMPERATIVES FOR WORKPLACE REFORM

30. The terms of reference make clear that workplaces, and workplace relations are very important to our economy and society and that:

*"Higher living standards, better pay and more jobs all depend on having fair, productive, and effective workplaces. The prosperity of tomorrow is driven by what happens in our workplaces today and this is why it is in our national interest to make sure that the FW laws are balanced and effective."*⁷

31. The PC then notes in approaching its work that:

- a. The choices our governments make in how Australia regulates WR, and the design of the WR system, reflect its pre-eminence in our national economic policy.⁸
- b. (Based on the terms of reference⁹) The PC "will assess the performance of the workplace relations framework, including the Fair Work Act 2009, focussing on key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people".

32. Workplace policy debate is characterised by claim, counter-claim, and competing visions and prescriptions for how and to what extent employment should be regulated.

33. Without diminishing the importance of materials and proposals drawn from experience and analysis – and such materials are also critical to this submission - the PC will be significantly assisted in this review by first-rate economic research to assist in reviewing the system and considering alternatives, and as a complement to the other submissions it receives.

34. First-rate economic research on the possible economic benefits of WR reform is long overdue, is highly relevant to the way PC undertakes its reviews, and is needed to overcome much of the misinformation which perpetuates in this policy area. Empirical research is the currency from which the PC examines a wide range of policy and regulation.

35. Those arguing for alternative approaches to the current FW status quo will best assist the PC in being able to engage with their proposals if they provide robust evidence for them. AMMA is arguing for substantial alternatives to what we think is an increasingly failing status quo, and we are pleased to be able to bring forward information to support this.

36. AMMA has commissioned what we believe is the most significant economic analysis to date of the benefits of WR reform, directed squarely at the considerations of the PC in this review, and the matters in the terms of reference.

⁷ Issues Paper 1, p.iii

⁸ Issues Paper 1, p.1

⁹ Issues Paper 1, p.iii

37. Leading global economic consultancy KPMG has prepared a major and unprecedented economic research report entitled *Workplace Relations and the Competitiveness of the Australian Resources Sector*, which is lodged with the PC to accompany and support this submission.
38. Part 2 of this submission outlines:
- a. The importance to Australia of a competitive and growing resource industry and, in particular, the importance of attracting a continuous pipeline of new resource project investment to Australia.
 - b. Increasing competitive challenges for resource operations and concerns from investors.
 - c. The significant and growing productivity challenge facing Australia and our declining productivity performance over some years (predating the FW Act).
 - d. The risk to existing living standards (which will go backwards) if productivity and competitiveness does not increase.
 - e. The very poor performance of Australia's WR system compared to international competitors.

ECONOMIC EVIDENCE – THE KPMG REPORT

39. The PC Commission “invites participants’ views on the best evidence about the impacts of the WR system”¹⁰, and at various points in the Issues Papers stresses the importance of backing up positions and recommendations with evidence. AMMA has heeded this message and commissioned substantial evidence to back up our submissions to this vitally important review.
40. A 133-page report by KPMG, *Workplace Relations and the Competitiveness of the Australian Resources Sector*, has been lodged with this submission.
41. It examines the economic impacts of four of the six WR reform priorities AMMA recommends to the PC in this submission:
- a. Restoring balance and suitable limits to union entry into workplaces (Part 5)
 - b. Greenfields agreement making for new projects (Part 3.4)
 - c. A useable option for statutory individual agreement making (Part 3.2)
 - d. Rebalancing unfair dismissal and adverse action protections (Part 7).
42. This research shows that the resource industry's recommended reforms could add up to \$30.9 billion to Australia's GDP and create up to 36,000 additional jobs.

¹⁰ Issues Paper 1, p.17

43. KPMG estimates that if key workplace reforms advocated by AMMA were fully implemented, they could collectively support resource sector productivity growth of up to 5% and investment growth of up to 8%.
44. This would grow national GDP by 2% and employment by 0.3%.
45. We commend this major piece of independent economic research, which has been prepared for this review, to the PC to assist its consideration of delivering the WR system our country needs to better meet current and forecast labour market challenges.
46. This 2015 research is also complemented by earlier experiential analyses on the practical operation of the FW Act, undertaken by AMMA and RMIT. At various points, we cite real world experiences of resource employers in the six reports of the AMMA Workplace Relations Research Project, and also commend this material to the PC.

THIS SUBMISSION

47. The PC *"invites participants to submit proposals they consider would improve the operation of the WR system together with supporting evidence and argument"*.¹¹
48. The resource industry seeks to do exactly that through this detailed and wide-ranging submission. In each instance, we have sought to identify problems, step back to look at a fundamental level at what regulation should deliver and how, and then made specific recommendations.
49. AMMA has approached this review comprehensively, seeking to take up the challenge of considering how Australia's entire workplace relations framework can be improved.
50. As we engage with particular parts of the system however, any organisation must necessarily focus on those areas presenting particular concerns for those it represents, and that are set to yield particular benefits for the wider community and those it represents.
51. AMMA members have systematically, comprehensively, and continuously reviewed the operation of the FW Act since its commencement through quarterly workplace policy committee meetings. In preparation for the 2012 FW Review Panel, this was complemented by a major series of surveys, the results of which remain very relevant for this review.

Reform priorities

52. Through this process, AMMA members have clearly identified six (6) key priority areas/ concerns in which changes to the FW Act are the most pressing, and that would yield particular benefits to employers, employees and the general community.

¹¹ Issues Paper 1, p.15

53. The six reform priorities for resource industry employers based on their experience operating under the FW Act are:
- More balanced rules for the taking of legally **protected industrial action**, which minimise impacts on employers, employees and the community and see more matters resolved without damaging strikes and to the enduring satisfaction of the employers and employees concerned (see Part 4)¹²
 - Balanced and effective governing **union access to workplaces** (See Part 5)¹³
 - Accessible and reliable options to secure WR arrangements for new projects through **Greenfields Agreements** (See Part 3.3)¹⁴
 - Ensuring **agreement content** is restricted to employment matters (see Part 3.5)¹⁵
 - Proving useable **individual agreement** options (Part 3.2)¹⁶
 - Reducing artificial and inflated litigious risk of **adverse action**, whilst continuing to protect employees from unlawful, discriminatory, etc. treatment (See Part 7.4)¹⁷

Other proposals

54. This is, however, also intended to be a comprehensive submission, engaging with the operation of the system as a whole and presenting principles and vision for reforming the system as a whole, as well as specific areas of the system beyond the lead priorities and concerns of the industry. It is structured into 10 Parts, some with multiple chapters.

Part 1.	Introduction
Part 2.	Economic Case for Workplace Reform
Part 3.	The Bargaining Framework
Part 4.	Industrial Action and Disputes
Part 5.	Union Access to Workplaces
Part 6.	The Safety Net
Part 7.	Employee Protections
Part 8.	Institutions

¹² PC Issues Paper 3, pp.10-14

¹³ PC Issues Paper 5, p.15

¹⁴ PC Issues Paper, *passim*

¹⁵ PC Issues Paper, pp.3-4

¹⁶ PC Issues Paper 3, p.14-16

¹⁷ PC Issues Paper 4, pp.5-6

Part 9. Other Workplace Relations Matters

Part 10. Recommendations

55. Above all, this is advanced as a system of recommendations for a new system based on employment. The recommendations are severable, but are based on consistent principles and aspirations for our system.

56. We commend our recommendations to you as a comprehensive package of changes to take our system forward to ensure WR in Australia better supports economic, employment and social outcomes for employers, employees and our community.

57. Employers agree with the PC that:

No nation aspires to be a low wage economy. The more relevant question is how a workplace relations system, together with other policies and practices, should be designed to achieve high productivity and to allocate labour to its best uses, thereby sustaining higher incomes and enabling greater wellbeing over time.

58. This is precisely the question we have sought to engage with and to assist the PC in answering and making recommendations. This not just an exercise in making recommendations to change specific policy settings, but to embrace the challenge of thinking about the system we need.

PRINCIPLES / GOALS FOR OUR WR SYSTEM

59. Throughout this submission, resource employers seek to deal with both the big picture and small, and to work from broad principles about what each area of regulation needs to deliver, through major changes if any, to smaller more applied changes which should be engaged with in the absence of major changes to the system.

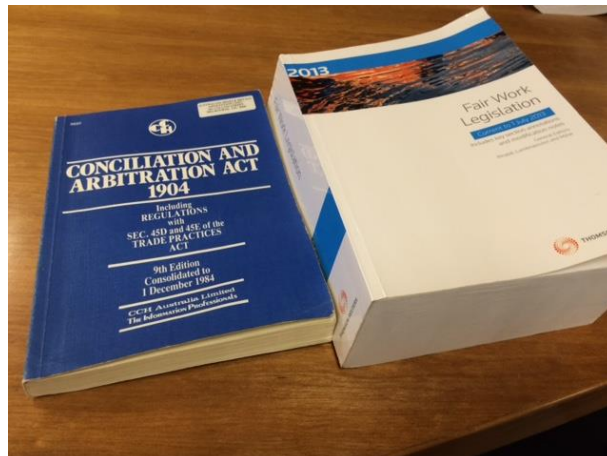
60. We encourage the PC to adopt a similar approach in its work. The Commission should consider the big picture, and start with the aims of the system or of a particular area of regulation. These should be scrutinised to determine a body of principles or goals for, for example, how we encourage bargaining, protect against unfair dismissal, or provide a safety net.

61. The following principles are a good start for the PC to guide the future development of Australia's WR system, and remediate pressing problems with the FW Act:

- a. **An employment driven system:** Our WR system has had various guiding or organising principles or paradigms over the years, of which "Fair Work" is just the latest. The time has come to focus on employment, regulating employment, and supporting employment.
- b. **Foundation for productivity, growth and jobs:** Our system has long paid lip service to supporting our economy and jobs, but needs to in future genuinely play its role in supporting crucial macroeconomic outcomes.

- c. **Genuine safety net:** The safety net has to become a genuine safety net, which will be of declining direct relevance, but protect those genuinely in need through the protection of a fundamental body of minimum standards.
- d. **Enterprise determination:** Australia's WR framework should again encourage and support employers and employees moving off the safety net and into agreements appropriate to the enterprise and employment.
- e. **Options for more diverse work, workplaces and individual preferences:** The WR framework must provide options and choices that are relevant to employers and employees in contemporary workplaces. This includes options for the 88% of private sector employees not choosing to join trade unions.
- f. **Shorter and simpler:** The overwhelming impression one gets from looking at other WR systems is how much simpler and straightforward they are in either prescribing or proscribing outcomes. Putting to one side what is regulated and to what level, Australian employers and employees are entitled to a vastly simpler and more straightforward framework of rights and obligations.

By way of a visual example, we can compare the legislation employers dealt with 30 years ago compared to that of today:



- g. **Regulate outcomes not processes or treatment of employees:** The PC notes that Australia regulates processes more than other Anglosphere countries¹⁸, and properly understood this accounts for much of length and complication in our system of WR regulation. This is a duplication of regulatory approach, and we need to move away from regulating how workplace relations plays out, towards ensuring outcomes for employees in particular meet prescribed standards.
- h. **Fairness:** A WR system needs to be fair in outcomes for those who work and employ under it. It's up to parliament to determine what fair outcomes, rights and entitlements are. Subjective tests of fairness are inexact and difficult to

¹⁸ Issus Paper 1, p.9

comply with, and should be removed from the system in favour of clearer, less subjective regulation that is “fair” in what it provides for.

- i. **Focus on the low paid:** Policy debate often focuses on the most vulnerable, but then implements regulation of general application. This is flawed. If the concern is for particular cohorts of vulnerable employees, then the regulation it justifies should be better targeted to those employees, and one mechanism to do so is the AMMA proposal to make greater use of income thresholds to target various protections for the lower paid, to the lower paid.

62. We commend the above systemic principles and goals to the PC. They could usefully be adopted to guide the future development of our WR system to meet the needs of the current and foreseeable labour market, and changing generations of employees and employers.

OTHER CONSIDERATIONS

Internal regulation

63. For more than a decade, AMMA has advocated in parallel with reforming the FW Act and its predecessors, introducing a system of internal regulation.

The case for internal regulation

64. The FW Act has impeded direct relationships between employers and employees by imposing a mandated role for unions in agreement making.
65. It has also enhanced the role of the FWC and the industrial courts to review and constrain legitimate management decision-making.
66. AMMA maintains that where organisations and their employees have attained a high level of trust through their internal WR/HR systems and methods of management, they should be free to choose to work directly with each other under an ‘internal regulation’ model of WR and not be subject to any mandated interference by third parties such as unions and industrial tribunals.
67. Prior to the FW Act, resource industry employers had a significant capacities to deal directly with their employees either as a collective or individually without any mandated role for unions or industrial tribunals in setting wages and conditions.
68. The reduced complexity in agreement-making and processing introduced by the 2006 amendments also greatly enhanced the capacity of enterprises to establish industrial agreements that incorporated current pay and conditions and the statutory minimum standards, but which otherwise enabled organisations to develop high levels of trust to facilitate a shift towards internal regulation.
69. The subsequent introduction of the FW Act in July 2009 and January 2010 had the effect of dragging many organisations into a more bureaucratic and less direct management style and taking them further away from the ideal of self-regulation.

70. Under the FW reforms, historically effective methods of fostering direct employee engagement were removed:
- New AWAs were abolished.
 - ITEAs were only able to be made for a transitional period.
 - Access to employee (non-union) collective agreements was severely curtailed.
 - The existence of a single union member on-site now guarantees a union dynamic in the workplace.
71. Experience has been that legislation that removes access to statutory individual agreements encourages a non-representative union presence in the workplace and leads to problems with direct engagement levels between employers and employees.
72. AMMA's proposed model of internal regulation of WR arrangements and the associated benefits this can offer is contrasted with the evidence of AMMA members that increased union involvement in the workplace under the FW Act has served to make direct engagement more difficult. Unions' presence is viewed in some circumstances as creating conflict between management and workers in order to justify their own existence and create a business case for employees' continued union membership.
73. One AMMA member identified the following problems when asked to list the shortfalls in the WR environment under the FW Act¹⁹:
- Interference by unions resulting in productivity loss, decreased employee engagement, decreased preferred culture, increase in negativity, increased workload for HR.*
74. AMMA tracked members' perceptions of direct engagement levels with their employees under the FW Act from April 2010. The table below shows the results²⁰.

How would you describe the current level of direct engagement with your workforce?

Survey date	Extremely low (%)	Quite low (%)	Low (%)	Acceptable (%)	High (%)	Quite high (%)	Extremely high (%)	Index score out of 100
April 2010	0.0	1.6	3.1	29.7	20.3	32.8	12.5	69.5
Oct 2010	0.0	1.5	4.5	34.3	19.4	32.8	7.5	66.7
April 2011	0.0	2.8	7.0	35.2	29.6	19.7	5.6	62.2
Oct 2011	1.2	1.2	8.5	32.9	29.3	26.8	0.0	61.4

¹⁹ AMMA member company responding to AMMA WR Research Project [Survey 3](#), April 2011, reported by Dr Steven Kates, RMIT University

²⁰ AMMA WR Research Project Survey Report 4, October 2011, Dr Steven Kates, RMIT University

75. Employers' index scores for the levels of direct engagement with employees declined every six months for resource industry employers following the commencement of the FW Act.
76. In April 2010, levels of direct engagement were rated at an index score of 69.5, which six months later dropped to 66.7, then to 62.2 then to 61.4 in October 2011.
77. Comments from AMMA members as to what has contributed to that decline included²¹:

Union involvement in all levels of decision making impedes genuine employee/employer relationships.

There is sometimes artificial conflict.

Our employees usually believe union reps over management reps.

We have had to deal with the discontent created by lies.

It has been time consuming to respond to the many challenges by the union; also time consuming to meet with employees to explain fact from fiction.

78. And²²:

Direct engagement has deteriorated due to a drop in morale.

There has been growing union interference in the workplace.

79. Particular problems arising from third-party involvement at the workplace that have been experienced by AMMA members under the FW Act include²³:

Unions creating more major issues from minor matters.

Greater contact on trivial issues. Actions without all the facts.

Unnecessary disputes and issues.

80. One real outcome under the FW Act has been the reduced capacity for employers to deal directly with their own employees.
81. The labour movement's position, which was adopted to a large extent the FW Act, assumes an inherent inequality of power between employer and employee which is said to require the involvement of third parties (unions and tribunals) to balance the relationship.

²¹ AMMA member company responding to AMMA WR Research Project [Survey 4](#), October 2011, reported by Dr Steven Kates, RMIT University

²² AMMA member company responding to AMMA WR Research Project [Survey 2](#), October 2010, reported by Dr Steven Kates, RMIT University

²³ AMMA member company responding to AMMA WR Research Project [Survey 2](#), October 2010, reported by Dr Steven Kates, RMIT University.

82. Despite the FW Act's focus on collective arrangements and third party involvement, AMMA maintains there is considerable merit in introducing an option of internal WR regulation for those organisations that have shown they and their employees have the integrity and leadership capacity to manage their own WR regulation. The economic imperatives to create better and more productive workplaces will of course remain for those organisations.

Case studies

83. AMMA's Beyond Enterprise Bargaining report published in July 1999²⁴ first proposed a model of internal regulation to actively promote effective leadership management systems and HR practices. The aim was to ensure Australian enterprises were well-placed to meet the challenges of a competitive global environment.
84. That report also contained an AMMA Employee Relations Charter, which set out the principles and values that high performance workplaces would be encouraged to strive towards in order to successfully internally regulate their employee relations arrangements. The components of AMMA's internal regulation model were later fully detailed in a 2000 discussion paper²⁵ and again in a September 2007 research paper²⁶, citing strong support for an internal regulation model within the AMMA membership.
85. AMMA conducted a number of case studies of its members to look at the impact of third party union involvement on employee engagement and organisational effectiveness²⁷. AMMA found that where third parties had greater involvement in controlling the organisation and the execution of work, there was often an adverse effect on levels of employee engagement. In short, union involvement in decision-making processes meant many companies found it difficult to implement changes in working conditions and practices within a reasonable timeframe, if they were able to do so at all.
86. For example:

An attempt by smelter Southern Copper in the early 1990s to improve its performance by investing in and introducing new technologies and reducing employee numbers through voluntary redundancies was met with union opposition²⁸. As a result, it achieved minimal increases in performance and failed to achieve improvements in employee engagement levels. Following a 30-day strike, the plant announced its closure.

Comalco Bell Bay, also a smelter under pressure to increase performance, was far more successful. A move towards direct relationships with its employees was instrumental in improving its communication and leadership capability

²⁴ Beyond enterprise bargaining: the case for ongoing reform of workplace relations in Australia, AMMA paper, July 1999

²⁵ A model of internal regulation of workplace employee relations, AMMA discussion paper, 2000

²⁶ Employee Engagement – A lifetime of opportunity: An analysis of the employee engagement experiences of AMMA members using the Four Quadrant Model of Employee Relations and Organisational Effectiveness, AMMA Paper, September 2007

²⁷ AMMA submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Bill 2008, 12 January 2008

²⁸ AMMA, Employee engagement: a lifetime of opportunity, 2007

and resulted in rapid improvement in its performance. The smelter's lost time injury frequency rate fell by 60 per cent; off specification metal fell from 28 per cent to seven per cent; and overtime ceased to be necessary. Between 1999 and 2000, absenteeism halved and tonnes per annum produced grew from 122,000 to 150,000.

87. The experiences at Bell Bay and Southern Copper highlight the importance of building effective relationships between employers and employees to effect smooth workplace change where it is necessary for the success of the enterprise. While AMMA acknowledges employee engagement can be achieved where there are established working relationships with unions, our research highlights that those relationships are hard to maintain and invariably become adversarial. This is because the interests of the union are not necessarily aligned with the interests of the organisation or the interests of employees.
88. AMMA maintains that the involvement of external third parties in WR processes has the effect of compromising the decision-making abilities of an enterprise. While consultation and agreement is essential to implement change (such as to effect changes to working arrangements onsite), the more such negotiations involve external third parties the greater the risk that those parties will focus on what is in their own best interests rather than what is in the best interests of the ongoing viability and profitability of the enterprise.
89. AMMA's proposed model for internal regulation of WR is outlined below.

AMMA's proposed model of internal regulation

90. Under AMMA's proposed model, aside from the safeguards detailed below, enterprises would be immune from third-party involvement by trade unions and industrial tribunals in their WR practices. In order to ensure a high level of employee buy-in for the model, key features and protections would be:
 - a. Sixty-six per cent of employees must vote in favour of internal regulation in an employee ballot. A two-thirds majority would act as an added safeguard for employees in recognition of the fact that such a model represents a fundamental change to the regulation of Australian workplaces.
 - b. The most significant and rapid improvements in operational performance and productivity have occurred when the acceptance rate of individual employment arrangements has been in excess of 90 per cent. The 66 per cent majority proposed is therefore a minimum which companies would aim to exceed;
 - c. Procedures must be in place to ensure any ballot for self-regulation is free and informed;
 - d. Any agreement on a self-regulation framework would not have a fixed term of operation but would continue indefinitely or until a 50 per cent plus one majority of workers voted in favour of a return to the previous regulatory arrangements under the WR legislation of the day;

- e. Minimum employment standards set by the appropriate authority would have to be met or exceeded; and
 - f. Employees would have guaranteed access to a fair treatment procedure for complaints and grievances in order to resolve industrial problems.
91. Accompanying the self-regulation model would be the employee relations charter, a statement of standards for managerial leadership, behaviour and systems that AMMA believes is necessary to support and maintain a system of internal regulation. The charter would serve as a vision towards which organisations that wished to move to an internal regulation model would strive.

Recommendations

92. Workplaces should have the option of voting for an 'internal regulation' model of WR. A two-thirds majority of the workforce would be required to vote in favour of self-regulation, with a safety net and grievance procedures put in place to protect all workers.
93. High-income earners (perhaps those with earnings exceeding the current \$133,000 unfair dismissal limit / high income threshold) should have the ability to elect to enter into employment arrangements with their employers that allow them to opt out of any collective agreement-making stream under the FW Act.

Long run shifts in labour markets, economy etc.

94. In AMMA's view, the PC has been tasked not only with fixing problems with the FW Act today, but also considering and making recommendation for a WR system which can endure, and overcome pendulum policy making in WR.
95. A new framework should also better accord with significant and longer run shifts in our labour market, such as those the PC identifies in Issues Paper 1²⁹, including:
- a. Importance of more cooperative relations between employees and employers for innovation, technological diffusion, investments in skills, and in turn future productivity, economic growth and adaptability.
 - b. "The sensitivity of employment demand to regulations that raise the costs of less skilled labour" – although this is less relevant to the resource industry than the service sector examples cited by the PC in Issues Paper 1.
 - c. Traditional notions of the 'workplace' may changing due to technological advances that allow people to work remotely.
 - d. Changes in the occupational mix of jobs, towards higher skills.

²⁹ Issues Paper 1, pp.4-5

- e. Demographic change, including both ageing workers and high youth unemployment.
 - f. Sustained falls in support for trade unions, particularly amongst newer generations of workers.
96. The keys to meeting such longer term demographic trends are:
- a. Allowing and encouraging greater flexibility and scope for agreement in how and when work is undertaken.
 - b. Giving employers and employees more options to regulate work under terms that work for them.
97. AMMA's guiding principles for the PC's recommendations (above), and recommendations and analysis throughout this submission would deliver a system significantly more capable of responding to and accommodating these labour market shifts than the current FW Act which re-regulated and sought to recentralise WR in Australia.

Complete the federal system

98. Following the major package of changes in 2006, and subsequent confirmation by the High Court, WR for employers and employees in Australia has overwhelmingly been regulated under the federal system. Private sector coverage under state WR systems is now very limited to a rump of those working for non-corporations.
99. There is no point in continuing any state coverage of private sector WR, all the rump state systems are doing at this point is costing money for no gain to employers or employees.
100. There should be a comprehensive referral of residual WR powers over the private sector to the Commonwealth to complete the national system, and the PC should recommend this be completed.
101. A colloquial phrase we use at a couple of points in this submission is that the horse has bolted. The horse has well and truly bolted on the shift to a national system. This needs to be recognised and the national system completed.

International labour standards (ILO)

102. The PC notes³⁰ the existence of international labour standards (ILO Conventions) which are international treaties Australia has ratified on what our WR system should deliver on particular topics.
103. The PC asks:

³⁰ Issues paper 5, p.16

What are the implications of international labour standards (including those in trade agreements) for Australia's WR system?

104. The implications of international labour standards for this review are very limited.
105. The PC should not be constrained by international labour standards in its consideration of the WR system Australia needs to meet our current and future challenges, and that will best deliver on the goals in the terms of reference.
106. In particular, the Commission should be very cautious in dismissing or not progressing viable options based on any concerns they may be inconsistent with Australia's ILO obligations.
107. It's for government to craft laws that meet international obligations, and it's for government to take ILO obligations into account in its consideration of what the PC may recommend. The PC does not need to be restrained in its considerations of the best workplace relations system for Australia's future / or in recommending changes to the FW Act.
108. A number of further points should be noted on ILO standards and scope to reform the Australian WR system as it needs to be reformed:
 - a. Each tranche of labour market reform in Australia, from Labor's 1993 legislation to Labor's 2009 legislation has been subject to a complaint to the ILO claiming it breached Australia's obligations.
 - b. An ACTU complaint to the ILO has become a bit of a tradition, and as standard a part of the legislative process in Australia as a regulatory impact statement or an explanatory memorandum.
 - c. All any submitting party could give the PC at this stage would be assertion:
 - i. A complaint or allegation is not a finding, and ILO processes take some years to work through.
 - ii. Governments have a discourse with the ILO over time and argue for particular interpretations of international labour standards.
 - iii. The ILO's "precedent" on its core conventions is often confused and conflicting, and offers scope for differing interests to see what they want to see in it, and the options they want to see allowed and not allowed.
 - d. No credible submitting party in this review will be arguing to abolish unfair dismissal laws, to abolish minimum wages or remove collective bargaining from our system – meaning arguments on Australia's compliance with international obligations become very technical ones.
109. The PC needs to be very cautious about what it will be told on Australia's ILO obligations and future WR reform, and such caution should see it consider our WR

system and reform options on their merits, without being constrained by labour standards considerations at this stage.

110. It would also be more relevant to invite submission on this issue in the interim report in relation to more developed options the PC may be considering.
111. **Trade agreements:** The only international standards that could be relevant to this review (which we say should be addressed as outlined above) are treaties of UN agencies Australia ratifies as a nation. We know of no basis to look to bilateral trade instruments to shape our WR system, and suggest instead that these agreements have been made with a mind to how Australia regulates work.

FROM HERE

The PC's interim report

112. The PC has indicated that it will conduct this review in multiple stages and issue an interim or draft report in July for comment.
113. We suggest the PC use this report to identify possible ways forward which it is inclined to recommend or considering recommending to government.
114. It should then invite submissions on specifics, on implementation and how the options being canvassed could be made to work in practice and specifically how to transition from the status quo under the FW Act to an improved system as proposed.

Further submissions, discussions and witness evidence

115. In the wake of this submission AMMA will seek to examine submissions from other key submitting parties and provide detailed responses in due course where this will assist the PC.
116. We also look forward to providing evidence in support of this submission in due course, and will be happy to discuss our submission and research in more detail at any point, including the KPMG Report *Workplace Relations and the Competitiveness of the Australian Resources Sector*.

2. ECONOMIC CASE FOR WORKPLACE REFORM

"In the medium term, income growth will...largely be determined by our success in raising our productivity. Increasing productivity to achieve the income growth that we are used to will be a significant challenge."³¹

"Industrial relations regulation is arguably the most crucial [area of regulation] to get right. Whether productivity growth comes from working harder or working 'smarter', people in workplaces are central to it³²".

- **A viable, growing, prosperous and internationally competitive resource industry is vital for the Australian economy.**
- **However, Australia is becoming a less competitive and costly place to do business, and 'mining' productivity has declined by more than 45% in the past decade.**
- **If we do not pursue reforms to support increased multifactor and labour productivity in the resource industry and broader economy, our living standards will decline.**
- **Australia now ranks as one of the least competitive and most costly places to employ compared to fellow OECD and other competing nations.**
- **Investment and jobs in Australia are at risk from fundamental problems in our workplace relations system that negatively impact on attracting investment which in turn detracts on employment opportunities.**
- **This chapter should be read in conjunction with the KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector"³³.**

AUSTRALIA NEEDS A HIGH PERFORMING RESOURCES INDUSTRY

117. The resource industry is and will remain a heavy lifter for the Australian economy. According to KPMG³⁴, the national resource sector contributed \$155bn in value added to Australian GDP in 2013-2014. This represents 10% of total GDP, half of which was generated in Western Australia.

³¹ "Challenges and opportunities for Australia over the next decade, Crown Perth, Dr Martin Parkinson PSM | Secretary to the Treasury | 2 July 2014 | Association of Mining and Exploration Companies Convention - <http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2014/Challenges-and-opportunities-for-Australia-over-the-next-decade>

³² Gary Banks, 'Successful Reform: Past Lessons, Future Challenges', Keynote address to the Annual Forecasting Conference of the Australian Business Economists, Sydney, 8 December 2010

³³ KPMG report titled: "Workplace relations and the Competitiveness of the Australian Resources Sector"

³⁴ KPMG report titled: "Workplace relations and the Competitiveness of the Australian Resources Sector" - http://www.amma.org.au/wp-content/uploads/2015/03/KPMG_WR_and_the_competitiveness_of_the_Australian_resources_sector.pdf

118. The resource industry represents 10% of Australia's GDP. The total (direct and indirect) resources sector contribution to GDP is estimated to be approximately 18%.
119. The resources industry is cyclical, and in a bull market can significantly strengthen the national economy.

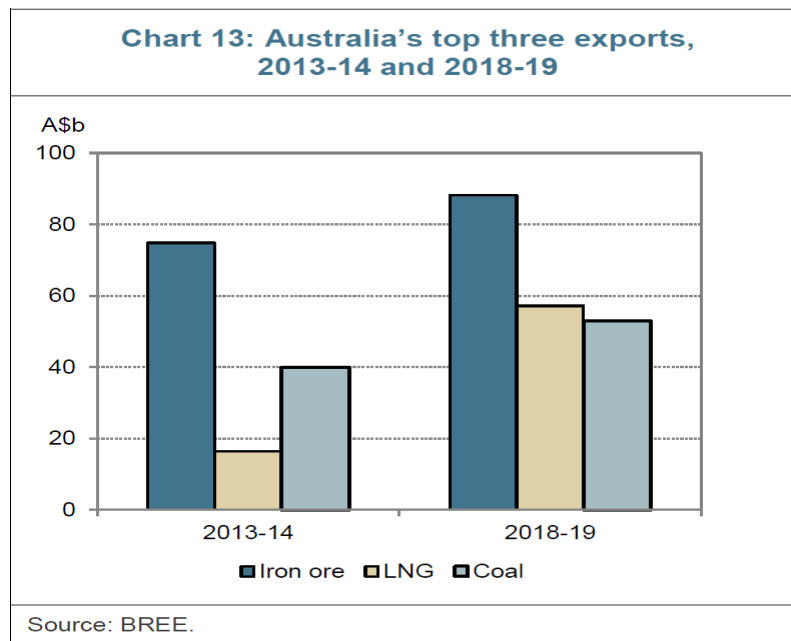
"Australia's resources boom is estimated to have raised employment and household income through a number of channels. Compared to the counterfactual, the Australian resources boom is estimated to have:

- increased the population by approximately 1 per cent, reflecting net migration flows responding to employment opportunities and wage growth;*
- increased employment by 3 per cent through an increase in demand;*
- increased real wages by approximately 6 per cent;*
- increased the tax base; and*
- raised household disposable income by 13 per cent³⁵"*

120. Our resource industry is considerably dependent on foreign capital. As capital is mobile and Australia only has a limited amount of the world's resources / reserves, if Australia is not an attractive place to invest, do business and create jobs, capital can and will go elsewhere.
121. In aggregate, the resource industry directly employed 269,000 people in resource extraction and 190,000 in resource-related construction and manufacturing in 2013-14. The resource industry also contributes to the employment of people in other areas such as professionals, administrative services, other construction and education and training through upstream production linkages. The total (direct and indirect) contribution of the resources sector is estimated to be almost 10% of total employment in Australia.³⁶
122. Resources-related employment directly contributes to 4% of total employment in Australia, compared to 10% of GDP. The higher GDP share highlights that the resource industry is less labour-intensive (and more capital-intensive) than the broader Australian economy.
123. High average wages and salaries in the resource industry, relative to the broader economy, also contribute somewhat to the higher comparative GDP share.

³⁵ Downes, P., Hanslow, K. and Tulip P. 2014, *The Effect of the Mining Boom on the Australian Economy*, RBA Research Discussion Paper 2014-08, August, KPMG "report titled xxx"

³⁶ KPMG report titled: "Workplace relations and the Competitiveness of the Australian Resources Sector"



124. Despite public and political discourse about reducing Australia's economic reliance on resources, it is forecast that Australia's resource industry will still represent the top national three exports in 2018-19. Iron ore is forecasted to remain our number one export; LNG exports are forecast to significantly ramp up as projects go on-line; and coal exports will continue to rise.
125. Australia's earnings from resources and energy commodities are projected to increase at an average rate of 7% a year from 2013-14 to total \$274bn in 2018-19³⁷.
126. Tax collection from the resource industry (including federal company tax and state royalties) has increased four-fold over the past decade.
 - a. The resource industry accounts for 24% of all corporate tax receipts in Australia, significantly higher than the sector share of GDP (10%)³⁸.
 - b. The tax collected helps pay for schools, hospitals, national defence etc., underscoring the national social and economic importance of keeping the resource industry strong and internationally competitive.

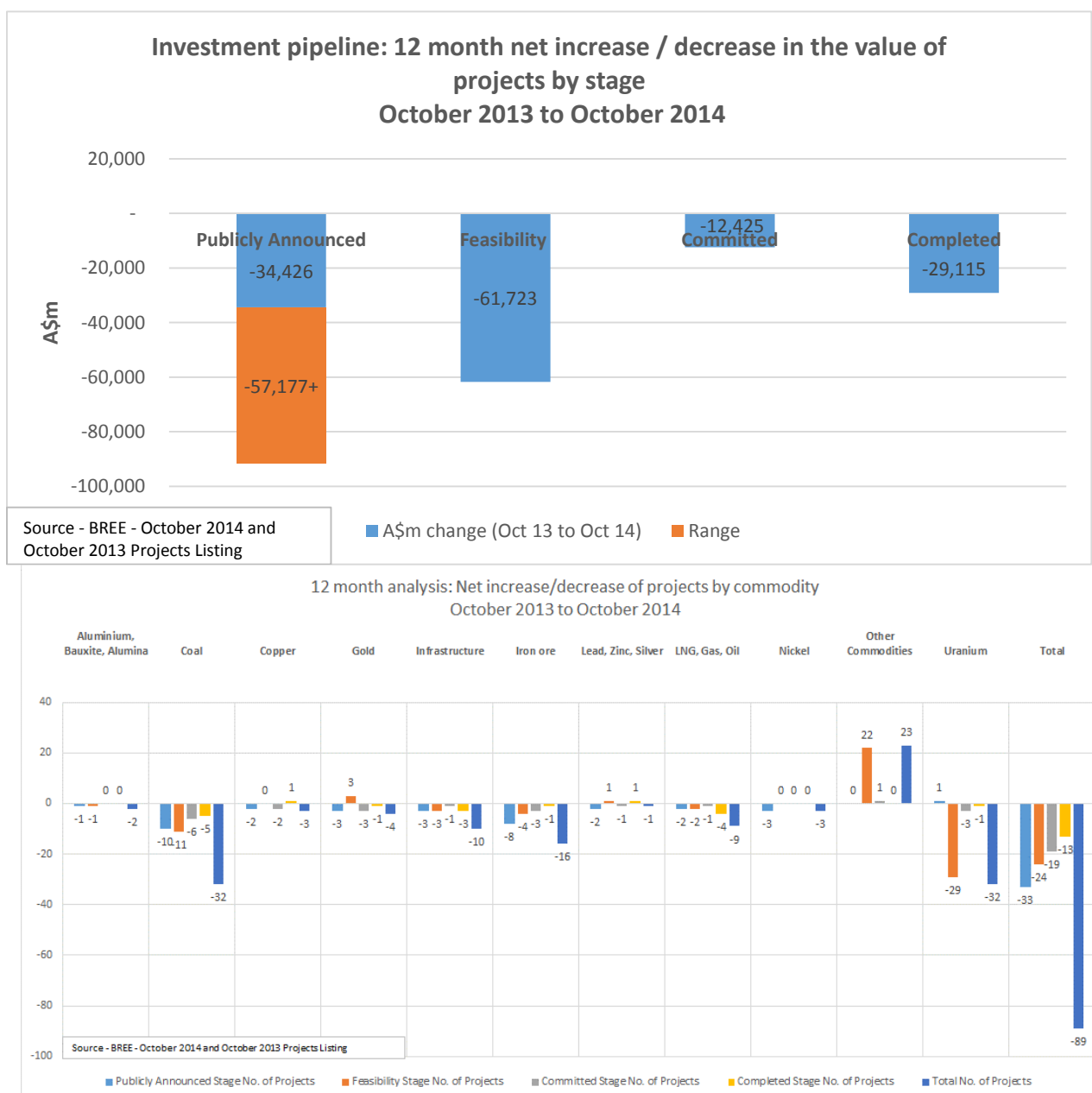
AN INDUSTRY FACING CHALLENGES

127. Australia is and will continue to be a major export-driven economy that is heavily reliant on the growth and success of our resource industry.
128. While there is discussion on securing greater diversity in our exports and major economic activities, Australia's prosperity and living standards, now and in the foreseeable future, still in substantial part rely on the success of our resources industry.

³⁷ Bureau of Resources and Energy Economics, *Resources and Energy Quarterly—September Quarter 2014*

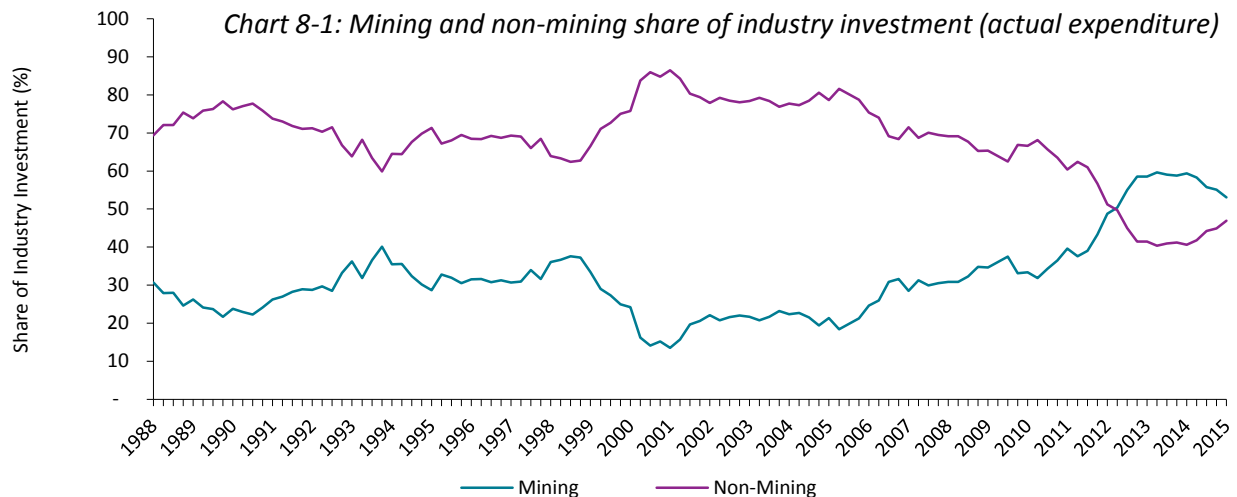
³⁸ Australian Taxation Office 2014, *Taxation statistics 2011–12*, April.

129. However the industry is confronted by a number of significant challenges.
130. Productivity in the resource industry has declined by more than 45% in the past decade.
131. The sustainability of Australia's resources and energy major projects has also been impacted, with the investment pipeline declining by 89 projects, or by \$118 billion³⁹ in the past 12 months.

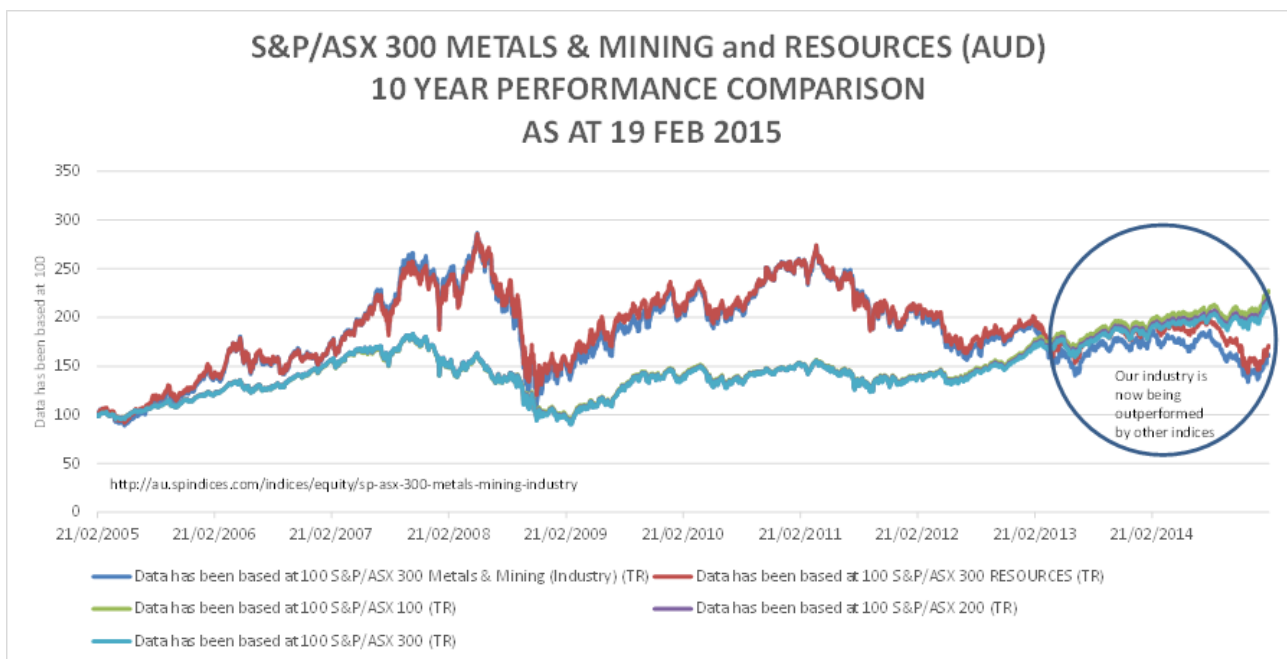


³⁹ Whilst some projects did transition from construction into production, other projects stalled and many others projects were no longer considered as economically viable. Source: <http://www.industry.gov.au/industry/Office-of-the-Chief-Economist/Publications/Pages/Resources-and-energy-major-projects.aspx>

132. The reduction in the projection pipeline coincides with the reduction in mining investment. The share of mining industry investment in recent decades used to exceed non-mining investment. As mining/resources projects stalled or became commercially unviable, so too did investment in the industry.

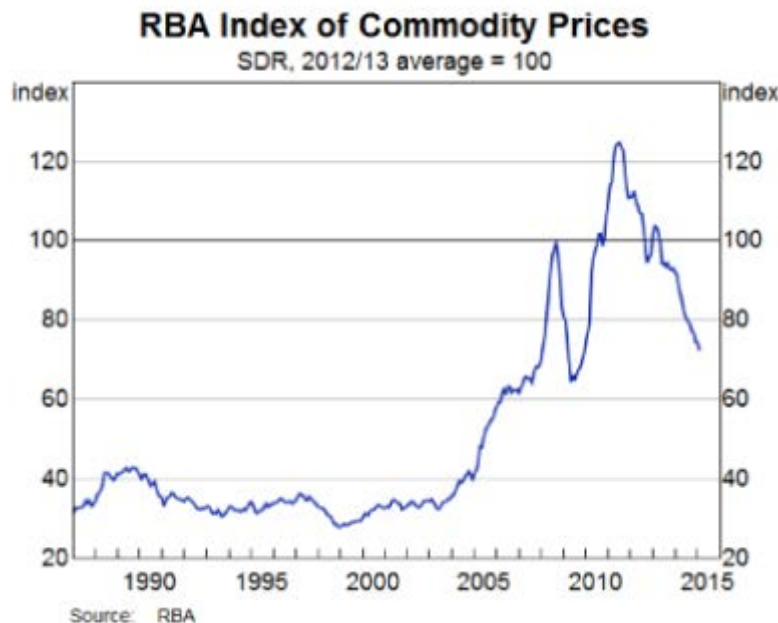


133. Unsurprisingly given the overall fall in the index of commodity prices, high production costs, depressed margins, declining investment pipeline as well as geopolitical risks, metals & mining and resources indices' performance on the ASX have declined, and are now being outperformed by other indices such as the S&P/ASX 100 (TR).



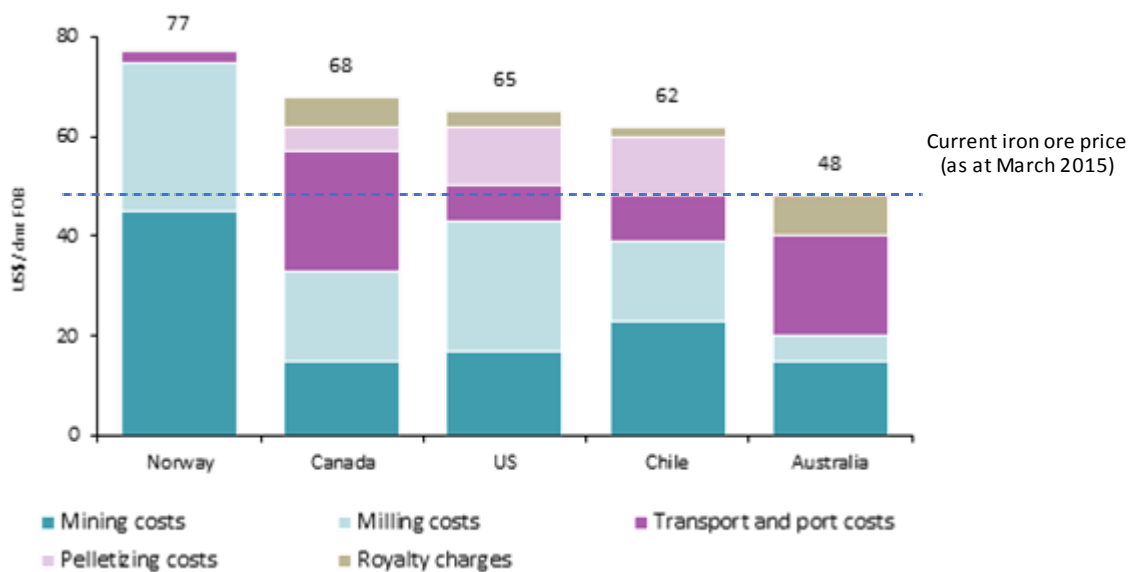
134. Financially, the profitability of the majority of resource companies has significantly declined as a result of the significant reduction in commodity prices. Today, March

2015, we can effectively turn the clock back seven years, as the index of commodity prices fall back to the commodity price levels achieved in early 2008.



135. Specifically, Australia's largest export, iron ore is now trading at six year lows. According to UBS resources on 12 March 2015, 62% Iron Ore Fines cfr Qingdao (Blmbg) is trading at \$57.61.
136. When commodity prices were high, resource companies begrudgingly absorbed and camouflaged these challenging structural productivity deficiencies and workplace inflexibilities that created higher costs, through their profit margins. Now resource companies are unable to do this due to depressed margins. The deficiencies, challenges and costs that were formerly masked, have now been exposed and require urgent rectification.
137. As the heat (demand) has come out of the market, (not to mention the increase in global supply causing or exacerbating supply gluts in many commodities), has led to the price of commodities falling resulting in many depressed profit margins. These controllable issues, costs and structural deficiencies can no longer be accepted/absorbed/masked. WR imposts under the current economic climate are becoming more and more transparent and are noticeably hindering resources companies' ability to compete in a highly competitive international markets.
138. These depressed margins are illustrated below using average iron ore production costs and the current iron ore price as an example.⁴⁰

⁴⁰ Source: SNL Metals & Mining 2013, U.S. Mines to Market, prepared for The National Mining Association, SNL Metals & Mining, KPMG



139. In 2011, the price for iron ore fines was over \$180 USD/T. It has declined by over 66% since that time. Of note, many iron ore producers and particularly junior iron ore miners, have production costs well and truly above the average production numbers sourced by SNL Metals and Mining.
140. Using today's iron ore price, and the breakeven costs quoted by UBS and disclosed in the Australian newspaper on Monday September 8, 2014, there are only 3 iron ore producers that have a break-even cost below today's iron ore price. There are a startling 11 iron ore producers that are not breaking even, using 62% Iron Ore Fines cfr Qingdao (Blmbg) as the price comparison.
141. KPMG's Workplace Relations and the Competitiveness of the Australian Resources Sector report (see below) notes that in recent years, Australia's competitiveness has declined as the cost of production in this country has for many commodities risen faster than the global average...

"This has been driven by higher input costs and an appreciation of the Australian dollar..."

"In Australia, wages in the resources sector, specifically construction wages, increased two and a half times faster than the national average in constant prices..."

"...wages account for 12 per cent of revenue in the resources industry".⁴¹

142. KPMG's report notes the example of one company's operations that were nearly 150% more expensive to staff in Australia compared to the same vessel in a European OECD member economy.

⁴¹ KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, p.9

143. This example illustrates that not only is Australia an expensive place to invest and do business, it is at risk of being an uncompetitive place to invest, employ and do business.
144. The Australian resource industry risks being classified internationally as less competitive than other export driven resources reliant economies, including OECD developed economies.

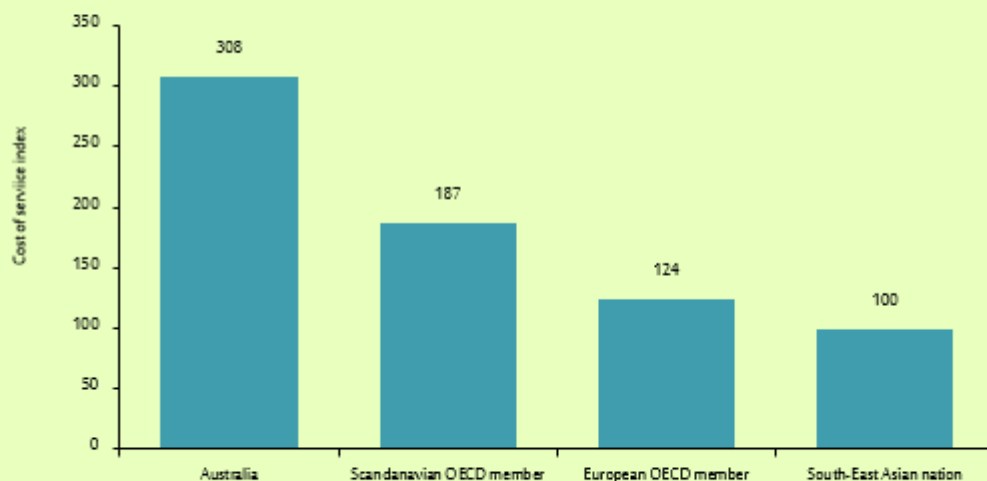


Source: OECD, From Sick Man of Europe to Economic Superstar: Bernd Fitzenberger, February 2015

Offshore oil and gas rigs require specialised services from supply vessels to ensure they continue to operate efficiently and safely. One of the world's largest providers of these services provided KPMG access to their labour cost data, which shows the cost of labour to staff the same type of vessel in four jurisdictions. To protect their commercial interests, they have been de-identified and the raw figures have been converted to a cost of labour index.

An analysis of their operations reveals that it is nearly 150 per cent more expensive to staff the same vessel in Australia compared to a European OECD member. It is more than triple the cost to staff an Australian vessel compared to staffing a vessel with a crew from the South-East Asian nation.

Chart: Cost of labour index for staffing offshore service vessels in the oil and gas industry, 2014



Note: The average Australian exchange rate with the local currency for 2014 has been used in developing the index. The labour costs consist of the total salary package and other on-costs, such as payroll taxes.

Source: KPMG analysis of industry data

WE MUST INCREASE PRODUCTIVITY AND COMPETITIVENESS

145. According to the ABS, labour productivity, capital productivity and multi-factor productivity have declined by more than 45 per cent⁴².

146. According to the International Monetary Fund:

"a significant pickup in labour productivity will be needed to maintain growth in living standards over the coming decade...this will be challenging."

*"To deliver sustained growth at around 3% ..., multifactor productivity growth needs to reverse its declining trend."*⁴³

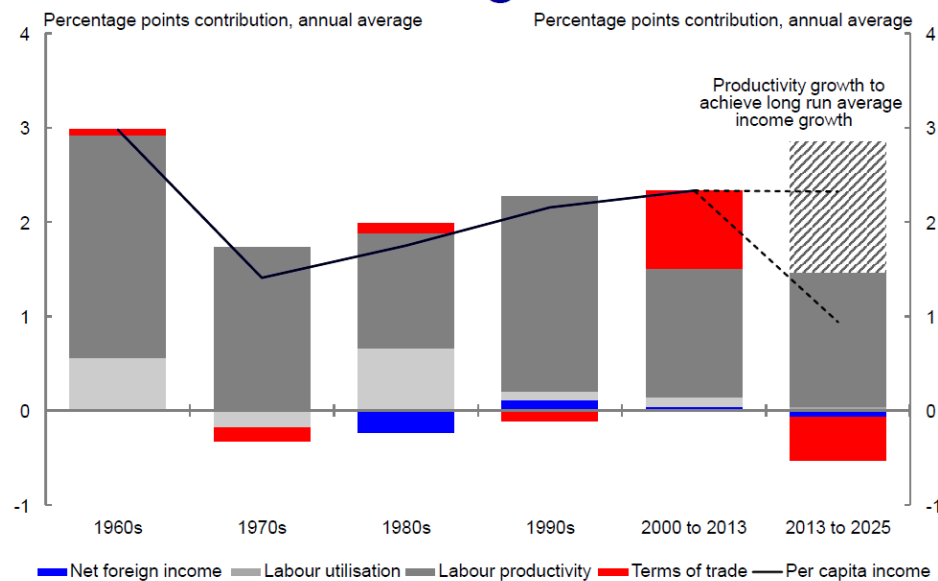
147. In July 2014, Treasury Secretary Dr Martin Parkinson, speaking to the AMEC convention in Perth⁴⁴, presented the following figure:

⁴² ABS: 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia – Table 1,6 and 7

⁴³ IMF 2013 Article IV Report on Australia

⁴⁴ "Challenges and opportunities for Australia over the next decade, Crown Perth, Dr Martin Parkinson PSM | Secretary to the Treasury | 2 July 2014 | Association of Mining and Exploration Companies Convention - <http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2014/Challenges-and-opportunities-for-Australia-over-the-next-decade>

Contributions to annual per capita income growth



148. Dr Parkinson explained the challenge illustrated in this slide thus⁴⁵:

We now find ourselves moving into another stage of the boom, which features rising production and export volumes, but falling prices and investment. Given the sheer magnitude of the investment boom, the economy will face some challenges in navigating this transition.

In the short term, net resources investment (the blue bars in the chart) is set to shift from being a major contributor to economic growth to a detractor from growth.

Exports (the grey bars) will rise as completed projects go into production, but the net effect of these two forces (represented by the green line) means that the economy will heavily rely on other sectors if it is to return to trend growth over the medium term.

We forecast that further falls in the terms of trade and subdued domestic price growth will result in nominal GDP growing by 3 per cent in 2014-15 and 4 ¾ per cent in 2015-16, well below the average rate of growth over the past 20 years.

The declining terms of trade will heavily influence the medium term outlook for average incomes.

Despite a significant slowdown in productivity growth, average incomes in Australia have grown at among the highest rates of OECD countries over the

⁴⁵ Emphasis added

past decade. That's largely due to the rising terms of trade and associated appreciation of the exchange rate.

We can no longer rely on rising terms of trade as a source of income growth.

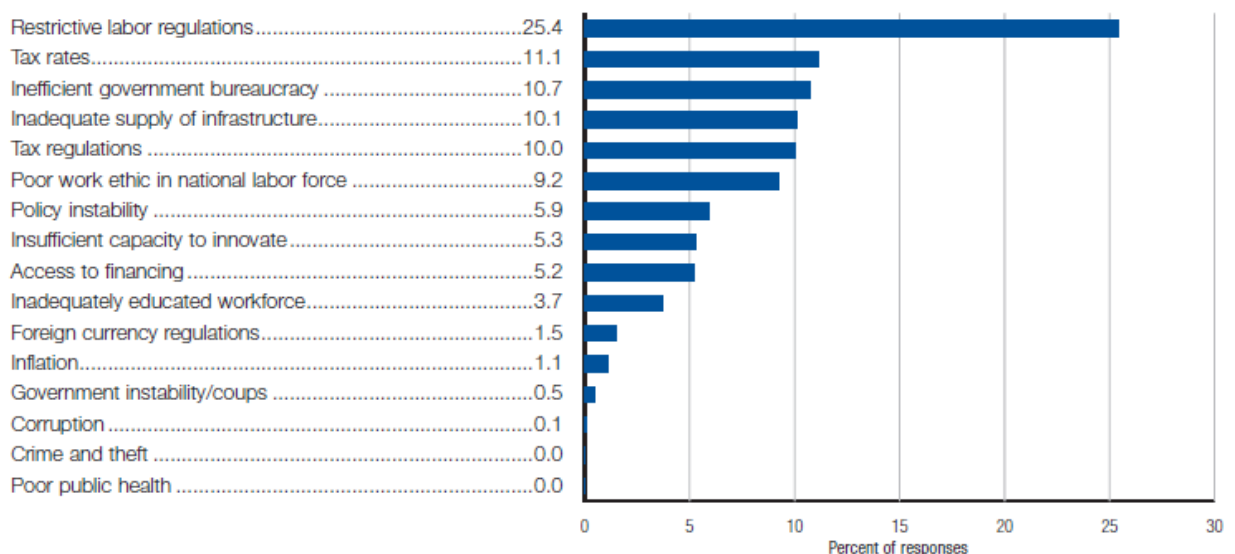
In addition, the ageing of the population will place downward pressure on income growth from increasing workforce participation.

In the medium term, income growth will therefore largely be determined by our success in raising our productivity.

Increasing productivity to achieve the income growth that we are used to will be a significant challenge.

149. However, on a global scale we rank very poorly on productivity. According to the World Economic Forum (WEF) Global Competitiveness Report for 2014-2015⁴⁶, the most problematic factors for doing business in Australia relate to “restrictive labour regulations”.

The most problematic factors for doing business

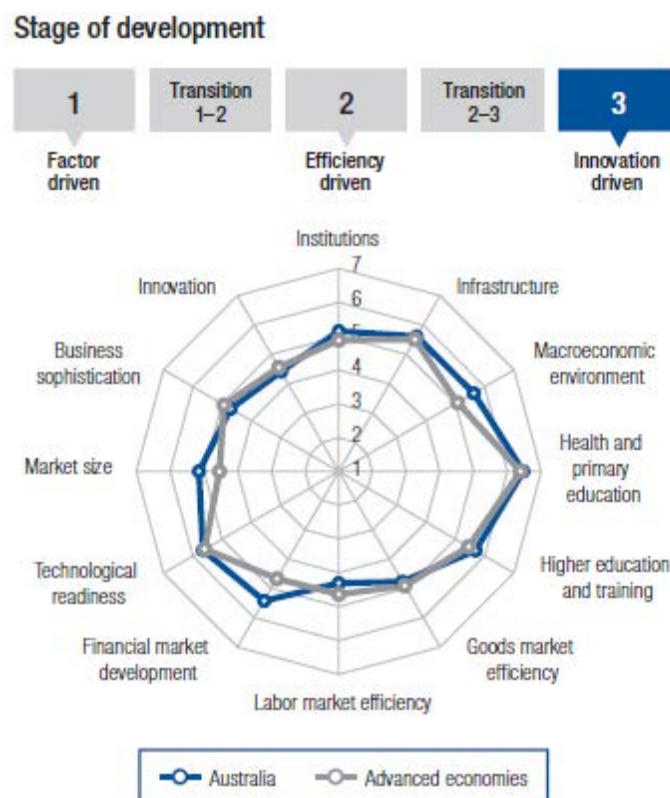


150. The WEF provides a detailed analysis of how Australia ranks compared to 148 other countries as a place to do business.
151. The following areas are of particular concern for Australia:
- Pay and productivity – Rank 125th
 - Cooperation in labour-employer relations – Rank 109th
 - Flexibility in wage determination – Rank 132nd

⁴⁶ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf, p.114

d. Hiring and firing practices – Rank 136th ⁴⁷

152. This means the perceptions of Australia as a place to employ someone rank below those in 108 to 135 other countries. It also sees a developed, first world economy and very long standing labour relations system being bracketed with developing countries and even least developed economies on key considerations relevant to investment and job creation. **Australia does not rank in the top 100 countries globally on key employment measures.**
153. Looking at a representation of how we compare on a wider range of policy and regulatory factors, we see that labour relations is an area in which Australia is ranking worse than our fellow developed economies (where the blue line crosses inside the grey):



154. This material should not simply be dismissed as the self-perceptions of Australian management. It is precisely because Australian management rate our WR system so poorly, and more poorly than management in any other developed country that we should take notice and start to fix our system. The methodology of the WEF is standard globally, and we need to ask ourselves how our labour relations could rate so poorly and as such an overwhelming concern, when it does not rank in the top 10 issues of concern in running a business and being competitive in most other OECD countries.

⁴⁷ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf, p.115

155. We also recall that the WEF's Global Competitiveness Report is a major global source on policy making and comparative international performance.
156. The WEF Survey results are supported by recent findings from a recent Fraser Institute report 'Survey of mining companies 2014' which disclosed that:
- a. 61%, 60% and 56% of respondents stated that "uncertainty regarding the administration, interpretation, and enforcement of existing regulations" is a mild, strong or severe enough factor not to pursue investment in Victoria, Tasmania and NSW respectively.
 - b. 75%, 64%, 62%, 59% of respondents stated that "regulatory duplication and inconsistencies" (includes federal/provincial, federal/state, inter-departmental overlap, etc..) is a mild, strong or severe enough factor not to pursue investment Tasmania, Victoria, Queensland and NSW respectively.
 - c. 23% of respondents stated that all Australian States and Territories have "Labour Regulations/Employment Agreements and Labour Militancy/Work Disruptions" that is enough to pursue investment in our country.
 - d. Of the 25 American States and Canadian Provinces assessed, only 1 state and 1 province was equal to or above this 23% figure, indicating the developed countries we compete with are not being similarly held back by their WR systems, at least in the minds of investors⁴⁸.
157. The overwhelming majority of evidence from national and international research supports Australia (including the Australian resource sector) needing to significantly enhance its productivity, competitiveness and undergo structural reform, or otherwise risk becoming less attractive for investment in a highly competitive international market place.

Competitiveness

"To enable Australia to remain competitive and continue exporting, Australia will likely have to address the causes of the decline, including through improved use of inputs in the production process and investigating policy reform. If the resources industry's competitiveness continues to decline, it could impact its sustainability and threaten the benefits of the sector that flow through to the broader economy in terms of higher employment and incomes....

"Comparatively high development costs and a sub-optimal environment for investment could jeopardise Australia's ability to attract the capital needed to finance projects and the willingness of businesses to explore, develop and operate in the resources sector. Such a scenario could potentially lead to a decline in investment growth and the associated economic benefits that flow through to the broader economy...

⁴⁸ <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/survey-of-mining-companies-2014.pdf>,

"Benchmarking of OECD countries approach to regulation highlights that Australia tends to perform in the bottom half of the cohort of economies where the resources industry contributes a significant proportion to overall GDP⁴⁹".

Workplace relations impacting Investment

"Investment in major resources projects has historically been a major driver of economic growth. Australia faces a number of challenges in competing with international jurisdictions to attract investment in major resources projects. Australia's competitiveness in expanding capacity has diminished. The current workplace relations framework impacts the ability to attract investment to major resource projects through the greenfield agreement making process and associated delays, and disruption and delays to projects associated with industrial action..."

"Industrial action has the potential to cause delays to project development. Consultation with industry suggests that, on large resource projects, industrial action by even a small number of workers can have significant financial implications. These costs range from \$1 million to \$10 million per day of action. Consultation with resource sector businesses identified that the proposed AMMA reform options have the potential to reduce the risks of actual and threatened industrial action and the associated risks to project timelines and costs⁵⁰".

Australia competes internationally in the trade of major commodities, however, Australia's competitiveness has declined in recent years with the cost of production for many commodities rising faster than the global average. The currently workplace relations potentially contributes to higher production costs through:

- *delays, uncertainty and higher labour costs associated with the current agreement making framework;*
- *disruption to project construction due to industrial action;*
- *the costs of managing union visits; and*
- *costs of managing and responding to claims of unfair dismissal.*

"The cost of production for many commodities has risen faster than the global average. Relative to global competitors, the labour cost share is higher for Australian resources sector businesses⁵¹".

Structural reform priorities

⁴⁹ KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector* P52.

⁵⁰ KPMG report – "Workplace Relations and the Competitiveness of the Australian Resources Sector, p96

⁵¹ KPMG report – "Workplace Relations and the Competitiveness of the Australian Resources Sector " p104

We remain the envy of most of Europe and the global economy generally because we completed important reforms in the 1980s and 1990s that drove productivity growth.

Reform stalled in the 2000s but incomes rose with historic rises in the terms of trade and mining investment.

We need to reinvigorate structural reform to boost productivity growth and sustain increases in living standards.

Structural reform

- 1990s – Competition enhancing reforms underpinned strong productivity growth
- 2000s – Reforms stalled, living standards rose with terms of trade and mining investment
- Today – Structural reform required to sustain growth in living standards into the future

Boosting productivity will require improvements across all markets – input markets such as the labour market, financial markets, and infrastructure markets as well as final goods and services markets.

Failure to undertake necessary reforms in related markets will mean that the potential benefits of reform in any single market are not realised.

The Government has commissioned a number of policy reviews that will recommend ways to enhance Australia's economic prosperity.

Making the most of these reform opportunities is essential⁵².

Productivity

"Productivity is critical to increase Australia's GDP. Australian GDP could be A\$90 billion p.a. higher if its productivity could be lifted. To achieve this lift, the resources sector is key for two reasons. First, the sector is a major contributor to the economy as a whole, providing 35 percent of all income growth since 2005. But the sector has also contributed to the decline in productivity....

"The sector is now at a point where 'getting productivity right' is likely to secure tremendous additional investments with corresponding wealth creation for the nation. Conversely, failing to do so will mean losing this opportunity for at least a decade and possibly longer⁵³"

"[L]ong run average growth rate includes the period of strong productivity growth following the reforms of the 1980s and 1990s. We should not take for

⁵² <http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2015/Australias-Economic-Policy-Challenges>

⁵³ http://www.mckinsey.com/global_locations/pacific/australia/en/latest_thinking/extending_the_lng_boom

granted that productivity growth of this order will be repeated, particularly in the absence of a reinvigorated structural reform effort⁵⁴".

"With the exception of the 1990s when annual labour productivity growth averaged 2.2 per cent, over the past 30 years labour productivity has not sustained a growth rate above its long-run average, achieving only 1.3 per cent in the 1980s and 1.4 per cent in the 2000s. Despite an uptick over the past three years, the risk to labour productivity growth appears to be on the downside⁵⁵".

Australia will need to increase the number of people working longer and lift productivity over the next 35 years or face an economy-wide deficit of \$400 billion by 2050⁵⁶

"It's an inconvenient truth but Australia's high wages are not supported by an equally high productivity⁵⁷"

"Mining labour productivity declined by roughly 50% since 2001⁵⁸"

158. The Terms of Reference noted the review will assess the impact of the workplace relations framework on matters including productivity
159. As demonstrated in three indexes on 'labour productivity', 'capital productivity' and 'Gross value add multifactor productivity' (at the end of this chapter) mining related productivity has significantly declined by more than 45 per cent.
160. A decade ago, mining labour productivity index was clearly the benchmark for all labour productivity indices; now it is merely on par with other indices, and below the benchmark index.

Australia is becoming less productive and less competitive as a place to do business

161. Given the similarities between Australia and Canada, Canada is typically used as an economy Australia can compare itself to (particularly for the resource industry).
162. Both nations are rich in mineral deposits; both are reliant on their respective resources sectors; both sell to the same market; have multinational companies with operations and productions in their resource regions; are in competition to attract many of the same investment opportunities; and both countries enjoy and are endeavouring to improve the standard of living for its citizens.

⁵⁴ <http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2015/Australias-Economic-Policy-Challenges>

⁵⁵

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/reports/The_sensitivity_of_budget_projections_to_changes_in_economic_parameters

⁵⁶ <http://www.theaustralian.com.au/business/economics/future-dire-unless-we-toil-more/story-e6frg926-1226999321549>

⁵⁷ http://www.misaustralia.com.au/p/business/companies/mining_wages_too_high_says_mitsui_rwRUTdHw3EioUrZmK3pytl

⁵⁸ [http://www.ey.com/Publication/vwLUAssets/EY-Productivity-in-mining/\\$FILE/EY-Productivity-in-mining.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Productivity-in-mining/$FILE/EY-Productivity-in-mining.pdf)

163. However, as noted below, there is a striking difference between Australian and Canadian multi-factor productivity levels. Investors closely analyse this information and use this information as a factor in determining where to invest.
164. Given the state of the resource economy, we shouldn't be giving potential investors reasons to not invest in Australia, however our declining levels of multi-factor productivity are going to do just that.

Multifactor Productivity – Australia vs. Canada

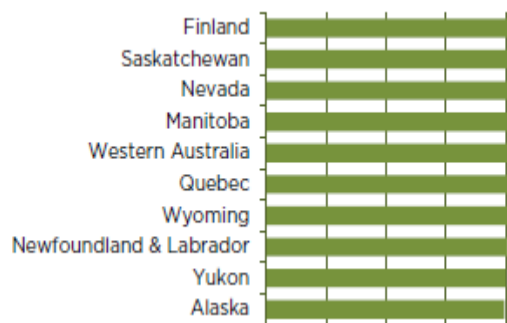


Source: 'Opportunity at Risk: Regaining our competitive advantage in minerals resources', Port Jackson Partners for the Minerals Council of Australia, September 2012

165. The top jurisdiction in the world for mining investment used to be Western Australia. However, the latest annual survey from Canada's Fraser Institute⁵⁹ shows that Western Australia has dropped to fifth.

The top

The top jurisdiction in the world for investment based on the Investment Attractiveness Index is Finland with an overall score of 83.8 (see figure 1). Finland moves up three spots this year to take over as the most attractive jurisdiction in the world for mining investment. Finland displaces Western Australia, which dropped to 5th overall. Saskatchewan moved up 5 spots to rank as the second most attractive jurisdiction in the world for investment. Rounding out the top 10 are Nevada, Manitoba, Quebec, Wyoming, Newfoundland & Labrador, Yukon, and Alaska in that order.



⁵⁹ <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/survey-of-mining-companies-2014.pdf>, page 31

166. Improving mining productivity has for some time been a key focus of the industry. For example, AMMA's national conference in 2014 was themed around *productivity*⁶⁰ and an Ernst & Young research report ranked productivity as their top strategic business risk for the global mining and metals sector.

The 2014-15 top 10 strategic business risks in the global mining and metals sector:

1. *Productivity (2 in 2013)*
2. *Capital dilemmas – allocation and access (1)*
3. *Social license to operate (4)*
4. *Resource nationalism (3)*
5. *Capital projects (7)*
6. *Price and currency volatility (6)*
7. *Infrastructure access (9)*
8. *Sharing the benefits (8)*
9. *Balancing talent needs (5)*
10. *Access to water and energy (new)*⁶¹

167. Resource companies are striving to be as productive as possible; adopting lean methodologies, six sigma methodologies, applying Kaizen techniques, right sizing, investing into research and technologies (e.g. mines of the future technologies) among many other initiatives. This investment may partially explain the reason why mining labour productivity has marginally increased from 2011-2012, however given the significance in the fall in the state of the resources economy generally and long run productivity trends, structural reform is necessary for sustainable productivity growth.
168. AMMA's recommendations in this submission, accompanied by the AMMA-commissioned KPMG report entitled "*Workplace Relations and the Competitiveness of the Australian Resources Sector*", provide both a new vision for the system and a comprehensive suite of detailed recommendations on how to improve the existing Australian workplace relations framework which will enhance Australia's resources productivity levels.

Workplace relations reform is vitally important

169. As noted by the World Economic Forum, the Fraser Institute and from mining executives around the world, Australia suffers from potentially crippling WR problems.

⁶⁰ <http://www.resourcepeople.org.au/#!2014-summit/cp6y>

⁶¹ <http://www.ey.com/GL/en/Industries/Mining---Metals/Business-risks-in-mining-and-metals>

170. AMMA concurs with the Treasurer that:

"...workplaces are important to our economy and society. Higher living standards, better pay and more jobs all depend on having fair, productive, and effective workplaces. The prosperity of tomorrow is driven by what happens in our workplaces today and this is why it is in our national interest to make sure that the Fair Work laws are balanced and effective⁶²".

171. As noted above, profit margins are under significant strain. Improving WR can play a significant role in improving organisational productivity, competitiveness and our national GDP.

172. KPMG's "Workplace Relations and the Competitiveness of the Australian Resources Sector" report models the impact of four key workplace reforms advocated by AMMA (to agreement making and the bargaining framework, industrial action, union right of entry and unfair dismissal and adverse action).

173. The KPMG report reveals that the impact of AMMA's reform scenarios on resource sector productivity and investment is between 2-5% and 3-8%, respectively.

174. The impact of these benefits to the resource industry on national GDP is between 0.8 and 2.0 per cent. Based on current levels, this is equivalent to GDP growth of between \$11.7bn and \$30.9bn. In addition, the KPMG report revealed that the impact on national employment in short term will be 0.1 per cent and 0.3 per cent. Based on current levels of employment, this is equivalent to 14,000 and 36,000 jobs⁶³.

COMMISSIONED RESEARCH EVIDENCE – KPMG REPORT

"Workplace relations and the competitiveness of the Australian resources sector" (lodged to accompany this submission)

175. AMMA not only provides the Committee with a submission on an extensive array of external research, we also reviewed the evidence-based requirements the PC employs to provide reliable, accurate and fully-costed recommendations in its reviews.

176. To best assist the PC and give our proposals the best opportunities of being engaged with and taken forward, AMMA commissioned KPMG to undertake ground-breaking research and analysis to inform this submission to the PC's inquiry into the Australian workplace relations framework.

177. Having read the PC's Issues Papers it is clear that there are limitations in previous research on the need for change in our WR system. We therefore commissioned major research from KPMG to try to overcome any gap in supporting information.

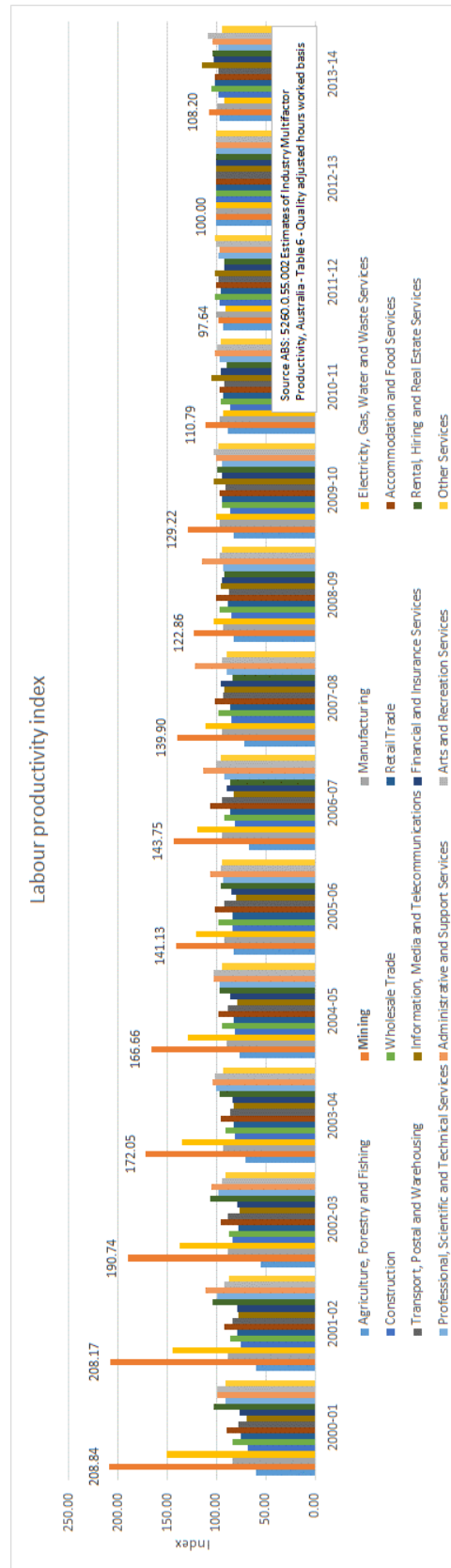
⁶² <http://www.pc.gov.au/inquiries/current/workplace-relations/issues/workplace-relations-issues-combined.pdf>

⁶³ KPMG report titled: "Workplace relations and the Competitiveness of the Australian Resources Sector"

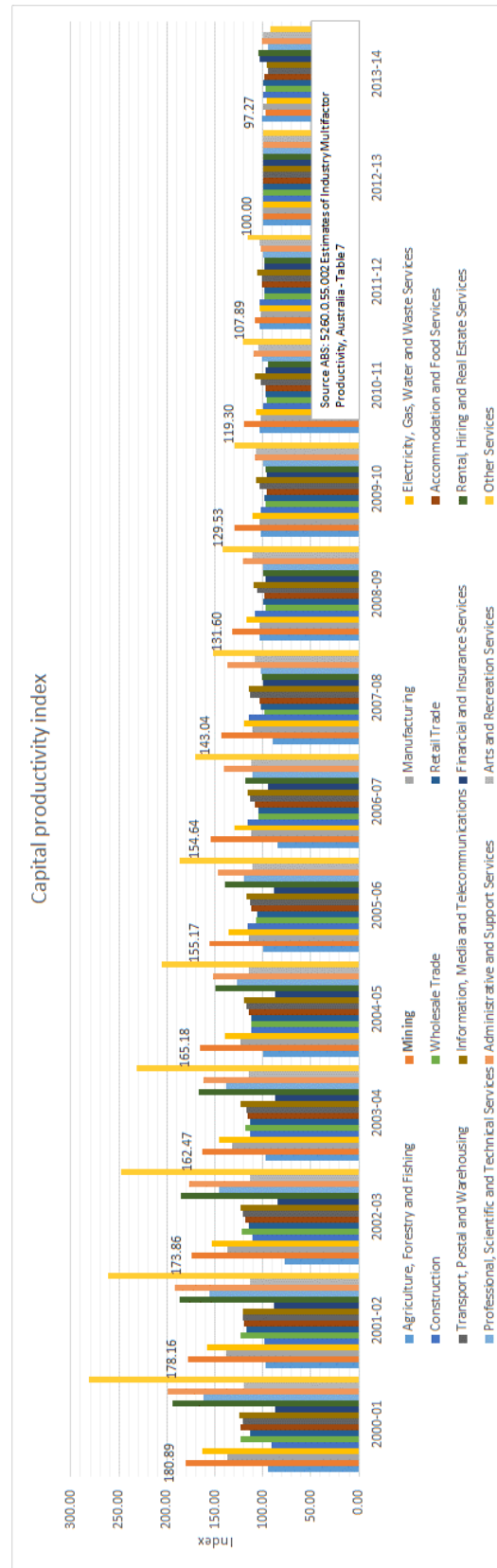
178. KPMG's analysis focuses on both resource sector and economy-wide impacts associated with potential changes in the Australian workplace relations framework.
179. Specifically, the scope of the KPMG report encompasses three components:
- a. Economic analysis of the FW Act (base case) and reform options on the Australian resources sector.
 - b. Analysis of the economic and socio-economic contribution of the Australian resources sector.
 - c. A benchmarking study comparing Australia's resource project related costs with projects in other OECD countries.
180. AMMA notes that the PC has been tasked to "identify and quantify, as far as possible, the full costs and benefits of its recommendations⁶⁴". AMMA recognises this and has applied the same methodology in the development of our submission and findings.
181. The findings in the KPMG report are significant. Not only does it state and quantify the importance of the resource industry, but it also describes the investment risk of inaction, but also the benefits to the national economy if just a handful of AMMA's body of reform recommendations are adopted.

⁶⁴ <http://www.pc.gov.au/inquiries/current/workplace-relations/issues/workplace-relations-issues-combined.pdf>

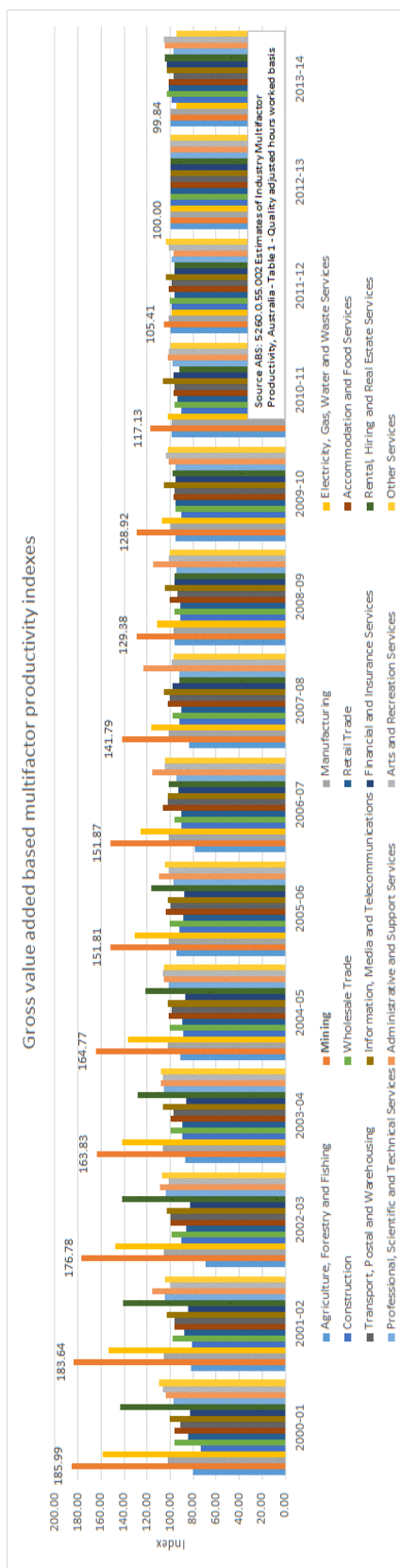
Labour productivity index



Capital productivity index



Gross value add multifactor productivity Index



3. THE BARGAINING FRAMEWORK

3.1. INTRODUCTION

*"These agreements would predominantly be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can generate sustainable real wage increases."*⁶⁵

- **The goals of enterprise bargaining and its advantages over centralised determination of wages and conditions have been clear since the early 1990s.**
- **The Australian system has gone backwards in delivering actual enterprise bargaining and become less relevant and accessible to a majority of enterprises, employers and employees.**
- **The system should provide a range of options for workplace bargaining that can better equip businesses to be productive and competitive, and support incomes and living standards.**

WHAT IS THE BARGAINING FRAMEWORK?

182. Australia's bargaining framework is essentially the rules under which employers and employees (some with the involvement of trade unions) can agree to move away from safety net-based employment to the regulation of work through a registered agreement. The existing provisions relating to enterprise agreement, including bargaining rules, representation, approval, termination and variation of agreements appear in Part 2-4 of the FW Act.

183. The bargaining framework and corollary matters such as industrial action are covered in the PC's Issues Paper 3, *"Workplace Relations Framework: The Bargaining Framework"*, which states:

*"[a]n overarching concern will be the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them – a broad issue for stakeholders in this inquiry"*⁶⁶.

184. The question is an appropriate one in that the focus of the inquiry is how the regulatory system is operating. AMMA contends that not only should the primary focus be on how the parties are currently impacted by the bargaining framework and the extent to which they are empowered to agree arrangements suited to them,

⁶⁵ Speech to the Institute of Directors, 21 April 1993: <http://pmtranscripts.dpmc.gov.au/browse.php?did=8849>

⁶⁶ Issues Paper 3, p.1

but the benefits and costs to the immediate parties should also be examined in light of the impact on third parties, including the wider community⁶⁷.

185. The PC inquiry represents an invaluable opportunity for the first time in the history of WR regulation in Australia to independently consider the impact of the current bargaining framework on employers and employees and how improvements can be made to improve the framework having regard to contemporary and foreseeable policy objectives.
186. It is important for the PC to appreciate that bargaining between employees (whether on an individual or collective basis) takes place in the shadow of the law and regulatory intervention. It is the nature, extent and effect of that regulation which should be the focus of the inquiry into the bargaining framework, and it is the nature, extent and effect of our regulation of bargaining that can be improved for the future.

WHAT THE SYSTEM NEEDS TO DELIVER

187. The Australian WR system should provide a genuine range of options for bargaining which:
 - a. Are practical, accessible, and which translate what can be agreed between employers and employees into registered agreements as simply and rapidly as possible (albeit within appropriate boundaries for agreement making).
 - b. Are consistent with the preferences and choices of employees in contemporary workplaces, including the 88% of private sector employees not joining trade unions.
 - c. Can act as a springboard and foundation for improvements in wages, conditions, work practices and productivity at the workplace level.
 - d. Yield agreements which support competitive, productive, growing and prospering Australian enterprises.
 - e. Translate negotiations into agreements in as many instances as possible without recourse to industrial action, without any threat of industrial action, and without disruption or damage to the enterprise.
188. The system shouldn't just be seen from a trade union perspective as negotiations over high wages and better conditions and employers shouldn't just see bargaining from a purely defensive perspective.
189. There should be a recognition that the institutional power of trade unions has led to both benefits and costs. If institutional power of trade unions remains, these costs should be clearly quantified and balanced against the interests of employers and

⁶⁷ This is not saying there should be a general public interest test for agreement making for specific enterprises, but that the PC has an opportunity to consider how the agreement making in Australia under the FW Act is delivering on the social and economic goals our WR should deliver on for the wider community.

the wider community. Historical factors should not direct the future modernisation and evolution of the system.

190. The system should be simple to all users and stakeholders. It is an unfortunate reality that each successive reform of the bargaining framework has led to direct and proportionate increases in the detail of legislation (i.e. compare the 1904 version of the federal legislation with the current FW Act and associated legislation). This may reflect the nature of the contemporary nature of policy making, parliamentary drafting, and the sophisticated nature of regulation in Australia, rather than the fact that a plethora of regulation is actually required for regulating the employment relationship and industrial actors (i.e. trade unions). Any future amendments should attempt to be clear and minimise interpretations and litigation.

WHY IS THIS PART OF AUSTRALIA'S WR SYSTEM?

191. The current enterprise bargaining provisions are primarily based on concepts first introduced at the federal level by the Keating Government's *Industrial Relations Reform Act 1993* (IRAA).⁶⁸ Many of the stated intentions and aspirations of the then new bargaining system remain highly relevant today and are likely to be relevant into the future. However, consideration needs to be given to:
- a. What we have achieved in 20 years of enterprise bargaining, and the extent to which our system has delivered on the goals for the future that were clear even at that stage.
 - b. What progress have we made in seeing terms, conditions and priorities increasingly devolved and decentralised to greater determination by employers and employees in enterprises?
 - c. How our bargaining framework and rules may need to be refined and changed to deliver on the aspirations and aims identified in the terms of reference and in particular to accord with and support adaptation to changing economic, labour market and community circumstances and needs.
192. As noted by the FW Act Review Panel in its 2012 report into the implementation and performance of the 2009 FW Act changes:⁶⁹

"Initially, the move towards enterprise bargaining took place within the context of the existing conciliation and arbitration system, through 'consent awards' and 'certified agreements' under the Industrial Relations Act 1988, made in accordance with principles developed by the AIRC."

⁶⁸ The Industrial Relations Bill 1988 and the Industrial Relations (Consequential Provisions) Bill 1988, which were introduced by the Hawke Government on 28 April 1988 created an ability for fixed term, non-variable binding agreements which may be certified by the Australian Industrial Relations Commission (AIRC) provided a Full Bench is satisfied that there are not against the public interest. The practical reality was that the AIRC refused to certify many proposed agreements which ultimately led to further reforms by the Keating Government in 1992 and 1993. See also a summary contained in AMMA's Beyond Enterprise Bargaining Report: The Case for Ongoing Reform of Workplace Relations in Australia, July 1999, pp. 26 -34.

⁶⁹ Fair Work Review Panel, Post Implementation Report, 2012, p.34. - <https://docs.employment.gov.au/node/29150>

193. The Keating Government made amendments to the IR Act 1988 to further facilitate the making of enterprise agreements by unions and employers under the *Industrial Relations Legislation Amendment Act 1992*.
194. Whilst it is technically correct to suggest, as Issues Paper 3 does at p.1, that “*since the introduction of the Industrial Relations Reform Act 1993 (Cth) employees and employers have been expected to work together at the enterprise level to agree on conditions of employment*”, it implies that this wasn't actually occurring prior to the 1993 amendments. In reality, there were growing movements to devolve WR from the industry or national levels to the workplace levels from the mid-1980s, and Australia's award system always allowed some greater enterprise specificity than was apparent from the outside.
195. The policy rationale for the 1993 amendments was contained in the Minister's second reading speech to the Industrial Relations Reform Bill 1993 s⁷⁰.
196. However, the introduction of the Bill into the Parliament was preceded by then Prime Minister Keating's now infamous address to the International Industrial Relations Association Ninth World Congress in Sydney on 31 August 1992. Prime Minister Keating was critical about the development of the framework at that stage, and remarked that:⁷¹

“It was a system which served Australia quite well I think, but the news I have to deliver today to those of our visitors who still think Australian industrial relations is run this way, is that it is finished...”

Not only is the old system finished, but we are rapidly phasing out its replacement, and have now begun to do things in a new way.”

197. The Keating Government's frustrations with the system were understandable as public polling in the 1980s and early 1990s indicated that confidence in the IR system and the AIRC was not particularly high⁷². For example, a July 1992 survey found that only 22% of respondents thought that wages, working hours and conditions should be determined by the AIRC.
198. Prior to the Keating Government's changes in 1993, and despite numerous reform amendments, the federal IR system (as distinct from the concurrent and parallel state based laws) was still firmly entrenched in the conciliation and arbitration power of the *Australian Constitution* pursuant to s.51 (xxxv). Salient attributes of the system continued to be based on the *Commonwealth Conciliation and Arbitration Act 1904* (CCA Act) by the Deakin Government. The Hawke Government's review of the system by the Hancock Committee IR system suggested that it did not require

⁷⁰ Introduced into the Parliament on 28 October 1993, see also Bills Digest No. 53, “Industrial Relations Reform Bill 1993”, Parliamentary Research Service Department of the Parliamentary Library, 12 November 1993: http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/SHG10/upload_binary/SHG10.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/SHG10%22

⁷¹ ADDRESS BY THE PRIME MINISTER, THE HON P.J. KEATING MP, TO THE INTERNATIONAL INDUSTRIAL RELATIONS ASSOCIATION NINTH WORLD CONGRESS, SYDNEY, 31 AUGUST 1992: <http://pmtranscripts.dpmc.gov.au/transcripts/00008640.pdf>

⁷² Bills Digest No. 53, “Industrial Relations Reform Bill 1993”, Parliamentary Research Service Department of the Parliamentary Library, 12 November 1993, p.4: http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/SHG10/upload_binary/SHG10.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/SHG10%22

significant amendments to assist with tackling the economic conditions of the time (such as high inflation, high unemployment and low productivity growth)⁷³.

199. This led to a former Deputy President of the AIRC, J.T. Ludeke QC, appropriately observing that the findings of the Labor Government's Hancock Committee of Inquiry:

"recommended some reforms but, in essence, endorsed the concept of a compulsory, centralised system, in which dispute settlement and Award making were vested in a Tribunal having powers of conciliation and arbitration. It seemed that Australia had been on the right track since 1904, and no good reason had been put forward for changing course".

200. At the time of the introduction of the 1993 Keating reforms, there was an entrenched view that the industrial tribunals are primarily concerned about industrial disputation and their resolution, rather than economic policy making. As the Parliamentary Bills Digest notes:⁷⁴

"The effect of the arbitral system on economic outcomes remains an open question. (Indeed, there has been a longstanding view, principally associated with former President of the Conciliation and Arbitration Commission, Sir Richard Kirby, that the industrial tribunals do not act as an arm of economic policy making, but function primarily to resolve industrial disputes.)."

201. Prime Minister Keating indicated that the former system had inherent limitations of a system which did not recognise the needs of enterprises, particularly as Australia was moving into a more global market place, and noted:⁷⁵

"We had always recognised that we could not indefinitely focus all wage movements in a uniform movement. We had always recognised that the price of bringing inflation down and employment up through adjusting wages mainly in a single national decision would be some loss of flexibility which we would later wish to recover. So a few years ago we began putting in place a transition to a much more flexible system, under which the vast majority of decisions over wages and working practices would be made at the workplace level, often within an industry framework. Four years ago we amended the law under which the AIRC operates to allow the certification of agreements. In a speech in Melbourne in 1989, I foreshadowed the switch, and in our submissions to the national wage case in 1990 and 1991 we argued for the introduction of workplace bargaining based on productivity increases. The AIRC queried us at first but late last year it cleared the obstacle, and this year we have amended the act to encourage the making of workplace bargains throughout the country."

⁷³ See also AMMA's Beyond Enterprise Bargaining Report: The Case for Ongoing Reform of Workplace Relations in Australia, July 1999, p.30.

⁷⁴ Bills Digest No. 53, "Industrial Relations Reform Bill 1993", Parliamentary Research Service Department of the Parliamentary Library, 12 November 1993, p.4:
http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/SHG10/upload_binary/SHG10.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/SHG10%22

⁷⁵ ADDRESS BY THE PRIME MINISTER, THE HON P.J. KEATING MP, TO THE INTERNATIONAL INDUSTRIAL RELATIONS ASSOCIATION NINTH WORLD CONGRESS, SYDNEY, 31 AUGUST 1992: <http://pmtranscripts.dpmc.gov.au/transcripts/00008640.pdf>

202. However, it is important to appreciate that the bargaining system envisioned by the Keating Government was not to be constructed in a policy and legislative vacuum. The Keating Government felt that it could only succeed with a fundamental shift to an enterprise bargaining framework (which existed in parallel with industrial awards) with the support of the ACTU to ensure that there were commitments to contain inflation as unions sought improvements to wages and conditions through a bargaining framework⁷⁶. Prime Minister Keating referred to the compact as follows:⁷⁷

"Bargaining is the way, but arching over it we have an agreement with the ACTU that wage increases will be consistent with keeping our inflation rate comparable with our trading partners. This is a very important commitment, which entrenches our very low inflation rate, and our competitiveness. It's an agreement we can rely on, one with teeth. The union movement has the ability to control the timing and extent of claims. And we as a government have already said that our commitment to superannuation increases over the decade, and to general minimum wage increases from time to time, would be reconsidered if wages growth started to outrun the level compatible with low inflation. Frankly, I think we could run into big trouble if we press ahead with workplace bargaining without an agreement on inflation. ... Those who think workplace bargaining can be carried out without an agreement on restraining inflation are, I think, naive."

203. In a speech to the Institute of Directors, Prime Minister Keating indicated that:

*"These agreements would predominantly be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can generate sustainable real wage increases."*⁷⁸

204. The 1993 IRAA attempted to introduce a paradigm shift in the system. It did so on the basis that by attempting to ensure that the labour market was able to have a degree of independence and flexibility in determining wages and conditions at the firm level (i.e. enterprise based bargaining above a safety-net of industrial award conditions) and limit the opportunity for damaging economic strike action that the labour market would be more efficient and thus in turn, Australia more competitive in a more globalised economy.
205. Industrial action in support of negotiations for an enterprise agreement was lawful and subject to immunity for the first time. As former President of the FWC, Justice Giudice observed:⁷⁹

⁷⁶ See for example the Joint Media release Prime Minister Keating and the ACTU, 1 May 1995 re-affirming the Accord Mk VII. The election of the Howard government in 1996 meant that the proposed Accord Mk VIII was never achieved:

<http://pmtranscripts.dpmc.gov.au/browse.php?did=9562>

⁷⁷ Ibid.

⁷⁸ Speech to the Institute of Directors, 21 April 1993: <http://pmtranscripts.dpmc.gov.au/browse.php?did=8849>

⁷⁹ Justice Giudice, Speech to the Industrial Relations Society and University of Sydney Colloquium, 2011.

"After these amendments there was an immediate and continuing reduction in the incidence and duration of industrial action which has persisted to the present time. Legitimising industrial action did not lead to more industrial action but to less."

206. Whilst it is true that industrial disputation (as historically recorded by the ABS as the number of working day lost) has declined over the past two decades, the economic impact of disputes where they are taken, and when they are threatened, remains significant within the resources sector.

207. A policy question to be addressed by this inquiry is whether the existing system should continue to "legitimise" industrial action in the context of formal bargaining (as exists under the FW Act), and if so, what if any changes should be made to ensure that equity considerations are balanced with the needs of the firm, third parties and the wider economy.

208. Speaking on the Industrial Relations Reform Bill 1993, then Minister for Industrial Relations, Hon. Laurie Brereton MP, stated:⁸⁰

"This legislation marks the culmination of the government's break with the past-our move as a nation from a centralised to a decentralised industrial relations system, to a system based primarily on bargaining at the workplace, with much less reliance on arbitration at the apex. Over time that process of change has parented a number of accords, a rewriting of the federal act, and two major pieces of amending legislation. Today it spawns a new system, a new system for a new era."

209. The second reading speech concluded with the following desire of the Keating Government for the impact of their proposed changes:⁸¹

"In essence, this bill will create a receptive framework for enterprise bargaining and build on the reforms of the last decade. By tailoring those reforms to the needs of the 21st century Australian workplaces, it will give our firms the ability to compete with the best companies in the world, many of which are located in the Asia-Pacific region, the region we have only recently begun to call our own".

210. Thus, more than 20 years ago the stated aims for enterprise bargaining reforms were:

- a. Meeting the needs of 21st Century workplaces.
- b. Competitiveness for Australia and Australian enterprises.

211. These remain the goals our system needs to deliver upon and the PC has both the opportunity and need, considering the terms of reference and problems with the current FW Act system, to chart a course for a system better able to deliver on these aims.

⁸⁰ Second reading speech, Industrial Relations Reform Bill 1993.

⁸¹ Ibid.

212. Following the election of the Howard Government in 1996, and further to its pre-election policy, the Howard Government introduced a second major set of reforms to the federal IR framework. The most important amendments concerned the bargaining and agreement making framework in particular.
213. In his second reading speech to the Workplace Relations and Other Legislation Amendment Bill 1996 (WROLA), the Minister for Industrial Relations the Hon. Peter Reith MP portrayed the reform measures as a fundamental break with the past, and in a similar vein to the Keating Government reforms, introduce another paradigm shift to the extant bargaining framework:⁸²

"The Bill I introduce today represents a break with a system of industrial relations that has been based on a view that conflict between employer and employee is fundamental to the relationship and that an adversarial process of resolving disputes is appropriate and inevitable. The bill rejects the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long—that employees are not only incapable of protecting their own interests, but even of understanding them, without the compulsory involvement of unions and industrial tribunals."

214. The Howard Government believed its reform measures would *"deliver the framework for structural reform of the labour market demanded by the imperatives of world competition and warranted by the legitimate expectation of Australians to enjoy improved living standards through higher employment and better paid jobs over time."*⁸³
215. In relation to agreement making, the then Minister indicated that:⁸⁴

"Both Australian workplace agreements and certified agreements have been designed to meet the objectives of placing the primary responsibility for industrial relations with employers and employees at the workplace, and reducing the complexities imposed by the current system. However, agreement-making under the government's legislation will be subject to a set of statutory minimum conditions to ensure due protection for workers."

216. The Howard Government's legislation was passed by the Parliament, with the support of the Australian Democrats in the Senate and contained no less than 176 amendments to the original WRAOL Bill. This included removing from the original bill specific provisions which required a proposed statutory agreement be certified against a prescribed statutory set of minimum conditions and minimum wages contained in a relevant award.
217. The "moderation" of the measures in the agreement with the Democrats meant that whilst a large number of provisions (as contained in the original bill) were not enacted, the structural reforms to the bargaining framework was secured. This included the ability for statutory individual contracts, called Australian Workplace Agreements (AWAs), to be entered into between an employer and an employee,

⁸² Second reading speech, House of Representatives, Thursday, 23 May 1996:
http://www.airc.gov.au/kirbyarchives/2009exhibn/legislation/1996_2rd.pdf

⁸³ Ibid.

⁸⁴ Ibid.

subject to a no-disadvantage test against the relevant industrial award (or designated award), and for collective agreements to be made with or without a trade union. It also contained options for specific greenfields agreements with a relevant union.

218. Bargaining remained truly voluntary (there was no compulsory powers to force an employer to bargain with employees or a trade union) and the only way protected industrial action could occur was in pursuit of a statutory agreement.
219. The steps to take protected industrial action were via the initiation of a bargaining period (and the requisite prescribed notice which set out certain particulars) by the trade union and the authorisation by the AIRC.
220. The resource industry was largely supportive of the evolution of the system and the reform measures, which allowed options and choices for both employers and employees in agreement making, which were underpinned by the safety net.
221. Despite general support for the direction of reforms started by the ALP and significantly progressed by the Coalition, there remained high transaction costs and involved a significant oversight by regulatory authorities and the AIRC. There was much that remained to be reformed in the WR system under the WR Act, and in particular the bargaining system in particular, notwithstanding the benefits of the Keating and Howard reforms. Many very sound reform proposals were not able to be progressed through the Parliament after the passage of the initial 1996 Coalition reforms.
222. In 2005, the Howard Government's Work Choices reforms built upon the 1996 reforms in relation to the bargaining framework. However, it differed from the 1996 measures in the following core areas:⁸⁵
 - a. Primary reliance on the corporations power (s.51 (20) of the Constitution rather than the conciliation and arbitration power in s 51 (35) for provisions relating to agreement making and bargaining (in addition to referrals from state jurisdictions and other constitutional powers).⁸⁶
 - b. The previous statutory no-disadvantage test against a relevant industrial award was removed (later to be replaced by a Fairness Test in 2007).
 - c. The introduction of a new form of greenfields agreement for employers.
 - d. Requirement for secret ballots to authorise protected industrial action.
 - e. A specified list of matters which could not be included in agreements termed "prohibited content".

⁸⁵ The *Workplace Relations Amendment (Work Choices) Act 2005* received Royal Assent on 14 December 2005 and amended the WR Act 1996 with the majority of new provisions commencing on 27 March 2006 following proclamation.

⁸⁶ The High Court upheld the validity of the provisions by 5:2 in *State of New South Wales v Commonwealth of Australia* (Work Choices Case) 14 November 2006 [2006] HCA 52.

223. The High Court decision which rejected a challenge to the validity of the Work Choices legislation importantly found that the corporations' power could be relied upon to regulate the industrial rights and obligations of constitutional corporations and their employees, in relation to workplace agreements and industrial action.
224. The use of the corporations' power of the Constitution as the primary source of a federal and unified IR system can be traced primarily to a policy discussion paper by the Howard Government in a three volume series called "*Breaking the gridlock, towards a simpler national workplace relations system*", published in October 2000.
225. The Coalition's 1996 and 2005 amendments to the bargaining framework were also an evolutionary step when considered against the 1993 amendments⁸⁷.
226. In combination, the reforms attempted to consolidate and build upon the direction of previous reform periods (in combination with other micro and macro-economic reforms) and reflect the dynamic and increasingly competitive Australian economy.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

227. The current legislative system of agreement making and bargaining under the FW Act can be traced back to an ACTU speech to the National Press Club in 2006.
228. Then Secretary of the ACTU, Greg Combet, set out the ACTU's intentions to publicly and privately advocate for a new framework of collective bargaining, pending the High Court challenge on the validity of the Work Choices legislation.
229. In his address to the National Press Club, Mr Combet indicated the key features of the ACTU's policy on collective bargaining they would put forward at their forthcoming ACTU Congress as follows:⁸⁸

"Collective Bargaining Policy

That is why one essential remedy to the injustice at the heart of these IR laws is the enactment of an enforceable right for people to collectively bargain.

The ACTU has been working for some months now on a new model for collective bargaining in Australian workplaces. A delegation of senior officials, many of whom are also here today, visited North America, the UK and Europe to investigate the way in which those countries give effect to their international collective bargaining obligations. They actually do something about it.

⁸⁷ There were many further reform bills were introduced by the Howard Government between 1996 and 20014. These bills are summarised in Online E-Brief, "Workplace Relations Legislation: Bills Passed, Rejected or Lapsed, 38th 40th Parliaments (1996-2004)", Steve O'Neill, 8 July 2005:

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/workplacelrelations

⁸⁸ Address to National Press Club, Greg Combet, "A fairer balance between industrial relations and the economy", 13 September 2006:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FWCZK6%22>

Earlier today, we launched the delegation's findings and the policy suggestions they recommend for Australia and this will be the centrepiece, this report and the proposed model we are putting forward of the policy to be considered at the ACTU Congress next month.

The model for collective bargaining rights that we are suggesting represents an entirely new approach for Australia. One which not only respects workers' rights, but which promotes co-operation, not division, and which promotes productivity and teamwork in workplaces. It is a new approach because it puts workers at the centre of decision making about the form of agreement that they will have. The report argues for a policy that removes the right of employers to unilaterally dictate the form of agreement their workers will have. It argues instead in favour of a system where an employee, a Union, or the employees themselves will have equal rights to initiate a collective bargaining process. Collective agreements will be possible between a Union and an employer or directly between employers and employees. But Union members as is appropriate should have the right to representation at all times.

Now within that framework there are two key elements of the proposal that we are advancing.

Firstly, that we argue - we argue that the law must oblige all parties to bargain with each other in good faith. To collectively bargain in good faith and it empowers the Industrial Relations Commission to help make that happen if help is needed.

Secondly, we argue that workers themselves must have a say when there is a contest about whether there should be a collective agreement. For example, when an employer refuses to bargain collectively and insists on individual contracts, we believe that the majority view of the employees themselves should determine the issue - give people a democratic say. If a majority of workers express their support for a collective agreement, then it is our proposal that the Industrial Relations Commission must ensure that good faith bargaining ensues and that the employees' decision is respected. And if it is not, then as a last resort we advocate that the Commission should be able to arbitrate to resolve intractable disputes.

Now that proposal, good faith collective bargaining, between an employer, a Union and employees, and the right for a majority of workers to decide what form of agreement should be negotiated by them or on their behalf, these things are fundamental democratic principles in our opinion and they are the foundation of the proposals that we are advancing. We want to give people a say in their own workplace, just as it is fair to elect a Government by majority, we believe it is fair for a majority of employees to democratically decide what form of agreement should apply to them."

230. The ACTU's report "*A fair go at work: collective bargaining for all Australians*" was published in September 2006⁸⁹. The report advocated for a new bargaining framework which would have a number of key features including, but not limited to:
- Removal of AWAs or any form of individual statutory agreement.
 - Industry Consultative Councils to facilitate industry-level consultation / negotiations and the development of industry-level framework agreements.
 - Creation of good faith bargaining rules to govern collective bargaining.
 - Where the good faith collective bargaining process fails to result in agreement, the federal industrial tribunal should have the discretion to terminate the bargaining process and commence an arbitration of the bargaining dispute (under the heading "last resort arbitration").
231. A number of significant pre-election policy commitments were announced by the Opposition Labor Party in "*Forward with Fairness*" in April 2007 and "*Forward with Fairness - Policy Implementation Plan*" in August 2007⁹⁰. The ACTU's bargaining framework was adopted in large part in the policy documents and the subsequent legislative package of reforms including the FW Act and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.
232. The FW Review Panel's 2012 report notes that in relation to consultation with external stakeholders on the draft FW Bill, including the utilisation of a sub-committee (the Committee on Industrial Legislation or COIL) of the National Workplace Consultative Council (NWRCC), which AMMA is a member:⁹¹
- "As far as the Panel is aware, the level of consultation undertaken in drafting the FW Bill was unprecedented in the Australian experience, as was the access to the draft legislation provided during the COIL process."*
233. This appears to imply or suggest that the level of consultation had some material impact on the outcome of the policies announced by the ALP in 2007 and the draft Bill which was presented to COIL. All representatives involved in the COIL process signed a deed of confidentiality with the Commonwealth and as a result AMMA is unable to disclose the process nor the discussions on various aspects of the legislation. That said, it is important for the PC to note that the process with respect to consultation over legislation within the WR Ministerial portfolio generally utilises COIL as a confidential consultation mechanism. It was this process that involved non NWRCC members which made it unusual in the historical approach of consultation with the ACTU and employer organisations which are formal members of NWRCC (and therefore COIL).

⁸⁹ It can be accessed here: <http://www.actu.org.au/Upload/Media/ACTU-coll-bargain-report.pdf>

⁹⁰ ALP, *Forward with Fairness – Labor's Plan for Fairer and More Productive Australian Workplaces*, April 2007; ALP, *Forward with Fairness – Policy Implementation Plan*, August 2007. A useful chronology of events concerning the development of the *Fair Work Act 2009* can be accessed here:

http://www.gph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/ChronFWAct

⁹¹ Fair Work Review Panel, *Post Implementation Report*, 2012, p.49. - <https://docs.employment.gov.au/node/29150>

234. This should be contrasted with a wider engagement on the proposed National Employment Standards which involved a Departmental level public and external consultation process⁹². Consultation was mostly in relation to implementation issues and not policy decisions which were generally immutable.
235. It would be inaccurate to suggest that there was any consensus, or support from employers for the FW changes which took effect in 2009. They were a policy retreat or discordant stop in a clear and bi-partisan direction of reform which had benefitted Australian employers and employees and the community, and which was delivering on shared and quite fundamental aims.
236. The ACTU's advocacy for a last resort arbitration mechanism was under consideration by the then Minister for Workplace Relations Hon. Bill Shorten MP in early 2013, but did not eventuate in any bill presented before the Parliament. This led to AMMA's Chief Executive, in conjunction with the Chief Executives of BCA, ACCI and AiG writing a joint letter to the then Labor Government and other Members of the Parliament to advocate against proposals to consider introducing compulsory arbitration for intractable disputes⁹³.
237. Whilst there has been a post-implementation review of the FW Act by the then Labor Government, there has been no merit based consideration of the provisions of the FW Act nor any economic modelling which was commissioned by the Review Panel.
238. Chapter 4 of the 2012 FW Review Panel Report "Contemporary industrial relations and the economy", is ostensibly devoted to economic considerations. The Panel notes within the introduction to that chapter:
- "The Panel decided early that economic issues would therefore rank high in its assessment of FW Act's operation in relation to its objectives, in the extent to which its objectives are being met, and in the Panel's consideration of how the operation of the FW Act could be improved consistent with its objects".⁹⁴*
239. However, there was no economic modelling, nor any qualitative or quantitative research commissioned on any aspect of the FW Act in the PIR. What appears in the FW Review Panel report is an overlay of macroeconomic performance, extant data on industrial disputes and agreement making, against historical IR systems or frameworks existing at the time.
240. In the context of the bargaining framework, the Review Panel does not attempt to quantify the real or hypothetical costs associated with agreement making nor other related parts such as protected industrial action.
241. The FW Act was a product of political processes and the political opportunities created post Work Choices rather than any robust analysis of the application of the laws on employers, employees, other stakeholders, nor any consideration of what

⁹² DEEWR, discussion paper National Employment Standards exposure draft, 2008.

⁹³ Joint Media Release, 19 March 2013: <http://www.acci.asn.au/getattachment/5b0b09b7-93a8-45aa-9b6c-1a7788c8520d/Annexure-4--ACCI-Joint-Media-Release-and-Letter-re.aspx>

⁹⁴ PIR, p.55.

was needed to equip our enterprise bargaining system to genuinely deliver on the aims identified by the Keating and Howard governments in the 1990s.

242. The FW Review Panel was deliberately limited in its scope and role and its recommendations were also limited (although some do remain relevant) and the previous government failed to fix problems with the FW Act its hand-selected panel of experts recommended.
243. This inquiry presents the first real opportunity to not only consider the impact of the existing laws, where they apply in the economy, but also to consider an alternative framework better able to deliver on the needs of the Australian economy, labour market and community in the medium and longer term.
244. Reforms recommended by the PC in this process should be formulated to be forward looking and rigorous, to ensure that they can outlast changes in political process and put an end to the swinging "IR policy pendulum", particularly in relation to the bargaining and industrial action framework.
245. This is why AMMA commissioned KPMG to undertake an independent analysis into priority areas of the framework and model reform options utilising CGE methodology. We have sought to back up our recommended approaches to future policy, much of them centring on bargaining, with rigorous economic evidence that can be scrutinised and relied upon by the PC.
246. The findings and results of the KPMG research are contained in the [report](#). Clearly the modest reform options will have a beneficial impact in the resources sector. However, it is assumed that similar benefits, when considered in other sectors of the economy, would also deliver benefits. AMMA encourages the PC to consider the findings and any further research as it applies economy wide.

Bargaining framework

247. The Explanatory Memorandum to the FW Bill 2008 indicated the significant changes being wrought to the then bargaining framework (which was working well and yielding substantial economic and employment benefits) as follows:⁹⁵

"r.12. The bargaining framework contained in the Bill entails significant regulatory change. These include the introduction of good faith bargaining, changes to the content of agreements, the creation of a single stream of agreement-making, a streamlined process for the approval of agreements and the introduction of Fair Work Australia-facilitated bargaining for the low paid. These regulations are focused on facilitating bargaining where employers and employees are not successfully able to bargain together. As a number of the elements of the bargaining framework are new to the federal workplace relations system and do not have parallels elsewhere, the impact of a number of elements of the bargaining framework is difficult to quantify at this stage."

⁹⁵ Explanatory Memorandum to the Fair Work Bill 2008, p.vi.

248. In October 2010, AMMA published a detailed report, *"Agreement or argument: What faith can we have in good faith bargaining?"*⁹⁶ The report attempted to summarise the first stage findings of the AMMA Workplace Relations Research Project in collaboration with RMIT University on the FW bargaining framework.
249. The early findings of the experiences of resource industry companies suggested that the FW changes were not working and needed to be revisited and amended, even though the new laws had only commenced in July 2009. Respondents to the first Research Project survey cited increased difficulty negotiating with union bargaining representatives under the FW Act as well as a negative cultural shift in the way unions were approaching bargaining – and this emerged in just the first few months in which the legislation was in operation⁹⁷
250. Of respondents that had engaged in good faith bargaining:
- a. 27.3 per cent said bargaining under the FW Act was "significantly more difficult" than under the preceding WR Act.
 - b. 27.3 per cent said bargaining under the FW Act was "more difficult".
 - c. 22.7 per cent said there was "no significant difference".
 - d. 22.7 per cent said it was "too soon to tell".
251. Respondents reported the new bargaining regime had led to:
- a. Having to devote more hours to enterprise bargaining (reported by 90 per cent of survey respondents that had engaged in bargaining during the "first eight months of the FW Act);
 - b. Having to devote more time to meeting and negotiating with other bargaining representatives (reported by 80 per cent of relevant respondents);
 - c. Having to devote more time to tribunal processes and bargaining-related tribunal applications (reported by 68.4 per cent of relevant respondents);
 - d. Greater union involvement in bargaining (reported by 65 per cent of relevant respondents);
 - e. Having to negotiate with a larger number of bargaining representatives (reported by 55 per cent of relevant respondents);
 - f. Employees taking more protected industrial action during bargaining compared with bargaining periods under the WR Act (reported by 25 per cent of relevant respondents); and
 - g. Unions demanding more union-specific clauses in enterprise agreements (reported by 68.4 per cent of relevant respondents).

⁹⁶ <http://www.amma.org.au/wp-content/uploads/2010/10/FullGoodFaithBargainingOctober2010Paper.pdf>

⁹⁷ Ibid, p.1.

252. Respondents said unions were wasting no time in pursuing union-specific clauses in enterprise agreements in addition to other clauses that would have been prohibited content under the WR Act. For instance:
- a. 76.5 per cent of relevant respondents said unions were now pursuing paid trade union training leave in their bargaining agendas;
 - b. 64.7 per cent said unions were pursuing right of entry clauses.
 - c. 58.8 per cent said unions were pursuing shop stewards' rights clauses.
 - d. 52.9 per cent said unions were pursuing payroll deductions of union fees.
 - e. 29.4 per cent said unions were pursuing clauses relating to the use of contractors.
 - f. 11.8 per cent said unions were pursuing clauses requiring employers to maintain a union office on-site.
253. In addition, 52.6 per cent of respondents that had negotiated with a bargaining representative under the FW Act were not made aware of how many employees that person represented.
254. These findings of the RMIT University research at the very start of the operation of the FW Act five years ago, appear to be directly born out in the recent analysis conducted by KPMG for AMMA as part of consultations with resource industry employers for this submission.
- a. Employers foresaw significant problems, particularly in bargaining in the proposed changes which became the FW Act.
 - b. We identified these problems to the then government and were ignored as it passed a huge and complex tranche of amendments.
 - c. AMMA and its members then closely monitored the impact of the new FW Act at the workplace level to discern whether the concerns identified came to pass.
 - d. Employer concerns were borne out very rapidly, perhaps more rapidly than anticipated.
 - e. These concerns persist and have intensified, given that:
 - i. Unions have had five years to understand and exploit their artificially inflated rights and capacities in bargaining under the FW Act.
 - ii. The former government did nothing to redress concerns regarding bargaining under the framework it imposed, notwithstanding acknowledgement of problems with the system and the appointment of the FW Review Panel to examine them.
 - iii. The current Senate has to date not passed any WR reform legislation.

Trade union attitudes to bargaining

255. To understand the regulatory framework and rules on bargaining, agreement making and industrial action, it is necessary to consider them operating not in a vacuum, but as applied in workplaces. Trade unions are not merely bargaining representatives or agents – they possess institutional powers and privileges, which distinguishes them from another other agent.
256. Trade unions play an integral part in representing their constituents in workplaces. They play a particularly important leadership role and also a technical representative role. They don't act as an agent of their members within the workplace, akin to a third party legal representative or industry association, which assists an employer in bargaining.
257. Trade unions operating within the resource sector or other sectors have a very real and direct impact on bargaining processes and outcomes in individual firms.
258. Many trade union leaders do not see bargaining as a "win-win" equation. For example, National Secretary of the Maritime Union of Australia (MUA), Paddy Crumlin was critical of employers seeking increases to pay with improvements to productivity, calling them "dinosaurs":⁹⁸

"MARITIME union leader Paddy Crumlin has declared massive pay rises won by offshore oil and gas workers were secured without productivity trade-offs, describing employers critical of the deal as 'dinosaurs' with an outdated view of workplace relations."

259. Mr Crumlin appeared to justify the MUA's actions on the basis that it was limited to a "very small" number of workers and it was pursued to remedy an apparent "pay gap" between maritime workers and construction workers:⁹⁹

"First of all, the number of workers this is about is very small, it's in the hundreds. All we're pushing for is that those workers will be paid the same as construction workers," said Crumlin.

Employers have recognized a large pay gap between construction workers operating on contract wages and shipping service workers paid on long-term wage agreements.

"In the past four years, construction wages have shot up. We want to remedy that pay gap," said Crumlin.

⁹⁸ Hannan, E. & Burrell A., "Union leader claims 'dinosaur' employers out of touch", The Australian, 3 February 2010.

⁹⁹ http://www.shipid.com/news/81533/Australia_Maritime_Strike.html

260. The ACTU and its affiliates consider union organisation and union collective bargaining as:¹⁰⁰

“[T]he primary means by which unions achieve fair wages and employment conditions for union members. Union members earn on average 12 per cent more than non unionists, and union members have greater access to leave, superannuation and other employment conditions.”

261. Part 3 of the AMMA submission builds on these issues in more depth and in particular addresses:

- a. Individual agreements (3.2)
- b. Options to improve IFAs (3.3)
- c. Greenfields agreements (3.4)
- d. Collective agreements (3.5)
- e. Agreement content (3.6)
- f. Agreement approval (3.7)
- g. Bargaining and agreement making (3.8) .

¹⁰⁰ ACTU Congress 2012, Wages and Employment Policy, p.1.

3.2. INDIVIDUAL BARGAINING

"[E]mployers benefitting from the mining boom would have been in a better position to afford generous AWAs than would retailers";

"It is likely that workers in more highly skilled industries were just as well off, if not better off, under AWAs than under the relevant award".¹⁰¹

- **Employers and employees should again have access to individual statutory agreements.**
- **These agreements should be subject to approval by the FWC, and to the same or higher statutory tests against disadvantage than those for making collective agreements.**

INTRODUCTION

What are individual statutory agreements?

262. Millions of Australians work under individual agreements and always have. Managerial, professional and non-award employment has always been overwhelmingly on the basis of the offer and acceptance of agreed terms, which whilst having to meet some statutory minimum standards, can vary between like employees based on what has been agreed (see Chapter 6.2).
263. The policy debate on the inclusion of individual agreements in Australia's WR framework is not about these employees who are typically higher income earners and not union members, and who have not been covered by awards.
264. The individual agreements which have been discussed in Australia for more than 20 years, and implemented for 10 of those years, are an alternative option to collective bargaining for employees who have traditionally been covered by awards and who would fall within the eligibility rules of trade unions for union membership.
265. An individual statutory agreement provides an option for individual employees and their employers to:
- a. Agree on terms and conditions and register this as an enforceable agreement under WR legislation. In this respect, they are the same as the collective agreements employers enter into with unions and have registered in their thousands.
 - b. Step off the award into an agreement, which may or may not vary safety net of generic terms and conditions, provided the agreement meets the statutory test for agreement making (currently the BOOT test).

¹⁰¹ Labor's hand picked Fair Work Review Panel - Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation was released on 2 August 2012., p. 123- <https://docs.employment.gov.au/node/29150>

266. It is important not to confuse (as many would have it) statutory individual bargaining with inherent or necessary disadvantage for employees. How any particular scheme or system works from time to time will differ, but there is nothing inherently objectionable or disadvantageous in providing such an option in any WR system and such debates have arisen only in regard to particular policy settings at various times.

Principles for a fresh individual statutory agreement option

267. The system should recognise that the majority of workplaces do not operate on a collectivist structure. The vast majority of workplaces within the private sector operate on a combination of common law contracts, underpinned by the statutory safety net and supplemented by policies.
268. The WR system should accommodate a range of formal and informal workplace arrangements through individual and collective agreements, which does not undermine a statutory safety net.
269. The system allow employers and employees to make an individual statutory agreement, which has similar statutory features and characteristics to existing registered enterprise agreements.
270. As with each of the concepts addressed in this submission, and AMMA's vision for the future of Australia's WR framework as a whole, it is appropriate that we start with broad aims for the system / principles and what it should deliver.
271. As a matter of principle and goals for the system:
- a. All Australian employees, regardless of their income or occupation, should have the right to determine, by agreement with their employer, whether they wish to be employed subject to an individual or collective agreement.
 - b. The Australian WR system should include an option for statutory individual bargaining, subject to suitable tests and protections.
 - c. It should be possible to make an individual agreement provided the same tests are met as would be applied to making a collective agreement.

Unions don't like them

272. It should be recognised up-front that unions don't like individual agreements, and will argue their mere existence is inherently exploitative and disadvantageous, regardless of the specific system being considered. Unions would argue this even if an individual agreement required a doubling of current employee wages prior to registration.
273. There are two dimensions to union opposition to allowing those Australians traditionally covered by awards to exercise what should be pretty fundamental rights to reach agreement with their employer on how they will be employed:

- a. Ideology: Union antipathy to individual agreement is firstly antithetical, some would argue, to the collective purpose of trade unions and the collective, one-in-all-in way in which traditional trade unionism would see workplaces run. From this perspective, there is a collective interest in the terms and conditions of any individual, and it is in the interests of the collective if there is homogeneity of these terms and conditions under the control of the collective.
- b. Practicality: Individual statutory agreements are also attractive to those not wanting to participate in unions and rapidly expose the lack of value for many employees of participating in a union. Such agreements make it very hard for unions to organise a workplace and to do their business, and as a sheer matter of practicality and cost, it is in the interests of unions' capacity to do their business that the only available agreements be collective ones. We suspect that when the ideology and politics is stripped away, this has quite some significance in explaining the FW changes in 2009.

The status quo under the FW Act

274. There are currently no mechanisms to make a registered individual statutory agreement under the FW Act. The objects of the FW Act are exceptional and unique in that they actually contain a policy objective reflective of a pre-election policy of a major political party, expressed currently as follows:

Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

...

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and¹⁰²

275. AMMA has been unable to find any other analogous or similar federal legislative objective which is an expression of policy intent by a political party rather than the stated objectives of the operation of a legislative framework.
276. The fact that the Parliament allowed this to occur is lamentable. In what way does it provide readers of the FW Act any guidance on the objects of the provisions?

¹⁰² FW Act, s.3(c)

277. The ALP's "*Forward with Fairness*" policy unequivocally stated that "AWAs and statutory individual contracts will not be a part of Labor's fair and balanced workplace laws".¹⁰³
278. It is of a matter of historical record that the ALP and the trade union movement have not supported a form of statutory individual agreement making under the federal WR framework. This remains the case under both the former Accord partners' formal policy manifestos and is unlikely to change in the future.¹⁰⁴
279. What to make of this: Section 3(c) of the FW Act is political sloganeering. In assessing the performance of the FW Act against its "stated aims and objects" under the terms of reference, the PC should not in any way be bound by this existing object of the legislation.
280. We encourage the PC to engage with the merits of arguments for and against extending the system to in future offer an option for statutory individual agreement making, and in particular we commend the recommendations contained in this chapter.

WHY IS THIS NOT PART OF AUSTRALIA'S WR SYSTEM?

281. Despite the current absence of individual statutory agreement making, forms of individual registered agreements have previously existed under various federal and state WR frameworks in Australia.
282. For example, resource companies operating in WA utilised individual statutory agreements called Western AWAs under the *Workplace Agreements Act 1993* (WA). In 2002, after the Labor Government had won the state election, the Government passed legislation that removed the workplace agreements which had previously been introduced under the *Workplace Agreements Act 1993*, and repealed that Act. Part VID of the *Industrial Relations Act 1979* (WA) allows unincorporated employers in WA to enter into individual statutory agreements called Employer-Employee Agreements.
283. Resources companies have had a longstanding desire to engage more directly with employees through the use of instruments such as individual statutory agreements in Australia.
284. The impetus for individual statutory agreement making first started with the reforms introduced in New Zealand in 1990 and successfully utilised by resource companies operating in NZ.

¹⁰³ ALP, *Forward with Fairness*, April 2007, p.13

¹⁰⁴ See for example ALP 46th National Conference, National Platform, p.94:

http://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/121/attachments/original/1365135867/Labor_National_Platform.pdf?1365135867; See also the ACTU Congress

- a. For example, resource company CRA first implemented individual contracts in its Tiwai Point smelter in New Zealand under the *Employment Contracts Act 1991* (NZ) and later used individual contracts in its Australian operations.
 - b. This was not without significant controversy from trade unions at the time.
285. Under the *Workplace Relations Act 1996* (pre and post-Work Choices), resource companies continued to utilise individual statutory agreements (AWAs) until the passage of the Rudd Government's *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* which prevented new AWAs being made but allowed for a transitional instrument called an Individual Transitional Employment Agreement (ITEA). An ITEA could only have a nominal expiry date of 31 December 2008. Not all employers were able to make an ITEA. The employer had to demonstrate that as at 1 December 2007, it had at least one employee whose employment was regulated by a statutory individual agreement.
286. Pre-2006 under the WR Act, certified agreements and AWAs had a maximum nominal expiry date of three years. In 2006, this maximum nominal expiry date was extended to five years. Where no nominal expiry date was included in a workplace agreement, the nominal expiry date was taken to be five years. (There was an exception to this for employer greenfields agreements which had a maximum nominal expiry date of one year). The extended NED created lasting certainty in employment arrangements and offered immunity from industrial action during its nominal duration.
287. Under the pre-Work Choices amendments, AWAs were required to meet a statutory no-disadvantage test (against a relevant or designated industrial award) which was submitted to the designated body called the Employment Advocate (EA). Section 170VPB(3) of the *Workplace Relations Act 1996* also provided an avenue for the Employment Advocate (EA) to refer AWAs to the AIRC where the EA questioned whether the AWA met the statutory no-disadvantage test.
288. The Work Choices reforms streamlined the approval process for the lodgement of agreements which were required to be lodged with the designated body called the Office of the Employment Advocate (OEA).
289. Ultimately, the experience in Australia is one of introducing options for statutory individual bargaining, them being widely used in the resources industry as instruments of high pay and high employee satisfaction (evidenced by successful roll over into further agreements).
290. However the options to make such agreements have been removed by incoming Labor governments at the state and federal level. While these intentions were signalled by the incoming government in advance of each election, the policy was ultimately implemented with no real consultation with business, or regard to how the individual agreements were actually operating in practice, in particular industries. In particular, no consideration was given to perhaps retaining WA Workplace Agreements or AWAs where they met (for example) a minimum income test, or a minimum percentage of earnings in excess of awards.

291. We have therefore seen in Australia the worst of the pendulum or see-saw policy-making which pervades WR policy when it comes to allowing employers and employees to enter into statutory individual agreements.
292. With AWAs, and the pre-Work Choices AWAs in particular, we had hundreds of thousands of Australians working under them, regularly rolling them over by agreement and in our industry in particular paying well in excess of any award safety net. The individual agreements were integrated into the sophisticated HR strategies of resources enterprises and assumptions of inherent vulnerability or exploitation were entirely inapplicable and misplaced. Yet all these agreements were ripped away without regard to the wishes of employers and employees, and employees were forced onto complicated collective or transitional instruments.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

293. The current system does not allow any form of individual statutory agreement.
294. In May 2010, AMMA released a research paper, *"Individual Flexibility Arrangements (under the FW Act): The Great Illusion"*, which explored the utility and success of individual statutory agreements within the resource sector, both under former State systems and under the federal system as follows:¹⁰⁵

"The resource sector's reliance on individual statutory agreements such as Australian Workplace Agreements (AWAs) is well known. The sector has utilised individual statutory agreements from the time they were first available in Western Australia in 1993 and federally as AWAs in 1996. The Rudd Government removed the option for employers and employees to have an employment relationship based on an individual statutory agreement in March 2008 in the commencement of its move towards its Forward with Fairness system.

Up until that point, it was estimated that 67% of resource sector employers operating in the federal industrial relations system were operating under AWAs, with that figure closer to 80% in metalliferous mining."

295. Many resource industry companies successfully operated with multiple instruments, including collective agreements, common law contracts and AWAs.
296. Rio Tinto, for example, in its submission to the *Workplace Relations Amendment (Transition To Forward With Fairness) Bill 2008* indicated that its company at the time had the following industrial instruments in force across the corporate group:¹⁰⁶

¹⁰⁵ AMMA Research Paper, "Individual Flexibility Arrangements (under the Fair Work Act 2009): The Great Illusion", May 2010, p.4:

http://www.amma.org.au/assets/images/stories/papers/052010_Individual_Flexibility_Arrangements_The_Great_Illusion.pdf

See also AMMA research paper, "The case for ongoing flexibility in employment arrangement options in the Australian resources sector", March 2004.

¹⁰⁶ Rio Tinto submission to the Senate Committee Inquiry into the Workplace Relations Amendment (Transition To Forward With Fairness) Bill 2008, February 2008:

http://www.aph.gov.au/~media/wopapub/senate/committee/eet_ctte/completed_inquiries/2008_10/wr_tff08/submissions/sub04_pdf.ashx

Per cent

Australian Workplace Agreements	22
Employee Collective Agreements	15
Union Collective Agreements	8
Common law Contracts	55
Total	100

297. Rio Tinto is an example of a company which had successfully utilised statutory individual agreements for a considerable period of time (over fifteen years), having initially been used in the West Australian state system and since 1997 under the *Workplace Relations Act 1996* (prior to Work Choices)¹⁰⁷

298. In its parliamentary submission to the Senate Inquiry, Rio Tinto indicated that AWAs met the needs of both the company and its employees, stating:¹⁰⁸

"AWAs have met the needs of both Rio Tinto and our employees. Whilst the agreements may override the application of more detailed award provisions, Rio Tinto provides its employees with a competitive salary package in mining industry terms and a very generous package when viewed across the economy as a whole. Rio Tinto has not used individual statutory agreements as a device to reduce the level of salaries and benefits payable to an employee. AWAs (where used), have formed part of an integrated approach to employment arrangements at a site. In many cases, this approach has also incorporated an enterprise award (other than coal mining where an industry award applies)."

299. This view was shared by many companies who successfully utilised individual agreements within their business operations and paid well above the prevailing award rates of pay. According to RMIT University in its survey research of resource industry employers, 65.1 per cent of respondents indicated that they supported a return to AWAs underpinned by a no-disadvantage test¹⁰⁹. That is – 65.1% of resource sector employers supported a return to pre-Work Choices AWAs not subject to the restricted test for approval which led unions to successfully argue against Work Choices at the political level.

300. Labor's hand-picked FW Review Panel in its report on the performance of the FW Act identified the *"problem with AWAs"* as follows:¹¹⁰

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ AMMA Workplace Relations Research Project [Survey 4](#) Report, Dr Steven Kates, RMIT University, October 2011.

¹¹⁰ PIR, p.119.

"The policy was intended to address the problem, as identified by the Government at the time, that the previous framework promoted individual statutory agreements over other forms of workplace regulation, which resulted in lower wages and worse conditions for some employees, particularly vulnerable employees."

301. According to the Panel's own analysis, it found that the mining industry had an above average density of AWAs given that the mining industry represented around 1% to 2% of total employment and 7% to 14% of AWAs and ITEAs related to mining employees¹¹¹.
302. The Panel noted, in relation to the available data on AWAs under the Work Choices framework, the following:¹¹²
 - a. *"While there was much anecdotal evidence of the negative impact on some employees' wages and conditions arising from the use of AWAs under Work Choices, comprehensive data was not available as the Office of the Employment Advocate ceased collecting data after a short time".*
 - b. In some instances, employees on AWAs such as *"highly skilled workers in high-paid jobs – were well remunerated"*.
 - c. The number of AWAs in the mining industry made under the Work Choices framework actually increased despite the introduction of the Fairness Test (2,263 vs 2,569). That is when the Howard government made it harder to secure an AWA in response to concerns being raised by unions, the mining industry was so clearly meeting these requirements that it could increase its usage of AWAs as employment expanded.
 - d. *"[E]mployers benefitting from the mining boom would have been in a better position to afford generous AWAs than would retailers"*.
 - e. *"It is likely that workers in more highly skilled industries were just as well off, if not better off, under AWAs than under the relevant award"*.
303. It is curious that the Panel generalised recommendations from organisations which sought a statutory individual agreement making option in the following way:¹¹³

*"In particular the Panel did **not** accept that ... the Government should permit individual agreements with provisions that undercut award provisions ... this is contrary to the objects of the FW Act and inimical to both the making of collective agreements and the safety net role of modern awards"*.
304. However, and to be clear, that is not what the resource industry suggested in the FW Review Panel process, and it is not what we are commending to the PC now. This was a straw man and an inaccurate representation of what the resources sector

¹¹¹ Ibid.

¹¹² Ibid, pp.120 – 123.

¹¹³ PIR, p.21.

argues Australia's WR system requires in terms of an option to make statutory individual agreements.

305. AMMA supported and still supports a form of an individual statutory agreement, with the statutory characteristics akin to enterprise agreements, which do not undercut in any way the safety net. AMMA supported individual agreements underpinned by the better off overall test against minimum entitlements under modern awards and the National Employment Standards, just as union agreements are now¹¹⁴.
306. The ACTU in its supplementary submission appeared to be devoted to opposing any proposal provided by AMMA to the Review Panel. Specifically, in relation to individual agreement making, the ACTU opposed AMMA's recommendation to re-introduce a form of individual statutory agreements on the following basis:¹¹⁵

"Not consistent with the objects of the Act that recognise that statutory individual employment agreements can never be part of a fair workplace relations system".

307. So the best evidence the ACTU had to oppose an individual agreement option was that at its insistence a Labor government has misused the objects provision of the FW Act to make a political point and to plant an uncomfortable political time bomb for any future government considering revising this area.
308. The ACTU did not cite any specific research or evidence in relation to the use of AWAs within the resource sector from 1996 to 2008. In response to AMMA's recommendation to ensure individual statutory agreements pass a better off overall test against awards and the NES, the ACTU also opposed this on a similar basis, stating:¹¹⁶

"Not consistent with the objects of the Act that recognise that statutory individual employment agreements can never be part of a fair workplace relations system."

309. This fails to engage with a quite fundamental point – if the individual agreement meets the same test that a collective agreement with the union would need to meet, why should it not be offered as an option under a FW system equipped for a future in which union membership is very unlikely to rise from its present very low levels in the private sector, and in which individual choices and priorities (and demands on employers) are likely to become more diverse.

¹¹⁴ AMMA submission to the PIR, p.54.

¹¹⁵ ACTU Supplementary Submission PIR, 2 March 2012, p.9:

http://www.actu.org.au/Images/Dynamic/attachments/7538/ACTU_supplementary-submission-to-the-post-implementation-review-of-fair-work-act-2009.pdf

¹¹⁶ Ibid, p.10.

310. Whilst the ACTU appears emphatic in its opposition towards AWAs (or any form of individual statutory agreement), the ACTU at its 2012 Congress indicated that it “*will pursue better safeguards on IFAs, including formal certification requirements, that ensure employees are genuinely better off overall than they would have been had they not entered into an arrangement.*”¹¹⁷
311. It appears that the ACTU's opposition to individual agreements perhaps may be over its form rather than its substance. In any event, and despite the ACTU's 2012 policy on IFAs, it is clear that there will never be any consensus or agreement from the ACTU on individual statutory agreement making under the federal WR system.
312. By implication, it is reasonable to assume that the Labor Party will also not support individual statutory agreements. The former Accord partners will continue to oppose such a concept outright with no consideration of the merit of such an instrument, the level of statutory safeguards provided or such tests as may be created to protect employees from having their current minima reduced by a form of an individual statutory agreement.
313. Nor is it likely that there will be some acceptance that higher-paid employees and their employers should be able to enter into an individual statutory agreement which is at least on an equal basis to collective agreements.
314. Whilst regrettable from a public policy perspective, the closed minds of unions and one side of politics should not restrict the options or considerations open to the PC. This Inquiry should consider the available evidence of individual statutory agreement making within the resource industry and the absolute lack of any systemic problems with employers and employees having conditions reduced during the brief Work Choices period when it was legally permitted but not mandatory to do so.
315. Clearly, within the resource industry's experience, AWAs and other forms of individual agreement making existed successfully before the Work Choices period and in parallel to other agreement-making options. AMMA believes that a new form of individual agreement making that contains the necessary checks, balances and protections could work in the future.

INTERNATIONAL APPROACHES (OECD)

316. New Zealand allows both individual and collective employment agreements. The NZ department of Labour advises that:

*From 1 July 2011 every employee must have a written employment agreement. It can be either an individual agreement or a collective agreement. All employers **will be required** to retain a signed copy of the employment agreement or the current signed terms and conditions of employment.*

¹¹⁷ ACTU Congress 2012, Wages and Employment Policy, p.3:
<http://www.actucongress.org.au/attachments/policies/final/Wages%20and%20Employment%20Conditions%20policy-FINAL.pdf>

317. The critical points to understand in relation to individual bargaining in NZ are:
- a. NZ abolished its awards and made very significant changes to its WR system in the early 1990s.
 - b. These changes were not substantially reversed under a Labor government when re-elected. Changes were made, but not the substantial shift back to re-regulation Australia suffered through the 2009 FW Act changes.
 - c. NZ, like the UK, did not reregulate and continued to secure the economic and labour market advantages of labour market reform.
 - d. Regardless of the form of agreement, that country's statutory safety net applies.
318. Levels of income inequality in Australia and New Zealand also remain comparable with NZ slightly shading Australia on one commonly used method:
- a. Australia – Gini coefficient (pre-taxes and transfers) = .46 (2012).
 - b. New Zealand – Gini coefficient (pre-taxes and transfers) = .46 (2012)¹¹⁸.
319. This supports a conclusion that scope for individual agreement making does not inherently cause disadvantage or cause widening inequity.

ECONOMIC EVIDENCE / KPMG REPORT

320. AMMA commends to you the KPMG [report](#) *Workplace Relations and the Competitiveness of the Australian Resources Sector* as the principal piece of economic and labour market evidence brought forward by the industry in support of WR reform.
321. Based on consultation with resource employers, the benefits of such reforms are modelled on the basis of increases in labour productivity in the sector of between 2% and 5%, and increases in investment of between 3% and 8%¹¹⁹.
322. Looking at the basis for these modelled scenarios, allowing scope for individual statutory agreement-making can contribute to reduced agreement-making costs, higher productivity, reduced union site entry and reduced industrial action¹²⁰.
323. This would translate in turn to GDP growth of up to \$30.9 billion, and jobs growth of up to 0.3% or 36,000. Importantly, these benefits are calculated solely with regard to the resources industry, and if implemented would be likely to be higher on a whole of economy basis.

¹¹⁸ Source: OECD - <http://stats.oecd.org/index.aspx?queryid=46189>

¹¹⁹ KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, p.12

¹²⁰ KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, p.13

324. KPMG indicates that:

Consultation with the industry indicates that the proposed AMMA reforms have the potential to reduce the costs associated with agreement making by:

- *Introducing modified registered collective agreements and individual agreements.*
- *Enabling agreements to be approved by the FWC (or equivalent) based on a no disadvantage test against the safety net.*
- *Extending the nominal expiry dates [of] agreements and allowing options for extension of agreements.*
- *Introducing expedited agreement processes for workers above a high income threshold¹²¹.*

325. Further, KPMG shines a light on a key problem with the collective agreement system:

Consultation with the resources sector indicated that the costs associated with collective agreement outcomes are higher than individual agreements. The primary driver of this cost is not wages. Rather, it is the conditions included in these agreements.¹²²

RECOMMENDATIONS

326. The PC has been asked to:

...make recommendations about how the [workplace relations] laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.¹²³

New type of individual statutory agreement option

Recommendation 3.2.1

There be capacity to enter into a new form of individual statutory agreement which is entered into between an employer and an employee. Once approved by the FWC (or a successor body) the individual agreement will have the same characteristics and enforceability as a collective agreement and no industrial action could be taken during the life of the agreement.

¹²¹ KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, p.110

¹²² KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, p.110

¹²³ Terms of Reference, The Hon J B Hockey MP, Treasurer [Received 19 December 2014]

Statutory test

Recommendation 3.2.2

The individual statutory agreement would be subject to the same statutory approval process as registered collective agreements, including passing a no-disadvantage test or BOOT test against the relevant safety net. Matters in the agreement could only be those that pertain to the relationship between an employer and employee. The nominal expiry date would be up to 5 years. If no nominal expiry date is included, the default period of 5 years would apply.

Alternatively

Recommendation 3.2.3

As an alternative, making an individual statutory agreement could be subject to some higher test than applies for other forms of agreement, such as for example an assessment by the FWC that a proposed agreement must leave the employee no less than X% better off than the award safety net to be approved.

Condition of employment

Recommendation 3.2.4

It should be possible to make an offer of employment conditional upon entry into an individual statutory agreement, provided the agreement meets the applicable tests for approval.

Employee protections

Recommendation 3.2.5

Individual statutory agreement making should be subject to appropriate protections of employee choice and against coercion or duress in the making of the agreement.

Approval process

Recommendation 3.2.6

Individual statutory agreements would be required to be registered by the FWC and be accompanied by co-signed supporting statutory declarations from the two parties.

Fast track approval process

Recommendation 3.2.7

A fast track approval process would apply for higher-income employees who would be able to lodge their agreement with the FWC and upon receipt of lodgement, the agreement would commence and be subject to audit by the FWO. This would be a form of **High Income Employment Agreement**, with the threshold for such agreements potentially being set at the current unfair dismissal high-income threshold of \$133,000.

Objects of the FW ActRecommendation 3.2.8

Existing s.3(c) be removed from the objects of the FW Act.

3.3. INDIVIDUAL FLEXIBILITY ARRANGEMENTS (IFAs)

"[IFAs] are of little value in their current form. They would need to be substantially modified to provide significant benefit to employers (and probably employees as well)."¹²⁴

- **The extremely low take-up of IFAs under the FW Act, particularly by resource industry employers who were high users of statutory individual agreements in the past, is symptomatic of their lack of utility for business.**
- **If IFAs are to remain as a genuine alternative to statutory individual agreements, they must be overhauled in key ways so as to minimise union influence over flexibility clauses and maximise the benefits for employers and employees.**
- **Employers would consider IFAs a better substitute for a statutory individual agreement if they were able to be agreed pre-employment, if no industrial action could be taken during their life, and if they could run for fixed terms of up to four years.**

INTRODUCTION

327. In Issues Paper 3, the Productivity Commission (the Commission) includes a list of questions it is interested in hearing from stakeholders on in relation to IFAs. These are:

How should a WR system address the desire by some employers and employees for flexibility in the workplaces?

What protections need to be in place for employees and employers in creating bespoke agreements?

What are the benefits and costs of IFAs (or similar provisions)? Case studies would be very helpful.

Why are employers apparently reluctant to use IFAs (in both enterprise agreements and individual arrangements that seek to override an award?)

Should there be restrictions on the matters that parties can trade off in forming individually-tailored agreements, and if so, why?

On the factual front:

- *How widespread are current IFAs?*
- *Which industries and occupations are most likely to be subject to these agreements?*
- *What sorts of matters are varied by IFAs?*

¹²⁴ AMMA Workplace Relations Research Project Survey Report 4, Dr Steven Kates, RMIT University, October 2011

Are the enforcement arrangements for ensuring IFAs meet the FW Act efficient and effective? If not, what are the remedies?

Are the notice provisions adequate?

To what extent are IFAs standardised across employees, rather than tailored to individual circumstances?

Are there better models for individual agreements internationally, and what evidence is there about their costs and benefits?

328. AMMA has conducted detailed research of its members in relation to their views on the viability of IFAs. In short, industry employers report that IFAs are not very useable in their current form, and that the proposed changes under the FW Amendment Bill 2014 are insufficient to make them useful.
329. In AMMA's view, a workable form of statutory individual agreement should form part of the suite of agreement-making options under the FW Act, alongside more workable and viable IFAs (see Chapter 3.2 on Individual agreements for details).
330. This is one of six principal WR priority areas that AMMA identified as in need of reform in early 2013¹²⁵.

What are individual flexibility arrangements (IFAs)?

331. IFAs were included in Labor policy as an alternative to statutory individual agreements in the context of Labor's plans to remove the scope for making new Australian Workplace Agreements (AWAs) under the national WR system.
332. The Rudd Labor Government's *Forward with Fairness – Policy Implementation Plan*¹²⁶ provided the first insight into what IFAs would look like under the FW Act system:

“Under Labor's new collective enterprise bargaining system, all collective agreements will be required to contain a flexibility clause which provides that an employer and an individual employee can make a flexibility arrangement.

The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure the clause provides for genuinely agreed individual flexibilities.”
333. In 2009, the Rudd Government introduced the mandatory requirement under the FW Act for all enterprise agreements and modern awards to contain a “flexibility term” or “flexibility clause”.
334. Flexibility clauses became mandatory for inclusion in enterprise agreements from 1 July 2009 and in modern awards from 1 January 2010. It is under the terms of those flexibility clauses that IFAs can be made between employers and individual employees. The breadth of flexibility available under those clauses would ideally then

¹²⁵ AMMA's Workplace Reform [Priorities](#) for the Next Federal Government, April 2013

¹²⁶ Released in 2007 while Labor was in Opposition

be as broad as possible to allow for individual negotiations of maximum benefit to both employers and employees.

335. However, in practice this is limited from award to award, industry to industry. Employees cannot enjoy a broad scope to use leave or remuneration flexibility such as to manage the interaction of their working and family lives as this would be conditioned by a union with whom the worker may never have had any contact.
336. In fact, the unionised workforce has never enjoyed less flexibility than they do now.
337. This repeats quite deliberately the former limits of facilitative provisions which constrained the scope for individual agreement and for individuals to determine how their entitlements would be used to meet their circumstances, and did so under the banner of facilitating such flexibility.
338. The two key sections related to flexibility terms and IFAs under the FW Act are:
- a. [Section 144](#) – This section requires a “flexibility term” to be included in a modern award, enabling an employee and his or her employer to agree on an IFA varying the effect of the award in relation to the employee and the employer to meet the genuine needs of the parties. Among other things, flexibility terms in modern awards must result in the employee being better off overall than they would have been if no IFA had been entered into. Most modern awards include the “model” flexibility term which allows IFAs to be entered into in relation to a broad range of matters such as:
 - i. Arrangements about when work is performed (although there has been contention over whether this allows trading off penalty or overtime rates for an earlier start or finish time if this is at employees' request i.e. it has a clear benefit to the employee);
 - ii. Overtime rates;
 - iii. Penalty rates;
 - iv. Allowances; and
 - v. Leave loading (noting again that not all awards allow the full suite of matters on which flexibility can be agreed, notwithstanding the protections for employees in entering into IFAs).
 - b. [Section 203](#) – This section requires a flexibility term to be included in all enterprise agreements negotiated under the FW Act. The difference between an award and an agreement flexibility term is that such a term in an agreement is **negotiated**, often with a union or unions, and has no mandated minimum level of flexibility other than the requirement that some sort of term be included. Unionised agreements invariably have a negotiated flexibility clause while non-unionised agreements typically use the model clause with much broader flexibility options.

- c. As mentioned, it is only under the terms of a flexibility clause that a future IFA can be negotiated between an individual employee and their employer. Consider the flexibility available under an IFA made by reference to the below term, which is included in many enterprise agreements¹²⁷:

"The terms that may be subject to an individual flexibility arrangement are a 15-minute tea break, paid at the rate prevailing at the time, which will be granted two hours after the state of an employee's ordinary hours."

339. While the flexibility able to be negotiated under such a term is laughable, one could also be forgiven for thinking that any flexibility derived would mainly be in favour of the employee and how they wanted to take the tea break, not the employer.
340. The collective agreement route allows a union to deliberately limit the flexibility available under the agreement to an absolute minimum. Consider, for example, a workplace of 90 men and women, many of whom have parental responsibilities and strong unionisation with a traditional blue-collar union. It may well be the case that flexibility is not offered on hours or time off in lieu, which may be opposed by the union and not relevant to many of the men, but which could be of considerable assistance to the women.

Why is this part of Australia's WR system?

341. In the lead-up to the Rudd Government's election in 2007, Labor promised employers that IFAs would be a suitable alternative to statutory individual agreements (AWAs) but without any ability to reduce pay and conditions. It should be noted that AWAs were widely used in the resource industry but undercutting of pay and conditions was not a feature in these agreements which offered high remuneration, well in excess of safety net levels.
342. In 2008, then-Deputy Prime Minister and Workplace Relations Minister, Julia Gillard, promised that¹²⁸:
- "...a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements."*
343. Given that a flexibility term had to be included in all modern awards and enterprise agreements, the expectation was that the Labor government was committed to fostering flexibility in all types of workplace arrangements.
344. The requirement that an IFA entered into by an individual employee and employer under the scope of the flexibility clause leave individual workers "better off overall" was presented as an appropriate protection to ensure employees did not fall below the safety net when entering into such arrangements.

¹²⁷ Coates Hire Operations Pty Ltd t/as Coates Hire [2009]. FWAA 1366

¹²⁸ Second Reading Speech, Workplace Relations Amendment (Transition to Forward with Fairness) Bill, the Hon Julia Gillard MP, February 2008.

345. However, as AMMA pointed out in a 2010 report on IFAs¹²⁹, employers faced considerable legislative and other impediments to achieving genuine flexibility under IFAs. Any resulting flexibilities are generally hard-won and in many cases illusory.

Guiding principles and priorities for employers

346. AMMA and its members are committed to a legislative framework that encourages and allows for direct, co-operative and mutually rewarding relationships between employers and employees that maximise flexibility and benefits to all parties.
347. Under this philosophy, AMMA has contributed to and fully supports the positive steps taken to achieve a more modern and flexible WR system. This includes a commitment to ensuring our WR system contains options for individual determination of terms and conditions (through agreement with the employer) as well as collective determination.
348. The experience of AMMA members in managing Australian resource workplaces across decades of changing market and global conditions, and in transforming Australian workplaces and workplace cultures, underscores the need to have options for individual agreement making and flexible use of terms and conditions at the workplace level.
349. However, despite the originally stated objectives of the Rudd / Gillard government in making flexibility clauses mandatory, there are numerous problems with IFAs from a practical standpoint in terms of their ability to achieve any desired level of flexibility for employers or employees. They are too limited and as a consequence, the take-up of IFAs in the resource industry is extremely low.
350. In an October 2011 survey¹³⁰, AMMA member companies made the following comments in relation to the value of IFAs in achieving genuine flexibility, which remain accurate to this day based on feedback from members:

"They are not flexible."

"They are of little value in their current form. They would need to be substantially modified to provide significant benefit to employers (and probably employees as well)."

"They do not provide or support genuine flexibility."

Interactions with other parts of the system

351. Flexibility clauses and IFAs have interactions with other parts of the FW Act system including:
- Enterprise bargaining** – Enterprise agreements that contain the flexibility clause under which an IFA is later made include negotiated flexibility clauses,

¹²⁹ IFAs under the Fair Work Act – *The great illusion*. A research paper by AMMA. Published in May 2010

¹³⁰ AMMA Workplace Relations Research Project Survey 4 Report, Dr Steven Kates, RMIT University, October 2011

with that negotiation often with unions in the course of collective enterprise bargaining.

- b. **Modern awards** – Flexibility clauses can be subject to application for variation in modern awards, such as in the current four-yearly review of modern awards by peak union or employer bodies.
- c. **Agreement approval** – The FWC is required to satisfy itself that any flexibility clauses negotiated in enterprise agreements are capable of delivering genuine flexibility to employers and employees. However, only a few members of the FWC currently engage proactively with that requirement (discussed later in this chapter).

What the previous system looked like

- 352. Prior to the FW Act taking effect, the resource industry's reliance on statutory individual agreements was well-known. The industry utilised the agreements from the time they were first available in Western Australia in 1993 and federally as AWAs from 1996.
- 353. The advent of individual bargaining in Australia coincided with the resource industry facing commercial and operational imperatives to transform adversarial workplace cultures, and to secure greater productivity and competitiveness. Having access to individual statutory agreements was critical to positioning the Australian industry to secure Australia's part in the "resources boom" which followed.
- 354. The Rudd Government removed the option for employers and employees to enter into new employment relationships underpinned by AWAs in March 2008¹³¹ with the commencement of its move towards the FW system.
- 355. Up until then, it is estimated that 67% of resource industry employers in the federal WR system were operating under AWAs that covered their entire workforce, with that figure closer to 80% in metalliferous mining¹³².
- 356. Compare that with the less than 5% of FW Act employment arrangements in the resource industry that AMMA estimates are subject to IFAs and it becomes obvious that workplace flexibility is suffering and will continue to do so in the years to come unless legislative reform is achieved. Direct and individual dialogue and relationships continue to be fostered with employees, and these efforts persist, but have been robbed of the practical legal foundations which underpinned them.
- 357. Key benefits for employers of statutory individual agreements, on top of the ability to harness innovation and excellence at their enterprises, is that if all employees on a project chose to enter into direct individual employment arrangements with their employer, unions did not have the ability to enter those sites to hold discussions with workers, try to recruit members, or agitate employees and / or management.

¹³¹ Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

¹³² *The case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA, March 2004

358. There was also, given the fact that AWAs were entered into with individuals on a rolling basis, no prospect of mass industrial action at agreement expiry time, another important protection for employers in exchange for highly remunerating their employees in the resource industry.
359. AWAs could also be entered into and agreed prior to the employment relationship commencing, thus providing businesses with certainty with regard to their labour costs and protecting them against having to “double handle” employment conditions. Under a current IFA, because they cannot be a condition of employment, employers must hire someone on one set of working arrangements and immediately or later negotiate another set underpinned by an IFA.

RECENT DEVELOPMENTS

Fair Work Act review panel recommendations

360. In its 2012 report, the FW Act review panel accepted there were problems with IFAs and that they were not delivering what it was claimed they would deliver. The panel made the following recommendations in relation to flexibility clauses and IFAs:
- a. **Recommendation 9** - The panel recommends that the better off overall test in s144(4)(c) and s203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.
 - i. AMMA supports this recommendation in as far as it goes, which was in essence taken up by the current government in the FW Amendment Bill 2014 which is currently before parliament. Given the conjecture there has been over trading off non-monetary benefits for monetary benefits under FW Act arrangements, it would be to the benefit of all to clarify this in legislation.
 - b. **Recommendation 10** - The panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.
 - i. This recommendation was not taken up by the former or current government and is something that AMMA does not support. The recommendation raises concerns that employees would be subject to duress and pressure from unions because they would not want employees to enter into individual arrangements at the expense of the collective should such information be made publicly available.

- c. **Recommendation 11** - The panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s145(3) or s240(3) where an employer had complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.
- i. AMMA supports this recommendation, which was taken up by the current government under the FW Amendment Bill 2014 which has not yet passed through the parliament.
- d. **Recommendation 12** - The panel recommends that s144(4)(d) and s103(6) be amended to require a flexibility term that requires an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.
- i. AMMA supports this recommendation, which was in essence taken up by the Federal Government in the FW Amendment Bill 2014 which is currently before federal parliament. The only difference was that the Bill quantified the extension at "13 weeks" rather than 90 days.
- ii. While this is an improvement and offers greater security for the parties, it falls far short of AMMA's recommended four-year maximum fixed terms for the operation of IFAs, with termination ahead of the fixed term only available by mutual agreement.
- e. **Recommendation 13** - The panel recommends that s144 and s203 be amended to include the prohibition currently under [s341](#)(3) preventing a prospective employer making an offer of employment conditional on entering into an IFA.
- i. That recommendation was not taken up by either the current or former government and is not supported by AMMA although that is our understanding of how it currently operates in any case. AMMA notes that under s341(3) a prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.
- ii. Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering into an IFA.
- iii. AMMA's submission to the FW Act review sought to enable employers to make IFAs a condition of employment given there are ample statutory protections currently in place ensuring employees must be left better off overall after entering into an IFA (i.e. under s.144 and s.203).

Coalition policy / proposed legislation

361. The FW Amendment Bill 2014 which is currently before federal parliament contains some provisions relating to flexibility clauses and IFAs that are on the whole positive for individual agreement-making and flexibility, albeit within an IFA architecture that is flawed and in need of more fundamental re-examination rather than piecemeal amendment:
- a. **Flexibility clauses in enterprise agreements** – The Bill seeks to provide that any flexibility term contained in an enterprise agreement after the legislation takes effect allows flexibility around the model clause's wide range of agreement terms as a minimum, if those terms form part of the enterprise agreement.
 - i. As mentioned, AMMA supports that provision and it progresses FW Act review panel recommendation 9.
 - b. **Requirement for a 'genuine needs' statement** – Under the Bill, whether an IFA is entered into under the terms of a modern award or an enterprise agreement, the IFA must be accompanied by a statement from the employee setting out why the employee believes the arrangement meets their "genuine" needs and results in them being better off overall than they would have been if they had not entered into the IFA.
 - i. The above requirement for a genuine needs statement for an IFA made **under a modern award** would apply in relation to modern awards in operation after the provisions commence, regardless of the fact the modern award may have been made before commencement of the provisions.
 - ii. The requirement for a genuine needs statement for an IFA made **under an enterprise agreement** would apply in relation to an enterprise agreement made after the provisions commence.
 - iii. AMMA is concerned to ensure that this requirement does not add significantly to the regulatory burden for employers or employees when entering into IFAs. We believe the requirement for such statements should be drafted so as not to be too onerous for the parties.
 - iv. AMMA members are extremely concerned about how this requirement will operate in practice. This threatens to create such a level of complexity and administrative burden on businesses that it will dissuade them from using IFAs. It risks discouraging the further take-up of one of the few mechanisms under awards and agreements to access flexibility, e.g. for work-family balance.
 - v. The proposal reflects an excess of caution and a deficiency of trust in the maturity and judgement of users of the system and this translates into unwarranted over-regulation and additional red tape.
 - c. **Non-monetary benefits can be taken into account** – In considering whether an IFA leaves the employee better off overall, the Bill allows for non-monetary benefits to be taken into account (including whether, for instance, the

employee's needs for work and non-work balance leave them better off overall as a result of the IFA).

- i. AMMA supports this provision as it is about recognising that employees, particularly those with family responsibilities, can value and prioritise non-remunerative parts of their work arrangements.
- d. **Contraventions of flexibility terms by employers** – The Bill proposes to provide that an employer does not contravene a flexibility term of a modern award or an enterprise agreement in relation to a particular IFA if the employer reasonably believes that the requirements of the term were complied with at the time of making the IFA.
 - i. AMMA supports that provision which gives effect to FW Act Review Panel recommendation 11.
- e. **Notice periods for terminating IFAs** – The notice period allowing an IFA to be unilaterally terminated by either the employee or employer will be increased under the Bill from the current 28 days to 13 weeks. This is designed to make IFAs more attractive to employers and employees as they can rely on the IFA arrangement being in place for longer. As is currently the case, both parties will be able to terminate an IFA at any time by mutual agreement.
 - i. The above extended period of operation is positive although AMMA would like to see fixed-term IFAs available for up to four years, allowing for termination earlier by mutual consent.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

Problems with the current system

362. In AMMA's April 2012 submission¹³³ to the General Manager of FWA (now the FWC), AMMA pointed out key concerns with IFAs under the FW Act:
- a. The estimated take-up rate of IFAs in the resource industry was less than 5%.
 - b. The scope of enterprise agreement flexibility clauses first had to be negotiated with unions before individual arrangements could be entered into.
 - c. IFAs offer employers no security against protected industrial action being taken while they are in operation, unlike statutory individual agreements.
 - d. Either party can terminate an IFA with 28 days' notice (although there is legislation before parliament seeking to extend that to 13 weeks). This makes such arrangements far too unreliable to be viable in many resource industry workplaces.

¹³³ Submission to the General Manager of Fair Work Australia on the operation of the first three years of individual flexibility arrangements under the Fair Work Act 2009, April 2012

- e. There is no ability for parties to agree on an IFA prior to the employment relationship commencing, in spite of the statutory protections in place that protect employees and prospective employees from being disadvantaged by signing an IFA.
- f. The model flexibility clause, while potentially allowing adequate levels of flexibility, is not the minimum level of flexibility required in enterprise agreement clauses, with negotiated flexibility clauses typically offering far less scope.
- g. Before approving enterprise agreements, the majority of FWC members do not proactively apply the test of ensuring the clause is capable of delivering genuine flexibility to an enterprise and instead pay mere lip service to this requirement.
- h. While the FWC applies the BOOT to agreement flexibility terms on behalf of employees, there is no requirement to ensure that any genuine flexibility is able to be delivered to employers.
- i. The BOOT is applied at a single point in time, i.e. when the IFA is first entered into, rather than on an ongoing basis.
- j. Union scrutiny of IFAs, even after they have been entered into, does go on and puts individual workers under pressure not to make individual arrangements.

Union involvement in negotiating flexibility clauses

*"Their main value is to the employee. There are significant road blocks to negotiating and introducing IFAs in heavily unionised workforces. Unions will only let clauses cover matters related to parental leave or taking annual leave in single days (or similar)."*¹³⁴

- 363. The problem with having to negotiate flexibility clauses with unions during enterprise bargaining is that unions have conflicting views to those of both employers and employees when it comes to facilitating flexibilities.
- 364. Notwithstanding the contrary intention by government, unions have approached flexibility clauses (and subsequently IFAs made under them) as instruments to be collectively negotiated, vetted and deliberately circumscribed. This was an approach unions successfully used to counter the intended effect of facilitative provisions in awards, and they are successfully recycling it to ensure IFAs cannot work as intended.
- 365. In September 2009, the AMWU posted a warning on its website accusing employers of seeking flexibility clauses *"in an attempt to undermine pay and conditions in collective agreements"*. While the union said it supported flexible working arrangements, the extent of that flexibility should first be agreed by a majority of workers and not *"forced on individuals"*, it said¹³⁵.

¹³⁴ AMMA Workplace Relations Research Project Survey 4 Report, October 2011, by Dr Steven Kates from RMIT University

¹³⁵ Flexibility push by employers is about undermining collective agreements, 22 September 2009, AMWU website.

- a. Again, we recall a 90% male, 10% female workplace and ask whether important flexibilities for individuals to manage their personal work / family balance should be required to be subject to a decision of one's workplace peers.
 - b. What interest or veto should the 90% have in what is available to the 10% to manage their working and family lives, particularly where any agreed flexibilities must be subject to the employee meeting statutory tests?
366. AMMA members that have used the model flexibility clauses in their agreements are generally more satisfied with the flexibility offered than those who negotiated a clause with unions.
367. As AMMA members have reported about their experiences in trying to negotiate flexibility clauses with unions¹³⁶:

"This does not work when involving unions. They have conflicting views."

"Unions don't support these – so either they are of no value or the initial intent is diluted."

"Unions only give them lip service."

"With regard to flexibility clauses, union resistance is too high, plus the company is not convinced it is worth the fight (i.e. any flexibilities achieved would be too hard to exercise anyway)."

"We just included the flexibility clause in the agreement as part of the obligations of the FW Act. However, all unions sought to modify the model flexibility clause. And frankly, they are not really worth the paper they are written on as they provide no certainty."

"The AMWU strongly opposes any flexibility in the workplace."

Examples of sub-standard flexibility clauses

368. Following are some notable examples of sub-standard flexibility clauses that have been negotiated by unions under the FW Act. As can be seen, these offer precious little flexibility for either employers or employees.
- a. **An agreement struck between** the construction division of the CFMEU in Victoria and Bam & Associates was approved by FWA in March 2010 and includes a mandatory flexibility term specifying that only one clause in the agreement can be subject to an IFA. That is the 'protective clothing and boots clause' which states:

Consistent with current practice, protective clothing and boots will be issued to each employee on a fair wear and tear basis. Employees are required to wear and maintain the company provided clothing and to

¹³⁶ AMMA Workplace Relations Research Project Survey 4 Report, October 2011, by Dr Steven Kates from RMIT University

present in a tidy manner, so as to display a professional company image.

This type of 'flexibility' clause provides no enterprise-specific flexibility but technically meets the FW Act's approval requirements. To suggest it is a viable alternative to the protections and flexibility afforded to employers under a statutory individual agreement would be nonsense.

In restricting flexibility to such a peripheral and non-core matter, the CFMEU is treating the IFA provisions with deliberate contempt and showing why change is needed.

- b. **The Coates Hire Operations Pty Ltd National Agreement 2009**, an agreement negotiated with the AMWU and CEPU, contains two separate flexibility terms applying in different circumstances.

The first 'flexibility' term applies to all employees covered by the agreement but allows flexibility around just one clause:

The terms that may be subject to an individual flexibility arrangement are a 15-minute tea break, paid at the rate prevailing at the time, which will be granted two hours after the start of an employee's ordinary hours.

The second flexibility term applies only to specific projects but more closely resembles the 'model' flexibility clause.

- c. **In a greenfield agreement** approved by FWA in August 2009, the flexibility clause stated:

The IFA may only vary terms of the agreement relating to flexible working arrangements to assist with an employee's family responsibilities.

- d. **Another agreement approved in October 2009** involving Parmalat Australia Ltd stated the only term an IFA could vary was one that said:

The employer will on an annual basis allow each employee to take up to 10 days' annual leave in single day absences.

The clause also required the employer to provide copies of all IFAs to the union upon request.

- e. **An agreement between Campbell's Soup and the AMWU** was approved in December 2009 following a very public dispute between the parties over the flexibility clauses in particular. Two flexibility clauses eventually made their way into the agreement. The first was an 'individual' flexibility clause, the second a 'majority' flexibility clause.

Under the individual clause, the only terms an IFA could vary were those in the *Food Preservers Award* that was incorporated into the agreement. Flexibility

was confined to the maximum number of single days or parts of a single day's annual leave an employee could take in any calendar year.

The 'majority' flexibility clause offered more flexibility but required majority support from the workforce in order to arrive at any sort of arrangement. Similar to the model clause, this clause allowed terms to be varied including arrangements about when work was performed; overtime rates; penalty rates and allowances. But a majority of employees in each department had to agree to any changes. It also required the AMWU to be fully consulted in developing and considering any modifications, giving the union the right to consult with members over any proposals.

369. As one AMMA member said:

"[IFAs] are good for staff but have to meet the business needs to make them mutually effective."¹³⁷

No active testing by FWC members

370. In addition to the above examples of sub-standard flexibility clauses, there are few examples of FWC members engaging proactively with the requirement to ensure agreement flexibility clauses are capable of offering genuine flexibility to employers and employees.

371. The below decisions are some notable exceptions that do address the issues proactively and ask questions of the parties in relation to the flexibility afforded by the clauses. The decisions also further underscore the token nature of many clauses that find their way into approved collective (usually unionised) agreements.

a. **Paid annual leave and salary sacrifice** – In an October 2013 decision¹³⁸, an FWC member queried how a flexibility clause allowed for agreement terms to be varied to offer flexibility. The clause simply said that flexibility arrangements could be entered into regarding:

- i. Advanced payment of accrued annual leave when requested.
- ii. The amount of salary sacrifice contributions.
- iii. Advanced payment of personal leave.

Questioned further, the parties simply said the flexibility was that employees could request to be paid annual leave in advance rather than in the normal pay run, and could vary salary sacrifice contributions in more frequent intervals than the standard three months.

As the commissioner pointed out, these "flexibilities" were able to be made under the agreement as it stood and did not require a flexibility clause to do so. In other words, the flexibility clause added no extra flexibility other than

¹³⁷ AMMA Workplace Relations Research Project Survey 4 Report, October 2011, by Dr Steven Kates from RMIT University

¹³⁸ National Union of Workers [2013] [FWCA 7921](#). 10 October 2013

what was already available in the agreement. However, given that the parties were in agreement on the clause, it was approved in the agreement.

- b. **Working arrangements** – In an October 2013 decision¹³⁹, an FWC member queried the benefit to the employee and the employer of a flexibility clause that simply enabled an employee who was a parent or had responsibility for a child; or who was receiving treatment for illness or injury to request a flexible working arrangement in writing.

The specific clause of the agreement that was referred to in the flexibility clause already allowed such arrangements to be entered into by consent between the parties. It was therefore not a flexibility term as required under the Act and would be substituted with the model clause, the commissioner said.

- c. **Family leave** – In a September 2013 decision¹⁴⁰, an FWC member queried the benefit to the employee and the employer of a flexibility clause referring to part of the agreement concerned with family leave. The NUW said the clause allowed the parties to agree to extend arrangements for unpaid family leave to greater than two weeks or to a long-term rearrangement of hours.

The commissioner pointed out that was already possible as the agreement did not prevent those arrangements being entered into. The NUW said just because there were other ways of overriding the agreement did not mean the flexibility clause was not valid. The clause was approved in the agreement.

- d. **First aid allowance** – In a September 2013 decision¹⁴¹, an FWC member queried the benefit to the employee and the employer of a flexibility clause that allowed flexibility only around how the employees were paid a first aid allowance – i.e. it could be paid in different ways such as via an all-purpose allowance or paid monthly, etc.

Again, the commissioner queried how that clause enabled the agreement to be varied in a way that gave extra flexibility to the employer and employee. The parties simply said it had been approved by other commissioners in other agreements and was a standard flexibility term. The commissioner accepted the views of the parties and included the term in the agreement.

372. As the above cases amply demonstrate, flexibility clauses finding their way into many agreements are worth little to either party, but usually the sole benefit is to the employee.
373. AMMA has commissioned KPMG to provide a separate economic analysis of some of the recommendations AMMA has made throughout this submission in the area of agreement making, including in relation to individual agreements. Please see the separate KPMG [analysis](#) for further details.

¹³⁹ Steggles Poultry Processing Pty Ltd [2013] [FWCA 7921](#), 29 October 2013

¹⁴⁰ National Union of Workers [2013] [FWCA 7423](#), 25 September 2013

¹⁴¹ H.A.G Import Corporation (Australia) Pty Ltd [2013] [FWCA 7424](#), 25 September 2013

RECOMMENDATIONS

374. AMMA makes the following recommendations to improve the operation and usefulness of IFAs for both employers and employees, and to minimise the involvement of third parties in what are essentially individual arrangements.

Recommendation 3.3.1

IFAs should be able to operate for fixed terms of up to four years but be terminated earlier by mutual consent. In the meantime, however, the 13-week notice period included in the FW Amendment Bill 2014 should apply, increasing the notice period from the current 28 days.

Recommendation 3.3.2

Parties to an IFA should be able to agree that, in return for the benefits received by the employee under the IFA, no industrial action will be taken during its life.

Recommendation 3.3.3

Parties should be allowed to agree on an IFA prior to employment commencing given the statutory protections in place for employees and prospective employees requiring that employees must be better off as a result of signing an IFA.

Recommendation 3.3.4

As an added protection for employees, the better off overall test should be ongoing and either party should be able to invite the FW Ombudsman to make an assessment at any time during the IFA's operation.

Recommendation 3.3.5

The legislation should be amended to explicitly require employers to be left better off overall as a result of entering into an IFA.

Recommendation 3.3.6

Before the FWC approves an enterprise agreement, all parties to the agreement should be required as a matter of course to clearly demonstrate that the terms of the flexibility clause are capable of delivering genuine flexibility benefits under a subsequent IFA and do not restrict the flexibilities available for either party.

Recommendation 3.3.7

The FWC's "model" flexibility clause should be the minimum level of flexibility mandated under enterprise agreements and awards, with parties able to agree on additional flexibility by consent. This is included in the FW Amendment Bill 2014 in relation to enterprise agreements.

Recommendation 3.3.8

Union scrutiny of IFAs after they have been entered into should be expressly prohibited as an enterprise agreement clause given this is an invasion of privacy and contrary to the intention of individual arrangements.

Recommendation 3.3.9

The proposed requirement under the FW Amendment Bill 2014 that an employee entering into an IFA must provide a written statement should be removed. If this requirement is retained it should only have to be completed where a monetary benefit has been traded off for a non-monetary benefit. Alternatively, the genuine needs statement should be a simple pro forma rather than a written document.

Recommendation 3.3.10

Consideration could be given to a high-income threshold for IFAs which could also attract faster approval and more flexible provisions than for lower-paid employees.

3.4. GREENFIELDS AGREEMENTS

*"More than ever the range of issues on the table is immense. The unions are not commercially-minded which results in poor commercial outcomes for the enterprise and Australia."*¹⁴²

*"The union greenfield agreement provisions are a disaster for major projects."*¹⁴³

- It is essential that there be practical, reliable, timely and balanced processes to set WR arrangements prior to new projects commencing, particularly in the resources sector.
- Existing greenfields requirements are dysfunctional and are jeopardising job-creating national interest projects.
- Employers are willing to make greenfields (new project) agreements with unions. However, unions should not have a veto on greenfields agreements. There must be alternative avenues where agreement cannot be reached with a union.

INTRODUCTION

375. "Greenfield" is a concept used for a brand new enterprise that do not have any constraints imposed by prior work, i.e. greenfields projects are meant to be entirely new businesses, projects, activities or undertakings for an employer or a group of employers. The term is often used in the construction and resource industries to refer to new structures where none have been before. Critically for the WR use of the term, a greenfields operation is one that has not yet engaged employees and for which no WR agreement is in place.
376. A greenfields agreement is a unique type of industrial agreement negotiated before an enterprise starts and at a point where no employees have yet been engaged.
377. Greenfields agreements are regulated separately in Australia's WR system and are a different species to all other forms of agreements made with employees. A greenfields agreement is effectively a pre-requisite or precondition to the creation of new resources workplaces and for the jobs and economic benefits they deliver.

Workable greenfields agreements must be part of Australia's WR system

378. It is absolutely essential for jobs and our economy that there be practical, accessible and reliable scope to make a greenfields agreement for new projects, particularly in the resources sector:
- a. Whilst in theory, employers are able to start from scratch with their WR arrangements on the safety net only (awards and the NES), and indeed that is what happens in small business and retail, this is not in any way possible for

¹⁴² Respondent to AMMA WR Research Project Survey 6, October 2012

¹⁴³ AMMA member company responding to Survey 3 in the AMMA WR Research Project in April 2011

heavy employment in major workplaces, or for the creation/construction of new workplaces and operations in sectors such as resources.

- b. For the purposes of the FW Act and the WR system there needs¹⁴⁴ to be an “agreement” in place for work and workplaces of the magnitude of resources operations.
- c. There are, however, no employees to negotiate with or to approve the agreement. Greenfields agreements are an exception to the rule that enterprise agreements must be approved by the employees who will be covered by them. It is for that reason that greenfields agreements are limited to particular circumstances¹⁴⁵, which under the FW Act is to “genuine new enterprises” ([s.172](#)).
- d. Employers need reliable WR arrangements in place prior to work commencing on greenfields sites:
 - i. Given the importance of ensuring certainty of labour costs and continuity of work on new resource construction projects, investors and clients will typically not award work unless a contractor has a settled WR agreement in place. It is important to note, however, that it is not the client or investor but the direct employer that negotiates the agreement.
 - ii. A key function of having a greenfields agreement in place is to ensure settled WR arrangements are in place before work begins in order to protect an enterprise from industrial action. If an enterprise agreement is not in place when employees start work, they can almost immediately apply to take protected industrial action in support of a new agreement.
 - iii. In addition to protection from industrial action, an agreement gives investors, clients and employers some certainty as to labour costs for particular parts of a project (i.e. wages, entitlements, rosters, shift allowances, etc.).

379. The risks of starting work without an agreement in place have been consistently highlighted by resource industry employers in calling for greenfields arrangements which work and can be relied upon¹⁴⁶:

“Given increasing union militancy, commencing or even pricing a project without having fixed labour rates via a binding agreement would be extremely risky.”

“Our clients would not support work without an enterprise agreement or steps to implement one in place.”

¹⁴⁴ With some exceptions, identified below.

¹⁴⁵ Fair Work Legislation – 2014 – Current to 1 August 2014, published by Thomson Reuters

¹⁴⁶ Respondents to AMMA WR Research Project Survey 6, October 2012

"A new project is at significant risk without greenfields agreements for all contractors and subbies. The risk is significant enough to stall or kill off projects."

"This is possibly a show-stopper for all major projects. IR disruption is a significant risk and investors would be unlikely to provide capital on this basis."

"To make a greenfield agreement, you must reach agreement with union officials as there is no workforce to engage." ¹⁴⁷

What the system must deliver

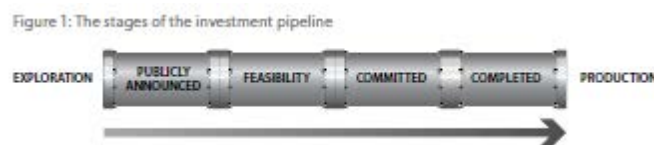
380. A modern WR system must provide a range of agreement-making options that allow the unique needs of employers and employees to be met. A range of collective and individual agreement options must be part of such a system and, where unions are involved in collective agreement-making, their involvement should not be mandatory. Providing alternatives to the current greenfields agreement-making rules is the only way to encourage unions to moderate their demands.
381. One of AMMA's principal contentions in this review is that our WR system has evolved in an *ad hoc* way without sufficient regard to guiding principles and an integrated approach to regulatory purpose and effectiveness.
382. This is particularly true in relation to greenfields agreements, which under the current system are not "new" agreements at all but are tainted with outmoded existing provisions with little regard for current industry and labour market conditions.
383. In future, rules for new project agreements in this country need to:
- a. **Encourage** unions to enter agreements that advance employee interests (not union interests) and deliver employment certainty.
 - b. **Provide** an ability for employers to truly negotiate with unions, not just capitulate to extortionate demands that do not represent the views of the workforce.
 - c. **Ensure** there are no unnecessary project delays.
 - d. **Provide** an alternative in the event that unions simply refuse to negotiate or finalise a greenfields agreement.
 - e. **Ensure** negotiations do not become protracted due to the insistence on clauses that have nothing to do with the direct employment relationship and actually make it harder for the employer to do business.
 - f. **Prevent** third parties from unduly impacting the commercial decisions of Australian enterprises.
 - g. **Rectify** the current problems with the FW Act.

¹⁴⁷ Respondent to AMMA WR Research Project Survey 3, April 2011

384. The importance of a more viable and appropriate greenfields agreement-making system is underscored by recent trends towards project cancellations and delays. Australia must do all it can to maintain a pipeline of major resource projects that contributes jobs and growth to our economy.

Investment and jobs at risk

385. Negotiations for “greenfields” (new project) agreements take place at a critical point in the investment cycle and are critical to seeing feasible or possible projects translate into commitments and actual hiring and construction.
386. The investment pipeline for minerals and energy projects typically works as shown in the diagram below.



387. Projects generally start at the “exploration” stage then move to the “publicly announced” stage, then the “feasibility” stage and, finally, to the “committed” stage. Once a project has substantially finished its construction and commissioning activities, it moves to the “completed” stage, after which production of the gas or oil or iron ore, etc. begins. It typically takes years for a project to work its way through all stages until completion, with no guarantees along the way.
388. The feasibility stage is an important point at which many projects stall. There are currently \$150 billion worth of projects at the feasibility stage, many of which will not go forward¹⁴⁸. In the past decade, it has certainly been the case that not all projects at the feasibility stage have progressed to the committed stage.
389. The following are feasibility stage projects that were delayed or cancelled in the 12 months leading up to April 2013, worth a total of \$150 billion to our economy¹⁴⁹:

Feasibility stage projects delayed or cancelled in the 12 months to April 2013

Project	Company	Value
Browse LNG	Woodside	\$36 billion
Outer Harbour	BHP Billiton	\$30 billion
Olympic Dam Expansion	BHP Billiton	\$20 billion
Sunrise LNG	Woodside	\$12 billion
Abbot Point T4-9	NQBP and partners	\$11 billion
West Pilbara Iron Ore	Aquila Resources	\$7.4 billion
Wandoan Coal Mine	Xstrata	\$6 billion
Kooragang Island Coal Terminal 4	PWCS	\$5 billion

¹⁴⁸ Resources and Energy Major [Projects](#) – October 2014, published by the Bureau of Resources and Energy Economics, accessed 23 February 2015.

¹⁴⁹ Resources and Energy Major Projects – April 2013, published by the Bureau of Resources and Energy Economics.

Project	Company	Value
Anketell Point Port	Fortescue / Aquila	\$4 billion
Cape Lambert Magnetite Project	MCC Mining	\$3.7 billion
Southdown Magnetite Project	Grange Resources	\$2.9 billion
Yarwun Coal Terminal	Metro Coal	\$2.2 billion
Mount Pleasant Coal Mine	Rio Tinto	\$2 billion
Weld Range Iron Ore Project	Sinosteel Midwest	\$2 billion
Balaclava Island Coal Terminal	Xstrata	\$1.5 billion
Fisherman's Landing LNG	LNG Limited	\$1.1 billion
Surat Basin Rail	Aurizon / Xstrata	\$1 billion
Wilkie Creek Coal Mine	Peabody Energy	\$1 billion
Total		\$149 billion

Source: Resources and Energy Major Projects – April 2013, published by BREE

390. In the six months to October 2014¹⁵⁰, the progress of many projects at the feasibility stage was negatively affected by low commodity prices. However, it is not just commodity prices but also the costs of construction, labour and productivity offsets that play a role in determining how much resource sector investment is realised.
391. At the end of October 2014, there were 138 projects at the feasibility stage, with a combined value of \$146.7 billion. That number of projects had dropped by eight since April 2014 and the total value had dropped by \$22.2 billion.
392. It is important to note that no projects listed at the feasibility stage in April 2014 had progressed to the committed stage by October 2014, with 17 projects removed from the major projects list altogether during that time because they were no longer being developed.
393. The following are some of the major projects that remain at the feasibility stage¹⁵¹:
- The \$16 billion **Carmichael Coal Project (mine and rail)**, expected to create 2,475 jobs in the construction phase and 3,920 in the operational phase when it starts up in 2017.
 - The \$14 billion **Scarborough Gas FLNG Project**, expected to create 2,400 jobs in the construction phase and 125 in the operational phase.
 - The \$12 billion **Gorgon (Train 4) Project**, expected to start up around 2019.
 - The \$8.8 billion **China First Coal Project (Galilee Coal Project)**, expected to create 3,500 jobs in the construction phase and 2,325 jobs in the operational phase when it starts up in 2018 or beyond.
 - The \$8.2 billion **Alpha Coal Project (Tad's Corner)** in Queensland, which has received conditional government approval. The project is expected to create

¹⁵⁰ Resources and Energy Major [Projects](#) – October 2014, published by the Bureau of Resources and Energy Economics, accessed 23 February 2015.

¹⁵¹ Resources and Energy Major [Projects](#) – October 2014, published by the Bureau of Resources and Energy Economics, accessed 23 February 2015.

4,000 jobs in the construction phase and 1,800 in the operational phase when it starts up in 2017.

- f. The \$3.98 billion **Centre Eyre Iron Project**, expected to create 1,950 jobs in the construction phase and 700 in the operational phase when it starts up in 2018.
- g. The \$3.3 billion **Balmoral South Magnetite Project (Stage 1)**, expected to start up in 2017.
- h. The \$2.9 billion **Extension Hill Magnetite Project**, expected to create 2,000 jobs in the construction phase and 500 in the operational phase when it starts up in 2015.

394. Successfully commissioning these and other major projects relies on stable, reliable WR arrangements being in place prior to project commencement, along with confidence that projects can proceed free of industrial claims, disputation and uncertainty. The imperative to reform the current greenfields agreement-making rules has now become acute.

What this review can deliver

395. AMMA welcomes the PC's terms of reference in relation to greenfields (new project) agreements¹⁵². AMMA notes the PC is seeking views about the best arrangements for greenfields agreements (not limited to those in the FW Amendment Bill 2014 that is currently before parliament).

396. The PC has also asked for an assessment of the effects of any arrangement on the viability and efficiency of major projects and on maintaining an appropriate level of bargaining power for employee representatives.

397. In addition to the specific terms of reference for this inquiry, the *Productivity Commission Act 1998* sets out general policy guidelines to which the PC must have regard in performing its functions, including in conducting this review¹⁵³. The most relevant PC guidelines to greenfields agreement-making include consideration of:

- a. **Improving** the overall economic performance of the economy through higher productivity in the public and private sectors in order to achieve higher living standards for all members of the Australian community.
- b. **Encouraging** the development and growth of Australian industries that are efficient in their use of resources as well as enterprising, innovative and internationally competitive.
- c. **Reducing** regulation of industry where this is consistent with the social and economic goals of the Commonwealth government.

398. To be absolutely clear:

¹⁵² *Workplace Relations Framework – The Bargaining Framework*, Productivity Commission Issues Paper 3, p2, January 2015

¹⁵³ *Productivity Commission Act 1998* – [s.8](#)

- a. The existing rules for greenfields agreement-making are flawed and impractical and are failing to support employment, investment and job creation.
- b. Reform is urgently needed, as recommended in this chapter.
- c. The resources sector is uniquely placed to assist the PC in this area as the principal user of the greenfields provisions of the FW Act and preceding legislation.

Snapshot of resource industry recommendations

- 399. AMMA's proposed reforms in this area are outlined at the end of this chapter.
- 400. At the heart of these recommendations is offering expanded choices / options for entering into greenfields agreements.
- 401. Instead of the status quo (the only option being union greenfields agreements), there should be four streams or options for greenfields agreement-making:
 - a. **Stream 1:** Union-negotiated greenfields agreements:
Including 'project proponent' agreements and 'major project' agreements.
 - b. **Stream 2:** FWC determined greenfields agreements.
 - c. **Stream 3:** Employer greenfields agreements.

COMPARISONS WITH PREVIOUS SYSTEMS

- 402. The FW Act on 1 July 2009 mandated union involvement in greenfields bargaining ([s.187](#)) in a way the previous system did not.
- 403. The 2006 iteration of the WR Act provided employers with an option of putting a greenfields agreement in place that did not require negotiating with unions ([s.330](#)). The trade-off in allowing employers to make a greenfields agreement without union involvement was that those agreements had a limited duration of 12 months instead of five years for union-negotiated greenfields agreements at that time ([s.329](#)). Thus, the "employer greenfields agreement" should be viewed as a default or transitional agreement where it was applied, and equally importantly an incentive and signal to unions that they should moderate their claims.
- 404. Greenfields agreements under the FW Act have a maximum life of four years compared with five under the previous system. That shorter span for greenfields agreements has unnecessarily increased transaction costs for businesses given they have to engage in bargaining rounds with unions and are exposed to protected industrial action more frequently than before.

405. In a high-paying industry like the resource industry, there is little justification for the threat of industrial action or the ratcheting up of costs that occurs in each greenfields bargaining round under the current system.

THE CURRENT RULES ARE NOT WORKING

406. The FW Act sets the rules for entering into the greenfields agreements that are essential in practice for commencing the vast majority of new projects in Australia, as did the preceding legislation under the Coalition. Some key points should be noted:
- a. Labor's FW Act in 2009 considerably changed the rules for entering into greenfields agreements.
 - b. The current arrangements for entering into greenfields agreements are flawed and dysfunctional and urgently require remediation, a point acknowledged by Labor, the Coalition, academics and union leaders.
407. Soon after the FW Act took effect, AMMA embarked on a research partnership with RMIT University to undertake and publish the AMMA Workplace Relations Research Project. The aim of the research was to identify any problems resource industry employers were having with the operation of the FW Act and build the business case for reform, given that:
- a. Employers pointed out fundamental problems during the drafting and passage of the FW Act.
 - b. These were largely ignored.
 - c. It was important to monitor whether the concerns predicted by employers came to pass, and document this as a basis to return to a more effective, balanced and appropriate legal framework.
408. The project spanned from April 2010 to October 2012 and was comprised of six comprehensive surveys of employers from all quarters of the resource industry, conducted and reported by RMIT University twice a year for three years. The rationale for a "longitudinal" study of this kind was to see if any initial problems with the FW Act disappeared over time as businesses got used to dealing with the new provisions.
409. That did not happen. If anything, the problems for employers became worse as time went by, including experiencing significant problems with the greenfields provisions as more employers started to negotiate under the changed bargaining landscape. Critically, these workplace changes coincided with peak demand for Australian resources.
410. Following are key problems the research identified with the greenfields agreement making under the FW Act, with a more recent AMMA member survey on greenfields agreements in October 2014 confirming these problems still exist.

Mandatory negotiation with unions / union veto rights

411. Under the current rules, because no workers have been employed, the parties that negotiate a greenfields agreement are the employer (or employers) and one or more relevant trade unions¹⁵⁴.
412. The key requirements under [s.187](#) of the FW Act are that employers must make a greenfields agreement with a union or unions that are entitled to represent the industrial interests of the "majority" of employees to be covered by the agreement. That section also requires greenfields agreements to be "in the public interest" before the FWC approves them, although most FWC members do not appear to engage proactively with that requirement. Previously, there was scope to enter into a specialised and limited form of greenfields agreement without the involvement of a trade union.
413. Union involvement in greenfields negotiations became mandatory under the FW Act from 1 July 2009. There is no other choice for businesses wanting to put a greenfields agreement in place than to agree with a union on both terms and conditions for employees, and additional matters insisted on by trade unions.
414. Unions know they have been granted a monopoly or veto right over greenfields agreements. They know how essential they are to doing business, and they exploit that situation.
415. This mandated union involvement in greenfields agreement making has led to:
- a. Delays in finalising agreements.
 - b. The WR arrangements of older projects, settled in very different economic and market conditions, being imposed on newer projects.
 - c. Exorbitant pay and condition outcomes given that unions control when bargaining will occur and what matters it will be over.
416. The union monopoly over greenfields bargaining reduces the benefit to business of having settled WR arrangements in place through a greenfields agreement for the first four years of a project¹⁵⁵:
- "The benefits of a greenfields agreement as an immediate short-term solution to getting an agreement in place do not exist under this legislation. The requirement to deal with unions and on project terms makes it difficult in terms of time and cost."*
- "There is limited ability to negotiate outside the project template framework, reducing the incentive or need for a greenfield start-up agreement. In our experience, it was better to lock in the certainty of an outcome on our terms than be exposed to the risk of delays and cost increases."*
417. It can often take one to two years to negotiate a greenfields agreement that will only run for four years.

¹⁵⁴ Fair Work Ombudsman [Fact Sheet](#) on Enterprise Bargaining, accessed on 20 February 2015.

¹⁵⁵ Respondents to AMMA member survey on greenfields agreements – October 2014

418. This is a fundamental flaw in the current rules and is unacceptable. Unions have been dealt into the game by the FW Act as the only partner for greenfields agreement-making but in many cases simply do not deliver outcomes on an acceptable or realistic timetable, or threaten not to do so. There is absolutely no incentive in the system for unions to complete this process, to adopt any urgency, or to share some ownership and responsibility with employers to ensure greenfields arrangements are put in place.
419. Many employers have little choice but to agree to often vastly inflated pay and condition outcomes given the relative cost to their business and the project as a whole of any work delays or suspensions due to not getting an agreement in place quickly or at all.
420. One AMMA member company in metalliferous mining estimated that if operations were disrupted on one major greenfields project alone it would cost up to \$10 million a day, \$70 million a week, or \$3.6 billion a year. These are the choices businesses are forced to weigh up under the current system, and it is readily apparent why patently inflated union demands are agreed to. Unions have the whip hand in greenfields agreement making under the FW Act. They know it and employers know it.
421. It is not lost on unions that they have the upper hand in bargaining along with the power of veto over every greenfields agreement in Australia, including those operating offshore:
- "We felt like the union was holding the project to ransom. There is a huge power imbalance."*¹⁵⁶
- "Greenfield agreements are not 'negotiated'. It is a take it or leave it scenario. Therefore, if you agree to the terms, the process is relatively quick. Depending on the availability of the parties, it could be a matter of weeks."*¹⁵⁷
422. Employers also typically face financial penalties for delayed completion of works under commercial contracts, as well as the costs of having equipment laying idle if a project has mobilised but employees are not working:
- "Our business is primarily a skilled labour hire business, however, charging often fixed prices for an outcome rather than an hourly rate. Cost of labour is critical to the viability of the business and when a fixed price project is on-hand with a fixed delivery date the business has little choice but to agree to union demands, however outrageous, to avoid liquidated and other damages for non-completion."*¹⁵⁸
423. Some projects do go ahead without greenfields agreements in place depending on whether investors consider the risk of not having an agreement in place to be less than the uncommercial outcomes they will be forced to concede to under a union-mandated agreement. This is however not a widespread or generally reliable course

¹⁵⁶ Respondent to AMMA WR Research Project Survey 4, October 2011

¹⁵⁷ Respondent to AMMA WR Research Project Survey 5, April 2012

¹⁵⁸ Respondent to AMMA WR Research Project Survey 6, October 2012

of action; the current system for greenfields agreement making under the FW Act is broken and is in need of repair.

Duration, renegotiation and industrial action

424. Under the FW Act, greenfields agreements can run for a maximum of four years, down from the previous system under which they could run for up to five. This occurred as globally there is a trend to even larger resource developments, particularly in hydrocarbons. Thus, at a time where developments became larger and needed more time to construct, Australia shortened the period for which greenfields construction agreements could be put in place. This creates an inherent inbuilt problem for a growing proportion of projects.
425. In practice, as outlined below, the rules for greenfields agreement-making under the FW Act have seen new enterprises increasingly constrained by the WR arrangements of existing and previous enterprises. Even recent legislative proposals seek to impose the conditions of other greenfields agreements directly onto new ones in particular circumstances.
426. The maximum four-year duration under the FW Act means industrial action cannot be taken as soon as work begins on major projects if there is an agreement in place.
427. However, with the construction phase of major projects typically lasting up to six years, current greenfields rules regularly see industrial action or the threat of industrial action while project construction is still under way, as negotiations need to commence for some form of replacement agreement when the initial greenfields agreement expires. Many agreements expire before construction is complete.
428. Industrial action mid-construction can be just as damaging if not more so given a greater number of employees will be onsite with the potential to disrupt a wider array of works (i.e. inflict more economic harm and reputational damage). Such industrial action during final or mature phases of project construction also worries investors and parent organisations, with markets closely monitoring major project completion. Unions know this, and gain a second whip hand. After their super status in the initial greenfields negotiations, they have employers at a distinct disadvantage when the agreement is first renegotiated as a brownfields agreement.

Unions have a monopoly

429. As one AMMA member reported, there is an intense period of time during greenfields negotiations when unions “play with you”, after which employers are under increasing market, financial and logistical pressure to get an agreement done. This works, in effect, like compulsory arbitration virtually 100% in favour of unions’ logs of claims in terms of the end result. As one AMMA member described it:

"Extortionate claims in greenfield construction project negotiations [were made along with] the use of 'blackmail' to drive other agenda issues affecting maintenance contractors and the in-house workforce." ¹⁵⁹

430. This power is well understood by unions and it sees their agenda and concerns dominate what ends up in many greenfields agreements, which includes restrictions on contractors and labour hire (for example) which do nothing to increase, and in fact often harm, the competitiveness of the operation, its productivity, etc.
431. Unions also recognise that what they can lock in during the greenfields phase, when they have the upper hand, they can insist remain in agreements covering the operation as it matures.
432. There must be an alternative to mandated union involvement in greenfields negotiations under any balanced system.

Existing agreements become the new benchmark

433. Existing greenfields construction agreements have become the new industry standard, insisted on by unions artificially supercharged in their determination of greenfields agreements. This has led to "leapfrogging" of terms and conditions from agreement to agreement, sub-sector to sub-sector, with no regard to changing global markets, circumstances or pressures on the economics of new projects.
434. Two AMMA members with greenfields agreements currently in place on a major project told AMMA that when the next metalliferous mining greenfields project comes online, unions will take the last greenfields project agreement as the base and this snowballing will continue from one agreement to the next until either "the economy crashes" or someone intervenes to change the dynamics.
435. In practice, whichever greenfields agreement has been negotiated last in terms of expiry becomes the yardstick for future agreements. So the last agreement from the last project becomes the base, and the escalations go up from there, never down.
436. This practice of taking other agreements as the new base has particularly serious operational consequences given the current union push towards new resource construction rosters. Construction unions are now seeking to move the industry from the commonly used "four and one" roster, which for many projects is the only feasible option, to different rosters that will not suit most enterprises.
437. As one AMMA member observed:

"The CFMEU, AMWU and CEPU have refused to negotiate unless the industry reduces the construction roster from four (weeks) on, one off to three on, one off." ¹⁶⁰

438. An employer can do nothing to stop this as in the latter example the CFMEU, AMWU and CEPU are the only avenue to securing a greenfields agreement under the FW

¹⁵⁹ Respondent to AMMA WR Research Project Survey 2, October 2010

¹⁶⁰ Respondent to AMMA WR Research Project Survey 6, October 2012

Act. There is no safety valve, no independent umpire, no alternative process that can be used or that can place pressure on unions to settle greenfields agreements.

439. Using existing agreements as the benchmark for future agreements also neglects to take into account the circumstances of the enterprise and the economy at the time the existing agreements were made, leading instead to the wholesale ratcheting up of pay rates on projects with no regard to how our economy or markets are changing. To illustrate the impacts of this we need to do no more than recall the very different operating environment for the Australian resources industry in 2015 compared with 2010/11.
440. Australia's WR system must be better calibrated to deal with changing economic cycles, i.e. the system must be able to work in good times and in bad. It must also be able to harness innovation and creativity from the workforce and its changing needs and experiences, fostered and assisted, not hindered, by workplace agreements.
441. Under the current system, with mandated union involvement, every contractor that comes onto a new project must adopt the same pay rates as existing contractors. Unions simply will not agree to some contractors paying more and some less.
442. And it is not just hourly wages but also allowances that are ratcheted up in this way, often with no practical justification.
443. In WA, a "hard-lying" allowance of \$100 a day was negotiated on one project in the event that employees were required to share a room or bathroom due to a shortage of accommodation at the time. As it turned out, no-one on the project had to deal with that eventuality, but unions insisted employees receive the payment anyway. Those conditions then expanded to the base business and were used as benchmarks for other projects.
444. As one AMMA member put it:

*"The union greenfield agreement provisions are a disaster for major projects."*¹⁶¹

Unions can and do refuse to negotiate

445. Unions can and do refuse to negotiate greenfields agreements at all with some businesses, depriving them of the commercial opportunity to tender for work on major projects. This refusal could be based on industrial vendettas of the past against a particular company but often has nothing to do with the targeted business at all.
446. AMMA members have reported unions withholding greenfields agreements from sub-contractors to make life more difficult for the head contractor on a project. Such tactics are used to put pressure on employers to achieve a variety of outcomes¹⁶²:

¹⁶¹ AMMA member company responding to Survey 3 in the AMMA WR Research Project in April 2011

¹⁶² Respondent to AMMA WR Research Project Survey 6, October 2012

"The bottom line is that if a union doesn't want to do a deal then they don't have to. This can place projects at significant risk."

"[It was] difficult getting a greenfields agreement in place to commence new construction work [with] the ability of unions to simply say 'no'."

"Unions were bold enough in two instances to make it clear in meetings that they would block our agreement to give an advantage to another contractor who would accede to their demands for a closed shop, nominated labour, union-appointed supervisors and safety reps."

447. This is a significant and artificial bar to competition in Australia, and if such conduct was undertaken by other actors in our system, the ACCC would take action. Issues Paper 5, and Chapter 9 of this submission, address the role of the ACCC, and whilst the resource industry does not support expanding that role, clearly some alternative to unions having veto powers on negotiation is required.

Good faith bargaining obligations do not apply

448. Under the current FW Act rules for greenfields agreements, if unions simply refuse to bargain, or refuse to do so in a timely way, employers have no recourse and no alternative.
449. The good faith bargaining obligations applying to other forms of collective agreement-making under the FW Act require parties to:
- a. Attend and participate in meetings at reasonable times (s.228(1)(a)).
 - b. Disclose relevant information (other than commercially sensitive information) in a timely manner (s.228(1)(b)).
 - c. Respond to proposals made by other bargaining representatives in a timely manner (s.228(1)(c)).
 - d. Give genuine consideration to the proposals of other bargaining representatives (s.228(1)(d)).
 - e. Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining (s.228(1)(e)).
450. None of the above requirements applies in a greenfields setting which is a problem that could easily be addressed. AMMA notes the current government's FW Amendment Bill 2014, which is currently before parliament, would apply good faith bargaining obligations to greenfields agreements, which AMMA supports in order to fix some of the problems resource industry employers are currently experiencing.

Unions can and do cause delays

451. Union conduct during greenfields negotiations has caused project delays, with one in five AMMA members reporting delays arising from union conduct in greenfields negotiations.
452. This was revealed in 2012 in AMMA's research with RMIT University and was widely reported in the media¹⁶³ followed by widespread calls for unions to moderate their behaviour.

Union action stalls one in five mining projects

EXCLUSIVE

ANNABEL HEPWORTH
NICOLAS PERPITCH

ONE in five new resources projects are stalling because unions are refusing to strike workplace agreements, putting pressure on companies to accept exorbitant wage claims or risk damaging investor confidence in the \$500 billion pipeline of potential projects.

Research to be released today by the Australian Mines and Metals Association, and obtained by *The Australian*, has found a significant deterioration in the nation's workplace relations climate, with an almost fivefold increase in the number of mining employers who consider that the industrial environment is unacceptable.

The survey found that it is taking longer to strike so-called greenfield agreements — which outline working conditions on new projects before workers are hired — than other workplace deals in 40 per cent of cases.

It coincides with the three-year anniversary of the July 2009 start of the Fair Work Act and has sparked warnings that a new wave of damaging strike action could hit the mining industry as potentially thousands of agreements expire in the next 12 to 18 months. That is because almost 40 per cent of resource-sector employers surveyed were yet to renegotiate new agreements under Labor's laws.

The findings will add to pressure on Workplace Relations Minister Bill Shorten to change the rules relating to so-called greenfield agreements, and to

Continued on Page 4

453. The following experiences of AMMA members show the breadth of problems arising from protracted greenfields negotiations following the FW changes in 2009:

*"Greater timeframes are required for greenfield agreement making; it is taking longer to finalise these types of agreements."*¹⁶⁴

*"A construction project in the Bass Strait was significantly delayed, resulting in Federal Court action against the relevant union by our client, for costs of delays."*¹⁶⁵

"Clients are generally not willing to award a project until they know the EBA is in place. As a result, we have suffered significant delay in being formally

¹⁶³ "Union action stalls one in five mining projects", Annabel Hepworth, Nicolas Perpitch, published in *The Australian* on 2 July 2012

¹⁶⁴ Respondent to AMMA WR Research Project Survey 2, October 2010

¹⁶⁵ Respondent to AMMA WR Research Project Survey 6, October 2012

awarded projects, and these delays have impacted on project commencement from our perspective and negatively impacted delivery.”¹⁶⁶

“Refusal to negotiate by some unions has caused the project some delays and significant commercial risk concerns.”¹⁶⁷

454. One AMMA member said while it was difficult to quantify the cost of delays experienced on one project arising from greenfields negotiations with a union, “it would be significant – probably measured in millions of dollars”¹⁶⁸.
455. An AMMA member based in WA was left at the mercy of unions' internal sign-off and approval processes in one recent round of negotiations:
- A greenfields agreement with national coverage was negotiated between the employer and the WA branch of the union.
 - After three months of negotiations, the employer and the WA branch of the union settled the terms of the agreement.
 - However, it took a further six months to get national sign-off because the other state branches had issues with the content.
456. This internal red tape and union politics further underscores the need for negotiation deadlines in the greenfields realm should employers wish to start the clock ticking, along with the need for alternatives to mandated union involvement.
457. Noting the PC's role in scrutinising and reducing unnecessary red tape, we note that the bureaucratic excess here was not one arising directly within the FW Act, but arose from the FW Act placing reliance on the internal processes of an external party, the trade union.
458. This situation would have been solved by offering an alternative, and the union would have rapidly got its act together at any number of points in this sorry tale if the employer had been able to threaten to commence the greenfields agreement process other than with union involvement.

Inter-union hostilities can cause further problems

459. The current greenfields rules also encourage inter-union aggression and industrial disturbances by allowing unions that have not been a party to a greenfields agreement to enter new project sites to talk to potential members.
460. Under the current system, an employer is not rewarded for its efforts in finalising a greenfields agreement (with all its associated difficulties) by being given any certainty about which unions it will have to deal with on its sites for the term of the agreement. Nor is the union that struck the agreement with the employer rewarded by being the only union with access to that site for the purposes of recruiting new

¹⁶⁶ Respondent to AMMA WR Research Project Survey 6, October 2012

¹⁶⁷ Respondent to AMMA WR Research Project Survey 6, October 2012

¹⁶⁸ Respondent to AMMA survey on greenfields agreements, October 2014

members. This adds up to a situation in which an employer has to put in more effort, time and cost to get a greenfields agreement up under the FW Act, and having done so, is offered less ongoing industrial certainty and peace than was delivered under the preceding system.

461. In cases where more than one union is involved in greenfields bargaining with an employer (sometimes employers are dealing with two, three or four unions at a time), inter-union rivalries can further delay bargaining. In some cases, competing unions will flatly refuse to be in the same room together, so employers have to bargain with each union separately for the same agreement, adding enormously to the length and complexity of negotiations:

"There is an inability to create binding workplace instruments for greenfields projects without the union's agreement. We will work with unions, however, it cannot be in a situation where the mobilisation of a project is dependent on the outcome of a union demarcation dispute (where we have no control over the timing or resolution) or where reaching agreement requires us accepting union centric clauses that offer no productivity or flexibility gains." ¹⁶⁹

"It can take less time [to negotiate greenfield agreements than other types of agreements], however, in some circumstances it may take more time depending on the union and demarcation disputes between unions." ¹⁷⁰

Productivity improvements are difficult to negotiate

462. Productivity improvements in collective agreements are difficult enough to negotiate under the FW Act but in a greenfields setting attempting to secure a commitment to productivity improvements is virtually impossible:

"We have either been rolling over long-established enterprise agreements with a long union history, or negotiating greenfield agreements – both making productivity improvements difficult." ¹⁷¹

"[The greenfield agreement making process is] time-consuming, lengthy, requires a lot of management and leadership time and effort and ... other than securing industrial harmony once the agreement is agreed and knowing what your labour costs are, there are limited productivity trade-offs." ¹⁷²

463. This is a major failing of the current system about which potential investors are well aware. Creating alternatives to mandated union bargaining and/or putting in place deadlines for negotiations would hopefully incentivise unions to be more facilitative in their approach to workplace productivity.

Restrictive clauses constrain commercial decisions

¹⁶⁹ Respondent to AMMA WR Research Project Survey 4, October 2011

¹⁷⁰ Respondent to AMMA WR Research Project Survey 5, April 2012

¹⁷¹ Respondent to AMMA WR Research Project Survey 4, October 2011

¹⁷² Respondent to AMMA WR Research Project Survey 6, October 2012

464. The union monopoly on greenfields agreement-making has given unions three main areas of control over the content of agreements.
465. **Firstly**, because unions are bargaining without the input of the workforce, entrenching union rights in the agreement becomes a priority, despite such clauses doing nothing to benefit the business or employees. This can and does lead to the inclusion of clauses requiring, for example, an office to be set aside so that union officials can use it while onsite; mandating the provision of trade union training; and requiring that employees' income protection and superannuation payments are made into union-controlled funds. Experience in established operations is that employees are concerned about their incomes, terms and conditions.
466. **Secondly**, unions use their bargaining strength to ensure union-centric drafting of compulsory clauses that must be included in all agreements under the FW Act. Mandatory flexibility clauses and dispute resolution clauses in a greenfields setting are drafted in such a way as to give unions maximum control and employers and employees minimal choice and flexibility.
467. As one AMMA member said:
- "The power of unions to pursue union agendas at the workplace needs to be reviewed and restricted. Pursuit of union agendas at the expense of the desires of local employees and employee/employer flexibilities can have negative effects on costs, work/life balance and productivity."*¹⁷³
468. **Thirdly**, unions use their artificial power in greenfields bargaining to insert clauses into agreements that give them ultimate control over the flow of labour onto a project, along with the terms and conditions applying to that labour, even if it is not unionised.
469. This extends to clauses committing the employer to using union-nominated labour in the event of any vacancies; requiring all contractors to pay "site rates"; and requiring consultation with the union before labour hire, contractors or international workers can be used (for further details see Parts 3 and 9 of this submission).
470. The following are some examples of content required to be included in union greenfields agreements and the problems associated with it¹⁷⁴:
- "Union access; training days; unions being a part of procedural implementation and approval; and the inclusion of redundancy and insurance payments."*
- "Hard-lying allowances; special project allowances; wage increases; and redundancy payments."*
- "Yes, we agreed to union preference clauses as we needed to get an agreement in place and the client did not want a protracted dispute."*

¹⁷³ Respondent to AMMA WR Research Project Survey 6, October 2012

¹⁷⁴ Respondent to AMMA WR Research Project Survey 3, April 2011

Future contracts can be impacted

- 471. Clauses in some greenfields agreements are so broad as to restrict the renegotiation of pay and conditions for businesses in future agreements once the construction phase is over. Typically, the construction phase of a project attracts higher rates of pay and conditions than the operational phase due to a greater number of allowances being applied to construction work and different rosters operating, etc.
- 472. A recent example in the coal seam gas industry saw a restrictive greenfields provision cover a very broad scope of current and future works. As the project moved into the second phase (i.e. out of major project construction) there was an appetite on the part of the business to introduce more moderate rates of pay and different rostering arrangements.
- 473. The drafting of the particular greenfields clause meant greenfields agreement restrictions re pay and conditions applied to a very broad scope of works and basically covered any classifications contained in the agreement that were engaged in onsite construction work within the scope of the nominated projects.
- 474. The clause was able to be included in the agreement due to unions' leverage in bargaining and control over the bargaining agenda under the FW Act, again highlighting how mandated union power in the greenfields arena can extend far beyond the immediate round of bargaining. This is a direct product of unbalanced and impractical outcomes under the FW Act.

Operational phases can be affected

- 475. While the bulk of greenfields agreements apply to new projects, a significant issue that some AMMA members are finding with greenfields agreements is where contractors are awarded contracts for the operational phase and have to negotiate with unions for an enterprise agreement that is "greenfields" in nature.
- 476. Unions have just as much ability to frustrate a contractor in these circumstances, sometimes demanding construction carry-over rates for operations and / or common conditions for all service providers even though they provide totally different services for an operational phase.
- 477. A current example is a union negotiating with a marine contractor on a major resource construction project, trying to extract construction rates and allowances and union-nominated labour clauses if the contractor wants an agreement for the operational phase.
- 478. Another marine contractor trying to do a greenfields agreement with the same union was forced to utilise a different employment model at high risk to the company's business because of the exorbitant demands and a lengthy negotiation process that was the alternative.

The case for 'project proponent' and 'major project' agreements

Project proponent agreements

- 479. There is a business case for the introduction of a “project proponent greenfields agreement” or “framework” greenfields agreement that could, by opting in, cover an entire resource project if all contractors decided to be covered by the agreement.
- 480. This overarching greenfields agreement would operate in a similar way to an Enterprise Migration Agreement (EMA) under the skilled migration system, where the project proponent enters into the EMA and employers / contractors are covered by it when they apply for 457 visas on behalf of their workforce.
- 481. Given that the client or project proponent takes most of the industrial risk, it makes sense to allow them to negotiate a framework agreement with the union or unions representing the majority of workers, which could then be adopted by subsequent contractors as they came on board the project, if they chose to be or if it was relevant to them.
- 482. The project proponent and the unions would agree on the framework which would look very much like an industrial instrument but would not be registered as such as it would not have been made by an employer of employees.
- 483. Once that framework agreement was in place, a contractor could come onsite and elect to be covered by it, or not.
- 484. There are existing protections prohibiting a project proponent from taking adverse action against a contractor because they do not have a particular industrial agreement in place (s.354 of the FW Act) and these would continue.
- 485. The benefits of having a “project proponent” agreement available would be considerable depending on how it was implemented. Projects would have certainty of investment, particularly around costs and scheduling, and large productivity gains would flow.
- 486. Such an option would also lend itself to a “project length” agreement as outlined below.

Major project agreements

- 487. Major resource projects can be of such vast scale that they can take years to build and commission (i.e. to move from the construction to the production phase).
- 488. Project construction can extend beyond the four years which is the current maximum length of greenfields agreements. This requires re-negotiation of an initial greenfields agreement during an extended construction phase.
- 489. Renegotiation creates a massive exposure to protected industrial action and a vulnerability to additional costs and delay, which is well-understood and actively exploited by trade unions.

490. Such major project agreements could last for terms of up to eight years negotiated at the outset, would be negotiated with trade unions, but would be limited to projects with a capital expenditure of \$50 million or more.

Delayed activation makes practical sense

491. There needs to be additional pragmatism to accommodate how very complex multi-billion dollar projects actually work. If greenfields agreements are to be time-limited there needs to be a recognition that there can be a delay between a greenfields agreement being approved and work being able to start.
492. This would not disadvantage any employees on the project who would receive the terms and conditions under the agreement as soon as work commences.

INTERACTIONS WITH OTHER PARTS OF THE WR SYSTEM

493. The FW Act's greenfields provisions interact with other parts of the system and these interactions can be damaging for doing business, securing investment, and operating productively and competitively.
494. **Collective bargaining for brownfields agreements** - The current rules encourage unions to use their mandated involvement in greenfields bargaining to pressure employers to concede to their demands in "brownfields" bargaining for other existing projects / workplaces. These tactics are not at all unusual¹⁷⁵:

"[Unions] have refused to make a greenfields agreement until agreements covering other established operations have been agreed to their satisfaction."

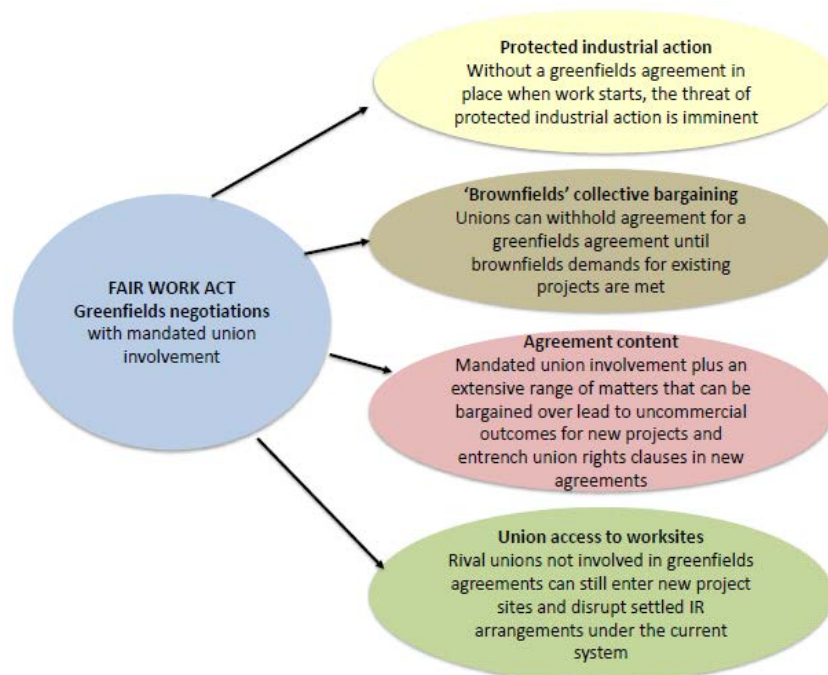
"Unions refused to sign contractor agreements over issues unrelated to this project and outside the control of us."

"The union refused to make a greenfields agreement when agreement was still to be reached for brownfields agreements covering existing operations."

- a. In this way, the greenfields provisions "bleed" into the general collective agreement-making provisions for established workplaces by allowing unions to leverage their power in the greenfields arena more broadly.
- b. It is also worth reflecting that this only serves to drag bargaining in the brownfields site further away from any operational priorities for the employer. This an example of how the minutia and daily practical realities of operating under the FW Act preclude any practical scope to increase productivity, efficiency or competitiveness. It is also an example of needing to look behind provisions and their nominally protective purpose to the effect they actually have on WR.

¹⁷⁵ Respondents to AMMA WR Research Project Survey 6, October 2012

495. **Union access to worksites** - Under the current rules, even if a union is not a party to a greenfields agreement on a new project, as long as there are workers onsite eligible to become that union's members, its officials can enter to hold discussions with workers under [s.484](#). These "fishing expeditions" can and do start as soon as work commences and have the effect of disrupting industrial harmony. This was not possible under the previous system when union entry was tied to agreement coverage (Part 5 of this submission on Union access to workplaces outlines recommended options to address this problem).
496. **Protected industrial action** – The greenfields provisions link to the protected industrial action provisions because a key reason employers concede to exorbitant union demands is the prospect of protected industrial action if an agreement is not secured. As stated above, greenfields agreements also fail to be long enough to complete the construction of major resource projects, thereby opening up the opportunity for protected action, which could be avoided in a more sensible policy approach.
497. **Agreement content** - There is a nexus between the length and complexity of greenfields negotiations and the FW Act's agreement content rules which determine the range and type of matters that can be negotiated. If the FW Act's agreement content rules were tightened in terms of what could be bargained over, it would reduce the time taken to finalise greenfields agreements by limiting the number of items on the table, ideally removing all those unrelated to the direct employment relationship. In particular, greenfields negotiations should be focused on the pay and conditions of the employees to work in the new operation, not on union matters, union agendas or on clauses seeking to subsume the legitimate commercial decision-making of enterprises.
498. The following diagram shows how the greenfields provisions interact with other parts of the FW Act:



THE COSTS OF GREENFIELDS NEGOTIATIONS

499. The complexity and risk associated with securing agreements under the FW Act's greenfields provisions has required AMMA members to invest significant financial sums obtaining advice about the negotiation of agreements, quite separate to the costs of the outcomes of the agreements themselves.
500. One AMMA member in metalliferous mining estimated the legal and advisory costs for greenfields negotiations on one major project alone would approach \$4 million by the project's completion. Of that figure, 25% (or \$1 million) can be attributed to the cost of set-up and the ongoing agreement-making advisory process.
501. While having a greenfields agreement in place provides industrial certainty for a while, that certainty often comes at a huge financial cost.
502. Wage costs negotiated under a greenfields agreement, according to one AMMA member, are in the vicinity of 10% to 20% above open-market rates for labour, depending on the availability of labour and the volatility of labour markets at the time.
503. On one major project, because every employing entity needed a separate greenfields agreement, there were in excess of 200 greenfields agreements in place. Due to the dependency of the project on industrial certainty over the life of the construction period, this gave the negotiating union an enormous and ongoing say over the commercial outcomes of the project, which is particularly alarming given there is little ability for employers to push back against union demands in this setting, particularly given the entire project relied on continued union consent.

Case study – offshore construction greenfields agreement

504. A greenfields agreement covering an offshore construction project in the oil and gas industry, which has since been renewed in nearly identical form ¹⁷⁶, would significantly discourage other similar projects going ahead if just some of its provisions were adopted in future agreements in the sector.
505. The agreement includes the following clauses for workers on an offshore vessel:

Job termination payment – On completion of work on the project, employees are entitled to a "job termination payment" simply for finishing the job, calculated at 15% of gross earnings for all hours worked, including allowances and training and money paid whilst on approved workers' compensation or income protection leave (but not paid on redundancy or termination pay).

Termination payment – This is in addition to the above "job termination payment" and equates to 84 hours' pay.

Termination bonus – This is in addition to the above termination payments and equates to 168 hours' pay.

Redundancy pay – Upon the completion of the contracted scope of work, employees are paid "redundancy" pay of 268 hours at their appropriate ordinary hourly rate (on top of the termination

¹⁷⁶ Noting that under the FW Act, there is no practical scope in such a renewal to redress the inflated costs, terms and conditions of the original agreement.

payments above). This is more than 20 days' pay (assuming a 12-hour working day) simply for completing the designated work for the duration of the contract.

Flexibility clause – The agreement allows flexibility around just one part of the agreement - the taking of annual leave – which in an offshore environment in particular is of very limited value to the employer.

Dispute resolution – The types of disputes able to be referred to the FWC under this clause are not limited to disputes over the application of the agreement. They include "individual(s) grievances over management decisions". The FWC is able to arbitrate on such grievances in the event conciliation fails, meaning the agreement is open-ended to additional costs and imposts.

Sick leave – The agreement gives workers 120 hours of sick leave which, if unused during their employment, is paid out upon termination as an "attendance incentive bonus".

Annual leave – The agreement provides for six weeks' annual leave.

Ordinary pay rates – Ordinary hourly rates of pay for workers on the project, not including a whole host of other allowances and benefits, range from \$40.25 an hour for a janitor to \$48.20 an hour for a barge welder.

Travel allowance – Each employee is paid a travel allowance of \$455.25 each way for all travel to and from the work location. Where travel time by another mode of transport is deemed unreasonable compared to flight time, the employee is paid an allowance of \$911.60 each way.

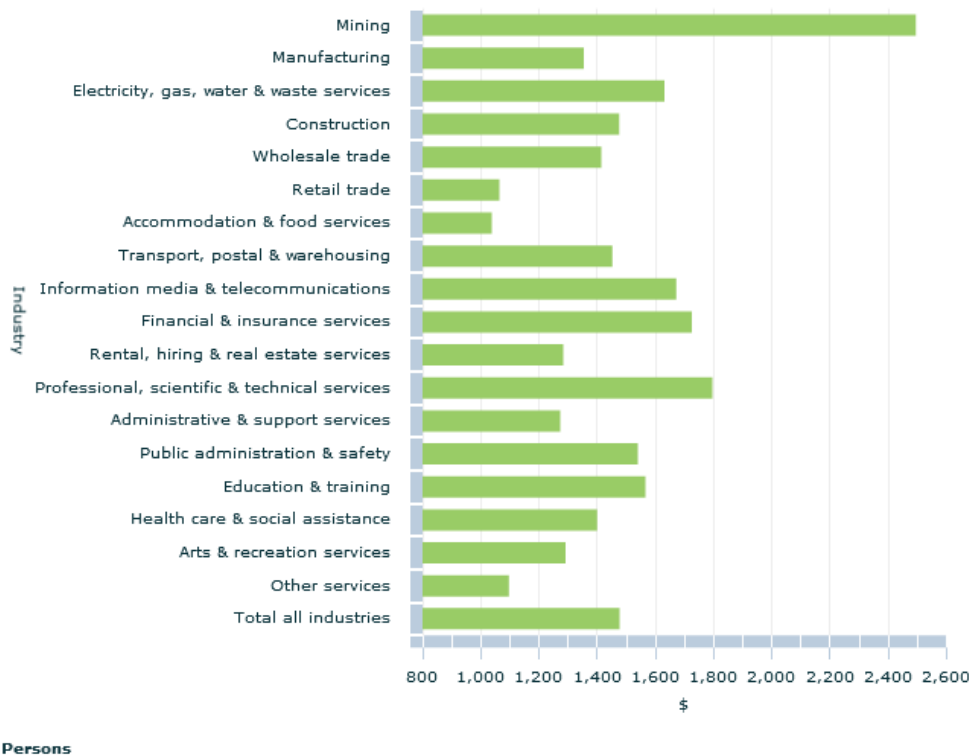
Shift allowance – A flat shift allowance applies to all hours worked, calculated at 17.5% of the ordinary rate of pay for the applicable classification.

Common-use ablutions allowance – Employees sharing common-use ablutions or accommodation aboard the facility are paid a flat allowance of \$90 a day (this allowance was retained in the subsequent rollover of the agreement despite each bedroom by that stage having its own en suite on a new accommodation facility – employees were paid the allowance nonetheless).

506. The culmination of the above terms means a janitor on that vessel would earn not less than several hundred thousand dollars per year, double or triple the average weekly earnings in the resource industry which are currently at \$2,494.50 a week¹⁷⁷, and exponentially higher than comparable onshore rates for a janitor working in, for example, a CBD office building. The graph below shows how far ahead the mining industry is in terms of wages compared to all other industries.

¹⁷⁷ Average Weekly Earnings, Australia, Nov 2014, published by the ABS on 26 February 2015, Catalogue number 6302.0

Average Weekly Ordinary Time Earnings, Full Time Adults by Industry, Original, Nov 2014



507. In the above example, for workers who had been on the project for one year and had not taken any sick leave, the termination payments alone totalled 640 hours' pay (including termination payments, termination bonuses, redundancy pay and untaken sick leave) in addition to the "job termination payment" of 15% on gross earnings. The more time worked, the more the payments accumulated.
508. The termination payments were also received by some short-term casual workers on the vessel who, because they worked on the project beyond one cycle, were deemed to be "permanent". This equated to an extra \$28,000 each for those workers for in some cases a two-week stint on the project, in addition to their ordinary pay and other allowances.
509. Australia is not the only economy able to supply global markets for our key resource exports. Resource employers accept ours is a higher-paying industry and that employees making careers in the industry will be amongst the highest paid in our community. However, the industry needs to be competitive and ensure that the costs and capacities under which we operate allow us to bring business, investment and jobs to Australia.
510. AMMA has commissioned KPMG to provide a separate economic analysis of some of the recommendations AMMA has made throughout this submission in the area of agreement making, including in relation to greenfields agreements. Please see the separate KPMG [analysis](#) for further details.

Consensus support for reform

511. The PC should note the widespread acknowledgement that the rules for greenfields agreement-making under the FW Act need to change.
512. It has now been widely acknowledged by both sides of politics that union control over new project arrangements, and the system design errors in the current FW Act have held back productivity and commercial competitiveness and led to unsustainable wage and condition outcomes at a time when significant falls in commodity prices are threatening project viability:

Australian Workers Union national secretary Paul Howes¹⁷⁸

*"The leap-frog wage outcomes in the offshore sector in particular are not going to be sustainable for the long term – we could be pricing ourselves out of the market."*¹⁷⁹

WA Liberal Party Premier Colin Barnett

*"Because of the dip in commodity markets, suddenly the competitive margins have narrowed dramatically so costs have to be kept down, which means in every respect, and it's not just the wage pays, it's the productivity per worker."*¹⁸⁰

*"The unions again are making quite inappropriate wage claims on new projects. Those projects simply will be deferred or won't go ahead. They're just completely out of tune with what is happening internationally."*¹⁸¹

Federal Labor Minister Simon Crean

*"When the accord years came along, the fundamental change in that was recognising that wage increases could only be paid through strengthening the productive capacity of the nation ... We had to play our role in wealth creation."*¹⁸²

Federal Labor Minister Martin Ferguson

"Mr Ferguson said unless the unions were tackled and excessive wages reduced, more Australian jobs would go offshore. He also said the MUA's WA branch had blocked equipment from reaching the massive Gorgon gas project, which had blown out the project's costs and timelines. 'I think the Maritime Union WA branch is a rogue union,' he said. 'I think they are not only potentially going to kill jobs for their own members, children and grandchildren in the future in the way they've conducted themselves, I think it's about time

¹⁷⁸ Noting that unions who are artificially reaping the benefits of a flawed and skewed system are unlikely to support change.

¹⁷⁹ AWU national secretary Paul Howes, National Press Club [Address](#), 5 February 2014

¹⁸⁰ "Union action stalls one in five mining projects", *The Australian*, 2 July 2012. Comments attributed to WA Premier Colin Barnett

¹⁸¹ "Union action stalls one in five mining projects", *The Australian*, 2 July 2012. Comments attributed to WA Premier Colin Barnett

¹⁸² "Put productivity first, not wages: Crean, Ferguson", *The Australian*, 3 July 2012. Comments attributed to then-Federal Minister for Regional Development, Simon Crean

the rest of the union movement fronted up to the fact that they are now killing jobs in manufacturing'." ¹⁸³

Federal Liberal Minister Ian Macfarlane

"If Australian projects price themselves out of the market, then it's not only workers, but also the national economy that stands to lose out." ¹⁸⁴

Fair Work Act Review Panel

"The panel is concerned ... that the existing provisions confer on a union (or unions) with coverage of the majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way." ¹⁸⁵

Fair Work Act review panel recommendations

513. The former Labor government recognised that major changes to our WR legislation are complex and need to be reviewed post-implementation, and at least nominally there is a need to remediate and "trim the sails" of new legislation to ensure it is operating as intended.
514. It convened a hand-chosen panel to review the FW Act in 2012 and recommend changes¹⁸⁶. Consistent with what was actually going on in greenfields negotiations as outlined above, the review panel identified substantial problems with the greenfields rules imposed by the FW Act.
515. To fix the problems it identified, the review panel proposed five legislative amendments, not all of which AMMA supported:

- a. **Reco 22:** Include a new provision after s.240 which expressly empowers the FWC to intervene on its own motion where it considers that conciliation could assist in resolving a bargaining dispute, including in respect of a greenfields agreement.

That recommendation was not taken up by the previous or current government and was not supported by AMMA.

- b. **Reco 27:** Apply the good faith bargaining obligations in s.228 to the negotiation of a s.172(2)(b) greenfields agreement, with any necessary modifications.

That recommendation was not taken up by the former government but was taken up by the current government in its FW Amendment Bill 2014 which is currently before parliament. AMMA supports the recommendation.

¹⁸³ "Martin Ferguson labelled a 'traitor' by MUA branch over Fair Work comments", ABC News, Latika Bourke, 1 March 2014

¹⁸⁴ Address to APPEA Conference & Exhibition, 8 April 2014, the Hon Ian Macfarlane MP, Minister for Industry

¹⁸⁵ Fair Work Act Review Panel Final Report, Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation, June 2012

¹⁸⁶ <https://employment.gov.au/fair-work-act-review>

- c. **Reco 28:** Require employers intending to negotiate a s.172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.

That recommendation was not taken up by the previous or current government and AMMA does not support it.

- d. **Reco 29:** So that [s.240](#) (as with reco 22) applies to the negotiation of a s.172(2)(b) greenfields agreement.

That recommendation would allow negotiating parties to apply for bargaining orders from the FWC in the event that good faith bargaining obligations were not observed. AMMA supports that recommendation as a natural extension of reco 27.

- e. **Reco 30:** Provide that, when negotiations for a s.172(2)(b) greenfields agreement have reached an impasse, a specified time period has expired and FWC conciliation has failed, the FWC may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement.

That recommendation was not taken up by the former Labor government but was in a modified way by the current government in the FW Amendment Bill 2014. AMMA has issues with both the review panel recommendation and the FW Amendment Bill's provisions but supports the need for some sort of determination-making power in the event of an impasse. However, this should under no circumstances extend to arbitration of an outcome.

The previous government recognised the problems but didn't fix them

516. Despite the review panel making significant (while not perfect) recommendations to change the operation of the system, the Rudd / Gillard government did not make any changes to the greenfields provisions in its three major tranches of amendments to the FW Act that followed the review¹⁸⁷.

517. This lack of action was contrary to comments in March 2013 by then-WR Minister Bill Shorten that the widely-acknowledged problems with greenfields negotiations would be addressed. When introducing the FW Amendment Bill 2013 in parliament, Shorten noted the review panel had extensively considered concerns raised by stakeholders about greenfields negotiations¹⁸⁸:

"In its report, the independent panel expressed the view that there are significant risks that the bargaining practices associated with greenfields agreements could threaten investment in major projects."

518. According to then Minister Shorten, the government supported the review panel's recommendation for the FWC to be able to "arbitrate" an agreement where negotiations reached an impasse and a specified time period had elapsed (a not

¹⁸⁷ Fair Work Amendment Act 2012, Fair Work Amendment (Transfer of Business) Act 2012, Fair Work Amendment Act 2013

¹⁸⁸ House of Representatives Hansard, 21 March 2013, p2910

entirely accurate description of what the review panel proposed and certainly not something that AMMA supports).

519. He promised that while no greenfields amendments had been tabled in parliament to date, he would “continue to work with employers and unions” with a view to introducing further legislative reforms in that area in the winter sittings of parliament in 2013. That never happened.

Current legislative proposals

520. Upon forming government in late 2013, the Coalition moved swiftly to table legislation implementing its *Policy to improve the Fair Work laws*¹⁸⁹, which included proposed amendments to the greenfields provisions of the FW Act.
521. The Explanatory Memorandum (EM) to the Coalition's FW Amendment Bill 2014 stated its overarching policy objectives were to:
- a. **Ensure** realistic timeframes for the negotiation of greenfields agreements.
 - b. **Ensure** negotiations did not delay / jeopardise investment in major projects.
 - c. **Protect** the interests of employees to be covered by such projects.
522. The EM acknowledged, as AMMA's research had shown, that the current rules were delaying the commencement of new projects or causing them to be cancelled altogether:
- “Alternatively, employers may be forced to agree to claims that are economically unsustainable.”*
523. AMMA notes that nearly 12 months after the FW Amendment Bill 2014 was tabled in parliament it has still not passed through the Senate, having passed through the House of Representatives some six months ago (August 2014).
524. AMMA strongly supports the thrust, while not all the detail, of the greenfields amendments in the Bill that would:
- a. **Apply** good faith bargaining principles to greenfields agreement-making for the first time.
 - b. **Retain** the current requirement for employers to only notify and make a greenfields agreement with the union or unions representing the majority of employees to be covered.
 - c. **Enable** employers to notify a three-month deadline for negotiations to help ensure the timely resolution of bargaining.
 - d. **Introduce** a much-needed capacity for employers to apply to the FWC to have their best offer endorsed as an agreement after three months of

¹⁸⁹ Coalition's Policy to improve the Fair Work laws, released May 2013

negotiations (although AMMA does not support the imposition of the additional “prevailing industry standards” test proposed).

- e. **Commence** the new greenfields provisions the day after the Act receives Royal Assent so they apply to all new greenfields agreements for which bargaining begins after that date.

525. As AMMA pointed out in its submission to the Senate inquiry into the Bill¹⁹⁰, the Bill must be amended to ensure existing artificially inflated greenfields agreements are not mandated as a benchmark for future agreements via a “prevailing industry standards” test, particularly given the almost universal acknowledgement that the current framework has led to unsustainable outcomes.

The prevailing industry standards test

- 526. The FW Amendment Bill 2014 proposes to apply an additional “prevailing industry standards” test to greenfields agreements which are not able to be agreed with unions after three months of negotiations.
- 527. The Bill’s proposed test, which would only apply to greenfields agreements taken directly to the FWC for approval without union endorsement, is as follows:

At the end of section 187

Add:

- (6) If an agreement is made under subsection 182 (4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

- 528. This is of concern to AMMA members as it appears to give the FWC a wide discretion to decide what the prevailing pay and conditions are and potentially require employers to amend their offers accordingly. The provision would seem to allow comparisons with numerous other agreements that are not relevant to the enterprise in question.

¹⁹⁰ AMMA Submission to the Senate, Education and Employment Legislation Committee into the Fair Work Amendment Bill 2014 made in April 2014

529. Applying such a test is inconsistent with the nature of greenfields agreements as a species of agreement-making specific to an enterprise that has never been subject to IR arrangements.
530. Imposing “prevailing” industry-level standards on greenfields projects would further entrench a policy approach that:
- a. **Disregards** the reform of our system for more than two decades towards enterprise / workplace-level determination of terms and conditions of employment and away from industry-wide outcomes.
 - b. **Threatens** to impose precisely the standardised industry-level outcomes that unions are pursuing despite declining membership and a move towards workplace-level rather than national industry-level bargaining.
 - c. **Risks** further entrenching inflated, non-competitive terms and conditions on an industry-wide basis which in turn risks discouraging project investment in Australia.
531. An amendment proposed by Family First Senator Bob Day would redraft the proposed provision as follows:

At the end of section 187

Add:

- (6) If an agreement is made under subsection 182 (4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions **for work performed in similar circumstances but taking into account the particular circumstances and needs of the employer and the enterprise.**

532. AMMA would add to the above amendment as outlined below, if the test remains in the legislation (which is not AMMA's preference):

At the end of section 187

Add:

- (6) If an agreement is made under subsection 182 (4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions for work performed in similar circumstances but taking into account the particular circumstances and needs of the

employer and the enterprise **and the importance of ensuring investment goes ahead and jobs are created.**

533. The above amendment takes into account the individual needs of the enterprise and acknowledges the impact new project agreements have on investment. However, it will be important that the FWC's discretion in deciding such matters is not broad.
534. It is AMMA's very strong view that the Bill will only address the inflated pay and conditions outcomes that are threatening the global competitiveness of Australia's resource industry if prevailing industry standards are not forced on other projects (see later in this chapter for AMMA's recommendations for reform).

OTHER COUNTRIES

535. Australia competes for new resource project investment with other countries with comparable natural resources, including both our OECD counterparts such as Canada and the US, and newer resource economies outside the OECD.
536. Labour costs are a separate matter, however, a key consideration for investors globally is the reliability of project construction, and the proven capacity under national systems to deliver major new project infrastructure, on time and on budget.
537. The concept of a greenfields agreement is a very positive one. Greenfields agreements should be able to be used as proof that there will not be industrial relations or union problems for the life of project construction in Australia. They should be a real asset to the global competitiveness of attracting capital investment to this country.
538. Greenfields agreements are currently failing to deliver what they could, and the concerns and experiences outlined above are well known to investors, particularly in the resources sector where information flow is pretty rapid and comprehensive.
539. However, with the changes recommended in this chapter, Australia's greenfields agreement-making system can again become a competitive advantage for doing business in this country, and in particular attracting multiple billions of dollars of investment.

RECOMMENDATIONS

540. AMMA's proposed reforms in this area would divide greenfields agreement-making into **three concurrent streams** depending on the needs of the enterprise:
- a. Stream 1: Union-negotiated greenfields agreements.
 - b. Stream 2: FWC-determined greenfields agreements.
 - c. Stream 3: Employer greenfields agreements

541. All streams would be available concurrently under modified provisions of the FW Act. Some of the streams, such as union-negotiated greenfields agreements and FWC-determined greenfields agreements, are modifications of existing provisions or proposals, while others are new proposals such as employer greenfields agreements and project proponent agreements. The proposed three streams and how they would work are detailed in the table below.

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
Five-year maximum life Extend the current maximum four-year terms for union-negotiated greenfields agreements to five years.	Five-year maximum life Extend the current maximum four-year terms for greenfields agreements to five years, including for FWC-determined greenfields agreements under this stream. Importantly, this stream would start with businesses negotiating with unions but would move to FWC determination after agreement was not able to be reached within a reasonable time. Three-month negotiation deadline As proposed in the FW Amendment Bill 2014, if agreement between a business and union(s) is not reached within a three-month time limit (triggered by the employer), the business can take its best offer to the FWC for ratification (note this does not give the FWC power to arbitrate an outcome). One-month deadline in some cases While a three-month deadline is workable in cases where work has not yet begun on a project, a shorter negotiation deadline of one month is more practical in cases where work has begun	Two-year maximum life Provide businesses with the option of making a greenfields agreement without union involvement on the understanding this type of agreement would last a maximum of two years. This type of agreement would see the employer determine the terms and conditions of employment provided they exceeded the award safety net.

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
	and / or other greenfields agreements are in place at the site that the employer could sign up to. Prevailing industry standards test The additional test proposed for FWC-determined agreements under the FW Amendment Bill 2014 would either be removed altogether or modified in the way AMMA identifies in this submission.	
“Major project” agreements This type of greenfields agreement would run the entire construction phase of projects (up to 8 years). These agreements would be union-negotiated and would only be available for construction projects with a capital expenditure of \$50 million or more.		
“Project proponent” agreements Introduce a “project proponent” greenfields agreement that could be negotiated by the head contractor with relevant unions, and which other employers on the project could sign up to if they chose. This type of agreement could last for up to five years as with other union-negotiated agreements, or for the entire construction phase of a project if it fits the description of a “major project” (above).		

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
Roll-over / continuity of supply agreements Given the generous terms and conditions applying in resource industry agreements, the parties should be able to agree to roll over all of the above types of union-negotiated agreement with the majority support of employees covered by the agreement for an additional two years . This would mean no protected industrial action could be taken in support of a new agreement as part of the rollover. If the parties wanted to renegotiate, they could do so with all the usual rules applying.	Roll-over / continuity of supply agreements Given the generous terms and conditions applying in resource industry agreements, the parties should be able to agree to roll over an existing FWC-determined agreement with the majority support of employees covered by the agreement for an additional two years . This would mean no protected industrial action could be taken in support of a new agreement as part of the rollover. If the parties wanted to renegotiate, they could do so with all the usual rules applying.	
Good faith bargaining Good faith bargaining obligations should apply to union-negotiated greenfields agreements.	Good faith bargaining Good faith bargaining obligations should apply to this type of greenfields agreement which is negotiated with a union up until the point at which the three-month or one-month negotiation deadline is up.	
Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.	Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.	Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.
Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that	Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that	Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.	work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.	work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.

3.5. COLLECTIVE AGREEMENTS

In a workplace, where an employer and employees who are not union members voluntarily agree to collectively bargain together they will be free to do so.¹⁹¹

- **There should be options for both collective bargaining with trade union involvement and collective bargaining directly with employees of an enterprise.**
- **This has worked very successfully in the past and should be restored.**
- **All collective agreements should be subject to FWC approval based on appropriate tests protecting against disadvantage.**

INTRODUCTION

542. The existing provisions relating to enterprise agreements appear in Part 2-4 of the FW Act. Section 3(f) of the FW Act emphasises enterprise-level collective bargaining. However, do we really have an enterprise level bargaining system in Australia?
543. A registered employee organisation is a significant agent within the system with both institutional and legal privileges. This is why there is little to be gained from a sterile examination of the legislative provisions without actually attempting to understand how the system operates, what type of costs are involved, and what are ultimately the benefits.
544. In practice, the way trade unions regularly approach agreement making is to seek common wages and conditions flow-on within an entire industry sector or sub-sector. There is a great deal of emphasis on perceived comparability or industry standards in how Australian unions support what is at least nominally enterprise bargaining, meeting the needs of each workplace.
545. Of course, in moving the bargaining agenda from the needs of the enterprise, its employer and employees, union bargaining also drags the WR agenda further and further from the productivity and competitiveness challenges facing that enterprise.
546. In the 1980s and early 1990s, AMMA supported a move away from a centralised wage fixation system towards enterprise-based bargaining. AMMA was encouraged by the transition, which occurred in the mid-1990s and beyond, to ensure that the regulatory framework provided for a greater number of options for engagement in the workplace. Over time, the overall desire of resource industry employers and employees has been to work co-operatively and directly with its workforce.

BEYOND ENTERPRISE BARGAINING

¹⁹¹ Labor's *Forward With Fairness* WR Policy, prior to the 2007 election.

547. There continues to be an attitude amongst many union officials within the resource industry that successive bargaining rounds should generate an endless continuum of wage increases of x% per annum for the life of the agreement. Genuine wages bargaining (the original intention of the 1993 reforms) has now turned into wage negotiations without any trade-off or consideration of how efficiencies and productivity improvements can be made.
548. Whilst there may be some moderation in union claims depending on the circumstances of the firm, the industry, or the economy at the time, many unions bargaining on behalf of a group of members simply give the employer a log of claims with some degree of ambit and insist on their claims without much regard to what the employer or non-unionised workers need or desire.
549. This is not to say that this did not occur from the time of the Keating reforms in 1993, however, the difference now is that there appears to be a recognition of bargaining fatigue and that there is very little value or benefit to an employer, apart from the certainty of workplace arrangements for a period of time.
550. Employers acknowledge that bargaining fatigue can cut both ways, and that after the worst of the low hanging fruit of ridiculous work practices were eliminated, productivity gains did become harder to secure. However:
- a. The resource industry is highly internationalised with a strong sense of international best practice and the importance of marginal gains in efficiency/lowering costs, given the scale of throughput we work with. Compared to other industries, resource employers rarely want for ideas as to how productivity could be improved/delivered through operational efficiency.
 - b. Pattern and industry bargaining have long dictated the culture and conduct of collective bargaining, and bargaining fatigue or a paucity of agreements delivering genuine changes in work or work practices, is a function of how unions have managed the collective bargaining system to their organisational and logistical advantage.
551. Above all the system has in too many instances become bureaucratised and employers simply process union claims into four-year agreements, counting themselves to have done well to minimise wage increases within their budgeted range. Under such a scenario, productivity, competitiveness, and the needs of the enterprise struggle to get a look in.
552. In July 1999, AMMA published a report, *"Beyond Enterprise Bargaining: The Case for Ongoing Reform of Workplace Relations of Workplace Relations in Australia"* which sought to make the case for the regulatory system to recognise genuine self-regulation in employee relations, based on high standards of managerial leadership and fair and effective systems for the internal regulation of employee relations.

553. In AMMA's submission to a Senate Committee Inquiry into the Coalition's *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, resource industry employers made the following salient points:¹⁹²
- a. Underlying all AMMA's activities is the belief that direct, cooperative and mutually rewarding relationships between employers and employees at the enterprise level are the best way to achieve efficient and productive workplaces.
 - b. Most organisations have had success with enterprise bargaining, but many are now dealing with the limitations of this process, including limited productivity improvements, "trade off" fatigue, a high level of third party involvement, complex procedures and high transaction costs.
 - i. *Note, this is a description of bargaining fatigue three years after the Reith/Howard changes of the 1990s, and five years after the Brereton/Keating changes.*
 - ii. *This is a decade prior to the artificial advantaging of collective bargaining with unions and further skewing bargaining in their favour in the FW changes commencing in 2009.*
 - c. Many organisations have developed sophisticated human resource and employee relations policies and procedures, and pay well above award specified minima. For these organisations, in the most part, the current high level of workplace regulation is unnecessary and only adds unwarranted transaction and compliance costs, and inhibits productivity.
 - d. The direction of reform that has been pursued through the 1990s has been that of the progressive devolution of responsibility for workplace relations matters away from the centralised system that has operated for most of this century. The move that has occurred is one where the direct parties have assumed greater responsibilities for matters pertaining to the workplace.
 - e. The pattern of collective enterprise bargaining is by its very nature episodic. It is a bargaining process, not a business process, and therefore arbitrary. This drives behaviour which tends to postpone organisational change in the short term to provide bargaining power in the process of re-negotiation of the workplace agreement.
554. It is over two decades since AMMA made the above points, however, they appear to resonate even more under the current framework.
555. When the previous Government consulted with employer organisations (such as AMMA) and trade unions, there was no consensus on fundamental reforms. For example, consider the explanatory memorandum and the table that summarised stakeholders views on the bargaining framework:¹⁹³

¹⁹² AMMA submission to the Senate Employment Workplace Relations, Small Business and Education Committee, Inquiry into the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, September 1999.

¹⁹³ Explanatory Memorandum, Fair Work Bill 2008, p.xliv.

Table 7: Employer and employee views on the new bargaining framework provisionsEmployer Stakeholders

Employer groups support a voluntary bargaining framework where workers may seek a collective agreement, but employers are not compelled to bargain collectively with their workforce.

Employer groups are generally accepting of the proposed good faith bargaining framework, in particular the specific provision that FWA will not have the power to force bargaining representatives to make concessions during the bargaining process.

Employer groups want restrictions on the content that can be bargained for and contained in agreements. Most are satisfied with the retention of the 'matters pertaining formulation.' However, some are concerned that the expansion of the content rule to relate to employee associations as well as the removal of 'prohibited content'. Employer groups are generally satisfied that industrial action is not available for multi-employer agreements and that arbitration is only for low paid workers.

Some groups are concerned with the expanded formula for matters pertaining to the employment relationship and their implications for delegates' rights.

Employee Stakeholders

Unions support the collective bargaining framework. They also want a strong industrial umpire to enforce the framework through the capacity to arbitrate outcomes. They want this framework to come into effect immediately.

Unions are particularly concerned that there are restrictions on the content that can be bargained. Some unions believe that there will be disputes over whether the content being bargained is a matter pertaining to the employment relationship.

Unions support the bargaining stream for low paid workers. Unions believe that workers in this stream must have the right to access arbitration by an umpire, as well as have access to industrial action in pursuit of claims.

556. The former *Workplace Relations Act 1996* (pre and post Work Choices) contained a range of collective agreement making streams. It is important to note that these forms of collective agreement making did not compel an employer to bargain with an employee or trade union acting as a bargaining representative.

557. Collective agreements (non-greenfields agreements) could be made either with or without a union¹⁹⁴, providing a very useful additional stream or option for agreement making suited to many enterprises.

WHAT THE SYSTEM NEEDS TO DELIVER

558. The system should provide options to employers and employees to enter into genuinely beneficial arrangements which suits the needs of the parties and the enterprise.
559. The system should recognise the diversity in how employers and employees arrange their workplace arrangements, which the majority of the private sector preferring to engage more directly. Bargaining for a collective agreement should not just be a negotiation on higher wages and/or conditions. It should be a genuine process considering improvements to employees' wages and conditions, as well as improvements to the way work is performed in the workplace.
560. The system should ensure that collective bargaining is truly voluntary, and there are a range of options to deal with different types of enterprises within the resource industry. This should include both:
- a. Collective bargaining with trade unions.
 - b. Collective bargaining directly with employees.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

561. The ALP's *Forward with Fairness* policy emphasised that collective agreements "will be at the heart of Labor's industrial relations system". An excerpt from the policy states:¹⁹⁵

"Labor believes collective bargaining is the way forward with fairness. That is why collective agreements will be at the heart of Labor's industrial relations system."

Collective agreements deliver benefits to employees above and beyond the safety net and are the most efficient and productive form of workplace arrangements for business.

Collective bargaining will be based on bargaining at the level of an enterprise. The well understood definition of 'enterprise' will continue and may include a single business or employer, a group of related businesses operating

¹⁹⁴ Pre Work Choices reforms, the *Workplace Relations Act 1996* (Cth) ('the Act') pt VIB established a framework for the registration and enforcement of certified agreements. Collective agreements could be made between employers and groups of employees under s.170LK of the Act and agreements made between employers and unions under s.170LJ of the Act. Section 170LL of the Act allowed a constitutional corporation to make an agreement with one or more unions prior to establishing or where intending to establish a new business. Under the Work Choices reforms, collective agreements could be either "union collective agreements" (s 328), "employee collective agreements" (s 327), "multiple-business agreements" (s 331), or "greenfields agreements" (ss 329–330).

¹⁹⁵ ALP, *Forward with Fairness*, p.13.

as a single business or a discrete undertaking, site or project. For example, this means a collective enterprise agreement can be made for employees at a warehouse, a chain of shops, a manufacturing plant or a major construction project.

Enterprise level bargaining enables the development of fair and flexible employment arrangements that are tailored to suit the needs of an individual business and the needs of employees. Collective enterprise bargaining fosters team work, employee involvement and commitment to the workplace. It improves loyalty and morale, lowers labour turnover which in turn delivers better performance and productivity."

562. The ALP did not refer to empirical evidence that collective enterprise bargaining with unions, in and of itself, *"fosters team work, employee involvement and commitment to the workplace"*.
563. Nor is there any empirical evidence that collective enterprise bargaining with unions *"improves loyalty and morale, lowers labour turnover ... delivers better performance and productivity"*. There is an assumption perpetuated by the ALP and trade unions that collective bargaining is effectively the only way to achieve benefits in the workplace. The *Forward with Fairness* policy perpetuated this assumption that collective agreements with unions deliver benefits for all parties:¹⁹⁶

"A Rudd Labor Government will replace the Government's current complex and unfair agreement making process with a simple, flexible and fair system to help employers and employees bargain collectively for agreements which deliver benefits to all parties."

564. The clear counterpoint to the centrality placed on the role of trade unions in the 2009 FW changes is that fewer and fewer Australians support them and choose to join them. The Australian system has, through the FW Act changes, placed greater reliance on unions and dealt them in as the only primary vehicle for bargaining, notwithstanding that only 12% of private sector employees are choosing to support them through membership.
565. The Explanatory Memorandum indicated that *"the new workplace relations system will be built on ... an enterprise-level collective bargaining system focused on promoting productivity."*¹⁹⁷ The extraneous materials provide that:¹⁹⁸

"enterprise agreements can ensure that increases in pay and entitlements are linked to productivity increases at the enterprise"

"collective bargaining will shift the focus of negotiations towards boosting productivity"

"collective bargaining ... will be less bound by regulation and red tape and is designed to have a positive impact on labour productivity".

¹⁹⁶ Ibid.

¹⁹⁷ Fair Work Bill 2008, Explanatory Memorandum, p.iv.

¹⁹⁸ Ibid, p.xl.

566. Neither aggregate data nor experiences in Australian workplaces have borne out these claims.
567. There are limited previous studies on the impact of enterprise bargaining in Australia. The EM only cites two published papers, two research papers produced by the PC in 1999 and 2000, and two working papers published by Melbourne Institute in 2000 and 2002¹⁹⁹. Interestingly, all of the papers considered the collective agreement framework which was in place under the former Howard Government's *Workplace Relations Act 1996*, and which provided for collective agreements with and without union involvement.
568. In any event, there was no evidence and remains little evidence to date on the benefits of collective bargaining from an employer perspective generally or within the resources industry.
569. AMMA's involvement in collective bargaining across the various evolutions of the system is that from an employer perspective there is very little benefit under the current framework to bargain for an enterprise agreement, other than having certainty that industrial action cannot lawfully be taken during the period a collective agreement is in operation. That is, from our extensive experience working with our members, there is little benefit to collective bargaining under the FW Act other than paying for an agreed period of industrial peace.
570. From an employee engagement perspective, collective bargaining is not the only or by far the best means to desired ends. High-performing workplaces in the resources industry have developed sophisticated HR modalities, which monitor employee satisfaction, remuneration packages/benefits, work/life balance, safety (both physical and mental wellbeing) and ensure that employees have a voice within the workplace to raise grievances and deal with disputes. The key to this is direct engagement and working at relationships between the employer and employee. This sophisticated, post-industrial approach (which doesn't come cheap and patterns often global HR values and cultures) is differently predicated to positional and adversarial bargaining models, drawn from the 20th Century, which underpin collective bargaining under the FW Act.
571. It is difficult to see how collective bargaining can provide benefits which are not already provided to employees, or that can be delivered other than through collective bargaining in such high performing workplaces. That is not to say that some employers do not see some value in embarking on enterprise agreement making or renewing a previous generation of agreements (such as standardising conditions across a patch-work of enterprises/operations), but the reality is that we have moved beyond enterprise bargaining both in substance and in form: therefore the regulatory framework should change to reflect this change in the industry and across the economy given the move away from collective representation and collective agreement-making in the private sector.

¹⁹⁹ Ibid, p.xli – xlii.

572. Again, less than one employee in eight is a member of a trade union in contemporary Australia – why would a system of bargaining be predicated on the involvement of trade unions?

Union vs employee collective agreements

573. Under Labor's Forward with Fairness policy, it was intended that the system would offer choice in agreement making as follows:²⁰⁰

"Where an employer and a union with coverage in a workplace voluntarily agree to bargain together they will be free to do so. In a workplace, where an employer and employees who are not union members voluntarily agree to collectively bargain together they will be free to do so. Where more than one employer and their employees or unions with coverage in the workplace voluntarily agree to collectively bargain together for a single agreement they will be free to do so".

574. However, the resulting FW Act when Labor gained power removed the longstanding option of collective bargaining without a union – that is, the FW Act narrowed the bargaining options available to employers and employees in workplaces.

575. Labor's FW Review Panel attempted to summarise why the former Government chose to remove the distinction between union and employee collective agreements, noting that:²⁰¹

"A distinction was maintained between union and non-union agreements. This resulted in disputes over the type of agreement that would be negotiated, thus inhibiting the resolution of agreements and in some cases leading to industrial action. While there is no data that identifies the extent of this problem, there is anecdotal evidence. Two examples included the Cochlear dispute and the Boeing dispute."

576. There was no systemic failures of the previous frameworks which required a change in the distinction between union and employee-negotiated agreements, and two anecdotal and in the case of Cochlear arguably misapplied examples is frankly an embarrassing justification for removing an avenue to agreement making that had been used for more than a decade. Again it is hard to escape the conclusion that the real reason why access to collective agreements without union involvement was removed from the system is that they enabled employers to put pressure on unions to finalise agreements, and agreements relevant to enterprises or face the threat of the agreement being put directly to the employees who would work under it.

577. The resource industry believes that there should be genuine choice in agreement-making for employers and employees and there should be multiple streams of agreement-making to allow for the variety of circumstances and needs in contemporary Australian enterprises.

²⁰⁰ ALP, Forward with Fairness, p.13.

²⁰¹ Fair Work Review Panel Report, August 2012, p.266 - <https://docs.employment.gov.au/node/29150>

578. Where a majority of workers are a member of a relevant registered organisation, it may make sense to enter into a voluntary enterprise agreement with the relevant union, on behalf of the employees.
579. However, there should also be an option where there is a minority of union members or no union members in a workplace, to have the option of entering or pursuing an employee collective agreement without union involvement. This is what was essentially promised by the former Government and it should be restored to the Australian WR framework.

Collective bargaining vs individual bargaining

580. The FW Act currently recognises that employees who are "high income" employees are able to enter into an agreement where the modern award no longer applies.
581. In a joint media release accompanying the release of the ALP's *Forward with Fairness – Policy Implementation Plan*, the then Opposition Leader, Kevin Rudd MP, and Deputy Opposition Leader Julia Gillard MP, indicated that:²⁰²

"Australia's dynamic economy demands a level of flexibility between high earning employees and their employers.

Workers earning \$100,000 or more per annum should be given the flexibility to negotiate their own employment arrangements.

This is a common sense approach which ensures workers with the most bargaining power are given the option to bargain with their employer.

...

Federal Labor believes flexibility must extend to bargaining at the enterprise level. We recognise a role for genuine, non-union agreements and that a flexibility provision should be included in all enterprise bargains".

582. Individual bargaining is considered in more detail in Chapters 3.2 and 3.3 of this submission.

RECOMMENDATIONS

583. The PC has been asked to:

...make recommendations about how the [workplace relations] laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.²⁰³

²⁰² Joint Statement, Kevin Rudd MP, Julia Gillard MP, August 2007.

²⁰³ Terms of Reference, The Hon J B Hockey MP, Treasurer [Received 19 December 2014]

584. Below are AMMA's suggested reforms in relation to collective agreement making.

Greater options for collective agreement making

Recommendation 3.5.1

Introduce different types of registered collective agreements, which operate in parallel with registered individual statutory agreements, to provide choices to employers and employees in workplaces.

There should be an option to make the following different types of collective-based enterprise agreements (plus an option or options for useable individual agreements):

- Registered collective agreements (with a union)
- Registered collective agreements (with employees)
- Registered greenfields agreements (with a union or determined by the FWC)
- Registered greenfields 'major project' and 'project proponent' greenfields agreements (see Chapter 3.4 for further details).

Statutory approval tests

Recommendation 3.5.2

Collective agreements would need to be approved by a valid majority of employees. The agreement would need to satisfy a no-disadvantage test against the relevant safety net. It would have a nominal expiry date of up to 5 years. Where an agreement does not specify a nominal expiry date, it is taken to be 5 years. There should be an option to "roll over" the agreement up to a further 24 months subject to any additional statutory safeguards (the agreement continues to meet the no-disadvantage test).

Content of agreements

Recommendation 3.5.3

Matters in a proposed statutory agreement must only pertain to the relationship between an employer and employee (see Chapter 3.6 for details). Matters which are codified in the legislation (such as union right of entry) should not be able to be included in collective agreements (see Chapter 5 for details). A list should specify what is and is not permitted content to ensure litigation over clauses is minimised to the extent possible.

Fast track approval for high income employees

Recommendation 3.5.4

Where all employees subject to a collective agreement are above a high income threshold (i.e. the current unfair dismissal high-income threshold of \$133,000 a year) the agreement process would be subject to a fast track system.

Statutory declarations would be lodged with the agreement to either the FWC or FWO and the agreement would be subject to audit by the FWO. Agreements would come into operation upon receipt of lodgement or acknowledgement from either the FWC or FWO.

3.6. AGREEMENT CONTENT

*"Unions are automatically a bargaining agent should they have a member amongst the employees. Given this position, they should not be able to negotiate for anything from which they may receive a benefit; and all benefits they receive should be disclosed. For instance, construction agreements contain redundancy funds; in some states unions obtain significant income from the earnings of these funds and therefore they are conflicted when they argue for increases to fund contributions compared to wage increases. Similar issues arise with income protection insurance, and whilst superannuation funds are heavily regulated, it is concerning to see industry super funds having their logos (presumably due to sponsorship in some way) on pro-union shirts being worn by workers at rallies. If modern awards are supposed to be a reasonable level of pay and conditions, it would be good to see that there is a cap on the outcome an EBA can have or perhaps the inability to take protected industrial action in support of an EBA that goes beyond that cap – for instance 150% of award total pay."*²⁰⁴

- **The matters able to be included in an enterprise agreement be limited to the direct employment relationship between employers and employees.**
- **Clauses that do nothing but entrench unions' power base in the workplace be specifically prohibited, along with any clauses purporting to be about "job security" when they are really about unions controlling the flow of labour onto a worksite and the terms and conditions for that labour.**
- **Recent case law reaffirms the need for legislative change in relation to what is meant by the term "genuinely trying to reach an agreement" as it pertains to unions seeking to embark on protected strike action in support of a proposed agreement.**

INTRODUCTION

585. The PC seeks views from stakeholders on what aspects of the employee-employer and union-employer relationship should be permitted matters under enterprise agreements, and how it would be possible in practice to address in legislation any deficiencies from either the employer, employee or union perspective²⁰⁵.
586. Resource employers would like to state at the outset that we believe if the test for allowable matters in agreements returned to one based on the direct employment relationship, while clearly listing the prohibited matters that do not fit that definition. This would improve many aspects of the WR system.
587. Improvements would be seen in shorter negotiating times for enterprise agreements and greenfields agreements, the retention of appropriate managerial control over

²⁰⁴ Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012.

²⁰⁵ Issues Paper 3

the flow of labour into workplaces, and unions enjoying a less “privileged” position on Australian worksites than they currently do.

588. Ensuring agreements are focused on the employment relationship between employers and employees (surely the very purpose of our employment laws) and less focused on union matters will see less crowding out of productivity and efficiency, and hopefully greater scope for enterprise and individual bargaining to better contribute to productivity and competitiveness.
589. AMMA's recommendations in this area are supported by previous research and are analysed in a separate KPMG [analysis](#)²⁰⁶ that accompanies this submission to the PC.

Why is this part of Australia's WR system?

590. Agreement content / permitted matters are vitally important because the rules about what can be included and enforced in an enterprise agreement send a signal to employers, employees and unions that directly determines the matters the parties will discuss during bargaining.
591. The more matters the system allows or encourages unions to pursue in agreements, the further unions will focus their concerns away from the core terms and conditions of employment, particularly in a system where unions have “default” bargaining representative status as long as they have at least one member that will be covered by an agreement²⁰⁷.
592. There is an ongoing tension between traditional employment matters that were included in awards (subject to complex constitutional precedent) and an increasing focus on matters that are more about the union and its business than the concerns of employees at that workplace.
593. What is included in an enterprise agreement is enforceable, creating legal obligations for employees and employers, as well as for the government enforcement authority or body. There have to be limits to what can become enforceable under the FW Act.
594. The scope of what can be included in an agreement also determines the scope of matters that unions can pursue through legally protected strike action, and again excessive scope to pursue claims not related to the terms and conditions of employees encourages disputation over union attempts to subsume managerial decision-making, preclude commercial decision-making on contracts, and serves to encourage and then perpetuate industrial action.
595. This issue, clarifying the scope of agreement and bargaining matters is of key importance to AMMA members and has been identified as one of six priority areas for WR reform²⁰⁸.

²⁰⁶ *Workplace Relations and the Competitiveness of the Australian Resources Sector*, KPMG [report](#) prepared for AMMA, 12 March 2015

²⁰⁷ Section [176](#) of the FW Act

²⁰⁸ Workplace reform [priorities](#) for the next federal government, AMMA, April 2013

596. It is also worth noting that there was something of an automatic control on this issue for the first 90-plus years of our national WR system, as constitutionally there were clear precedents delimiting employment from non-employment matters.

Agreement content under the FW Act

597. The FW Act's agreement content rules are split into three categories (as outlined in the table below):

- a. Terms that **may** be included in enterprise agreements (permitted matters);
- b. Terms that **must** be included (mandatory clauses); and
- c. Terms that must **NOT** be included (prohibited or unlawful terms).

TERMS THAT <u>MAY</u> BE INCLUDED (PERMITTED MATTERS)	TERMS THAT <u>MUST</u> BE INCLUDED	TERMS THAT <u>MUST NOT</u> BE INCLUDED
Matters pertaining to the relationship between employer/employee to be covered by the agreement	Nominal expiry date (that is not more than 4 years after the date on which the FWC approves the agreement)	Terms that exclude the National Employment Standards (NES) Designated outworker terms Unlawful terms – content that:
Matters pertaining to the relationship between employer/union to be covered by the agreement	Dispute settlement procedure	allows employees to 'opt out' of the agreement
Deductions from wages where authorised by employees	Flexibility term	takes away unfair dismissal rights
How the agreement will operate	Consultation term	- gives unfair dismissal rights before an employee has completed the minimum employment period - is a discriminatory term - is inconsistent with the industrial action provisions of the FW Act - is inconsistent with the right of entry provisions of the FW Act - requires or permits a contravention of the general protections provision of the FW Act

598. AMMA's submission recommends:

- a. **Modifying** the definition determining the matters that “may” be included in agreements (i.e. changing the current definition of “pertains to the employment relationship”).
- b. **Moving away from** the union-centric drafting of “mandatory” clauses that must be included in agreements, but which are subject to negotiation and have become yet another vehicle for entrenching union power in the system.
- c. **Broadening** the list of matters that “must not” be included in certified agreements and being explicit that some clauses currently being pursued are prohibited matters.

599. Relevant sections of the FW Act related to agreement making are:

- a. [s.172](#) – which specifies that when making enterprise agreements they may be made about permitted matters. Section 172(1)(a) is intended to retain the historic “matters pertaining” jurisprudence, whilst sub-paragraphs (b) – (d) are intended to allow broader content to be sought in bargaining, rendering valid what would previously have been invalid under the former system.
- b. Mandatory terms are covered by sections including [s.202](#) (flexibility term) and [s.205](#) (consultation term).
- c. [s.253](#) provides that agreement terms are of no effect if they are not about permitted matters, are unlawful terms, or if they relate to a designated outworker team.
- d. [s.194](#) provides that the following terms are unlawful and cannot be included in an agreement.
- e. [s.186\(2\)\(c\)](#) specifies that the FWC must be satisfied that the “terms of the agreement do not contravene [s.55](#) (which deals with the interaction between the National Employment Standards and enterprise agreements, etc.)”.
- f. Other terms can be included by way of formal undertakings given to the FWC during the approval process ([s.190](#)).
- i. This is a concern for AMMA members because it often involves FWC members making subjective assessments about what can and cannot be included, requiring employers to enter into undertakings that may not necessarily be required under the FW Act in order to get an agreement approved and that may not be required by other FWC members.

Comparisons with previous systems

600. The FW Act's definition of allowable agreement content is in contrast to clarity on the matters that could and could not be negotiated and subject to protected industrial action under the WR Act 1996 as it stood immediately prior to the FW Act taking

effect. The list of things you could not include in agreements under the previous system was known as "prohibited content".

601. When the FW Act took effect on 1 July 2009, allowable matters from then on included those not only pertaining to the relationship between the employer and its employees but also to the relationship between the employer and its employees' union²⁰⁹.
- a. This was a significant broadening of the previous definition of matters pertaining.
 - b. It invited unions to focus on their operational priorities and what they need in order to do their business of organising employees and securing members, rather than what the enterprise needs to do its business competitively and productively.
602. The "matters pertaining to the employment relationship" concept is of long standing. The High Court decision in *Electrolux*²¹⁰ clarified that industrial action could not be protected if content in an agreement included matters outside the employment relationship (and could therefore not be validly included in a proposed enterprise agreement).
603. As a result of the changed definition of matters pertaining under the FW Act, clauses bestowing rights on unions have returned in a big way since 1 July 2009 and now have permitted status. Previously, many such clauses were not permitted matters and everyone knew they were out of bounds and so they did not clog up the system, create disputes or crowd out bargaining on productivity and competitiveness.
604. This is now a central way in which unions seek to entrench their power in the workplace – i.e. through the agreement-making framework in agreement provisions.
605. Under both the Industrial Relations Act 1988 (Commonwealth) and the WR Act prior to 27 March 2006, collective agreements had to be limited to matters pertaining to the employment relationship (so-called "side deals" were not affected by content rules and these were insisted upon by some unions in bargaining as still occurs today. This is entirely a matter for the parties. The enforceability of such side deals is debatable but that is another matter).
606. Since 27 March 2006, a term of a workplace agreement that was not about such matters was deemed "prohibited content". Between 1904 and 2006, the formula was also used in the definition of an "industrial dispute" under successive Commonwealth IR statutes / the Constitution. Therefore, the content of agreements and the taking of protected industrial action has been intertwined for some time and remains an important area of workplace regulation for employers in Australia.
607. The FW Act deliberately widened the previous prohibited content formulation, whilst at the same time allowing a wider degree of flexibility for content in enterprise agreements outside the direct employment relationship. Predictably, this

²⁰⁹ [Section 172](#) of the FW Act

²¹⁰ *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 78 ALJR 1231

encouraged unions to pursue more and more matters relating to areas of their concern and affecting their own operations, agenda or income generation rather than the operations of the enterprise concerned.

608. Under s8.5 of the [WR Regulations 2006](#), a term of a workplace agreement was prohibited to the extent that it dealt with any of the following:
- a. Payroll deductions of union dues.
 - b. Leave to attend trade union training.
 - c. Paid leave to attend union meetings.
 - d. The renegotiation of a workplace agreement.
 - e. Unions participating in dispute settling procedures unless they are the employee's choice.
 - f. Union officials' entry rights.
 - g. Restrictions on the engagement of independent contractors and requirements re their conditions of engagement.
 - h. Restrictions on the engagement of labour hire workers and requirements re their conditions of engagement.
 - i. Foregoing annual leave in exchange for receiving payment instead (i.e. cashing out of annual leave. This is one of the only matters previously prohibited that AMMA members would like to see retained as permitted content going forward as both employers and employees draw benefits from it).
 - j. Providing information about employees under the agreement to a union or officer of a union unless required or authorised by law.
 - k. The foregoing of paid compassionate leave in exchange for payment.
 - l. The foregoing of personal / carer's leave in exchange for payment.
 - m. Encouraging or discouraging union membership.
 - n. Allowing for industrial action.
 - o. Prohibiting or restricting disclosure of details of a workplace agreement by a person bound by the agreement.
 - p. Providing for unfair dismissal remedies.
 - q. "Objectionable provisions".
 - r. Restrictions on offering, negotiating or entering into a statutory individual agreement (of the type of agreement that existed at the time).

- s. Penalties for not providing evidence of or being absent from work due to sick leave or carer's leave or other absence due to illness, injury or emergency affecting the employee or a member of the employee's immediate family or household.
609. Compare the above list of prohibited matters with the FW Act's list of unlawful / non-permitted terms under [s.194](#):
- i. A discriminatory term.
 - ii. An objectionable term.
 - iii. A term that confers an unfair dismissal entitlement where it would not otherwise exist.
 - iv. A term that is inconsistent with the provisions on industrial action.
 - v. A term that provides an entitlement to enter premises for a purpose referred to in [s.481](#) or [s.484](#) other than in accordance with that part of the Act (although there are numerous examples of where unions have gotten around this requirement through careful drafting).
 - vi. A term that provides for the exercise of a state or territory OHS right other than in accordance with the right of entry provision of the Act.
610. It is well-established in employment law that a list of permitted matters, or alternatively, a list of prohibited content, forms a valid part of the agreement-making system and helps ensure that all parties are clear on the parameters. However, the question is how this should operate and what should the scope of bargaining matters be.
611. AMMA's view is that such lists serve a useful purpose but that those currently in place under the FW Act must be significantly modified, along with the definitions and concepts underpinning them.

WHAT THE SYSTEM NEEDS TO DELIVER

612. Australia's shift to enterprise determination of wages and conditions and enterprise-driven improvements in productivity, competitiveness, flexibility and employee satisfaction is becoming increasingly superficial and illusory under the FW system.
613. In too many instances, agreement-making in Australia has become little more than a bureaucratic process of translating standardised union claims into agreements, with no scope or challenge to address productivity or progress organisational change.
614. In too many negotiations under the FW Act, productivity improvements or changes to the organisation of work are off the bargaining table, not up for negotiation.

- 615. Merely processing inflated union claims into wage outcomes that in many cases far exceed inflation does nothing to innovate or make enterprises more productive.
- 616. Government must make agreement-making simpler, more flexible and better able to empower employers and employees to improve productivity.
- 617. The FW Act must be amended in order to turn this situation around. This must be complemented by wider dialogue and initiatives to ensure Australia gets back into the business of productivity improvements and world-leading performance, and a significant part of this must relate to labour productivity being better encouraged and supported by our agreement-making system.
- 618. Businesses, their employees and the communities in which they operate deserve an agreement-making system that does not encourage unions and employees to take protected industrial action in support of matters that have nothing to do with the efficient running of an enterprise.
- 619. Matters that serve only to interfere with legitimate managerial decision-making or shore up union power have no place in a modern agreement-making framework.
- 620. Put simply, agreement matters must in future again pertain to the direct employment relationship between employers and employees, clarifying if necessary where those boundaries are, building on the already-established jurisprudence of the higher courts.
- 621. If unions can bargain over anything, they can then take protected industrial action over matters that have nothing to do with the business, which is simply not fair or appropriate and is inconsistent with delivering on the future-focused considerations in the terms of reference.

Key principles

- 622. **Firstly**, content under the FW Act should be limited to matters pertaining solely to the employment relationship between the employer and its employees. This should be based on the High Court's determination of "matters pertaining" in the *Electrolux* decision.
- 623. **Secondly**, bargaining and by extension protected strike action should not extend to matters that unacceptably restrict individuals' freedom of choice and companies' capacity to manage.
- 624. **Thirdly**, some matters need to be expressly identifiable as not pertaining to the employment relationship and listed explicitly in the FW Act as "prohibited content".
- 625. **Fourthly**, the system of prohibited content needs to be dynamic and adaptable to ensure it cannot be "gamed" or "worked around" by trade unions.
- 626. **Fifthly**, if certain clauses are mandatory for inclusion under FW Act agreements, consideration should be given to requiring a model version of those clauses to be included rather than allowing unions to use their bargaining power to further

entrench their control of the workplace in relation to dispute resolution, individual flexibility and workplace consultation. However, any such model clause would have to be fair to all parties concerned.

RECENT DEVELOPMENTS

Fair Work Act review panel recommendations

- 627. The FW Act review panel at **Recommendation 23** recommended that the FW Act be amended to prohibit enterprise agreement clauses which permit employees to opt out of the agreement.
- 628. While AMMA did not support that recommendation, it was enacted into law under the FW Amendment [Act](#) 2012 by the Labor government which took effect on 1 January 2013.

Coalition policy / proposed legislation

- 629. The FW Amendment Bill 2014 currently before the Senate contains no material provisions that would apply in this area, save for placing a higher hurdle on obtaining protected action ballot orders from the FWC, while not proposing amendments to the rules around the content that protected action can be taken over.
- 630. The more recent FW Amendment (Bargaining Processes) Bill 2014, which is currently before parliament, will also seek to put in place requirements in relation to protected industrial action. The Bill proposes to:
 - a. expand the test for genuinely trying to reach agreement;
 - b. require the FWC, before approving an enterprise agreement, to ensure parties have discussed ways to improve productivity at the workplace; and
 - c. require the FWC to refuse an application for a protected action ballot order if the claims on the table are manifestly excessive or would have a significant adverse impact on productivity at the enterprise.

HOW THE CURRENT SYSTEM IS PERFORMING

AMMA's earlier research

- 631. Since the FW Act first opened up the types of allowable matters in enterprise agreements, AMMA began tracking the experience of its members and the proliferation of "union rights" and other clauses that were previously prohibited.
- 632. In an April 2011 survey, AMMA asked its members the following question, with the responses tabulated below:

During enterprise bargaining since the Fair Work Act began, have union bargaining representatives pursued any of the following types of union-specific clauses for inclusion in agreements? Tick all that apply.

	% of respondents
Trade union training leave	86.4
Shop stewards' rights clauses	72.7
Paid union meetings	68.2
Trade union training levies	50.0
Payroll deductions of union fees	36.4
The requirement to have a union office onsite	18.2
Union picnic days	18.2
Other union-specific clauses (please specify)	4.5

633. What the table above shows is that union bargaining representatives are commonly pursuing a range of union-specific clauses in their agreements that would have been prohibited under the WR Act.
634. The inclusion of each of those clauses, which in relation to trade union training leave was sought in the agreements of 86.4% of survey respondents, will add to costs on the one side and enhance and entrench the power of unions on the other, representing at best highly-tenuous productivity or efficiency benefits for the enterprise. Another very common clause sought in the agreements of 72.7% of respondents was "shop stewards" or delegates' rights clauses.
635. The following are comments from AMMA members in that April 2011 survey about the types of clauses unions were pursuing and the pressure they were under to agree to matters that did not pertain to the direct employment relationship²¹¹:

"Participation in union-sponsored term payments ... plus guaranteed increases."

"The introduction of change clauses; consultative committee clauses."

"A clause stating that collective industrial relations will continue as a fundamental principle of the employer. Union membership shall be promoted by the employer to all prospective and current employees. Employees will be encouraged to participate in union meetings and exercise their democratic rights."

"Limitations to company alcohol and drug policy disciplinary action. Company policy in relation to illicit drugs and alcohol over limits while operating a vehicle was potential termination (after consideration of mitigating circumstances). Union now wants a specific clause over-riding this policy with a forced one strike policy (final warning)."

²¹¹ AMMA Workplace Relations Research Project Report 3, April 2011

"A union representative to be paid for performing union duties."

"That if an employee has a dispute against the company we pay expenses for employees to attend mediations, hearings, court etc."

"A delegates' rights charter and paid training leave for trade union training."

"Yes, we agreed to union preference clauses as we needed to get an agreement in place and the client did not want a protracted dispute."

"Union access; training days; unions being part of procedural implementation and approval; and the inclusion of redundancy and insurance payments."

"The number of Christmas parties offered!"

"The type of bread purchased and the Christmas bonus."

636. The following are comments from AMMA members in an October 2011 survey on issues with the type of agreement content unions were pursuing²¹²:

"It is much more difficult to implement management decisions as a result of objections by union delegates who seek to impose their views on the business and operate as if their permission is required before managers can do almost anything."

"Productivity has been affected by union involvement in decisions regarding everyday operations. There have also been client changes and site issues."

"Union activity has disrupted work, required the use of nominated union labour and has led to union-initiated restrictive work practices."

"With regard to flexibility clauses, union resistance is too high, plus the company is not convinced it is worth the fight (i.e. any flexibilities achieved would be too hard to exercise anyway)."

"We just included the flexibility clause in the agreement as part of the obligations of the Fair Work Act. However, all unions sought to modify the model flexibility clause. And frankly, they are not really worth the paper they are written on as they provide no certainty."

"The AMWU strongly opposes any flexibility in the workplace."

Case study – clauses from the 1970s and 80s

637. In the late 1970s and early 1980s, the resource industry saw a proliferation of clauses in enterprise agreements that sought to entrench the union rights agenda at the

²¹² AMMA Workplace Relations Research Project Report 4, October 2011

expense of the enterprise, something that is re-emerging as a particular concern under the FW Act.

638. *The Cliffs Robe River Iron Associates Iron Ore Production and Processing Agreement No 10* (made in 1979) included clauses requiring that:
- a. It be a condition of employment that each worker remains a union member while work continues.
 - b. The employer interview all new employees and ascertain whether they are current union members.
 - c. Prospective employees produce proof of current union membership.
 - d. If the employee is not a current union member and cannot afford to join the union, the employer make those payments on the employees' behalf and the amount be deducted from workers' first full day's pay.
 - e. The employer give an undertaking to facilitate and arrange accommodation on their premises for visiting full-time union officers as long as prior notice is given.
 - f. The company allow for 33.3 days per site for employees to attend trade union training.
639. Under the *Iron Ore Production and Processing (BHP Minerals Ltd) Award No 22* of 1981, clauses required:
- a. Shop stewards to be allowed the necessary time to interview the employer's representative during working hours in the event of a dispute affecting workers within their area.
 - b. The employer to allow union officials to enter the premises at any time.
640. What we are seeing today in FW Act agreements is a return to arrangements that the resource industry thought had long been confined to history. Some key areas of re-emergence under the current system are outlined below along with the associated problems.

Problems with the current system

Right of entry clauses

641. As mentioned in detail in Chapter 5 of this submission on 'Union access to workplaces', on 1 July 2009 the FW Act removed the prohibition on union entry clauses in enterprise agreements. Currently permitted clauses, subject to certain parameters, can confer very broad extra access on union officials outside of the rules of the FW Act.

642. This means that union entry clauses can now confer on union officials the ability to enter outside of meal and other breaks, without holding a valid entry permit and without any notice having to be given.
643. The following clause was included in a union-negotiated agreement that was certified by the FWC:
- "An official of the AWU may have access to the employer's premises, at any time, for the following purposes connected to this agreement ..."*
644. The purposes referred to in the clauses are to represent employees under any term of the agreement, to deal with disputes, to meet with the employer about the negotiation of a replacement agreement, to attend union induction meetings, and "for any other purpose connected to the relationship between the union and the employer".
645. This gives unions broad, almost unfettered, entry into workplaces, showing what can be achieved through unions' inflated bargaining power under the current system that could not be achieved under the statutory scheme for union entry and the checks and balances it contains. With the already broad entry rights conferred on union officials under the legislation itself, there is no justification for clauses conferring additional entry rights that detract from what should be a universal system regulating entry under the FW Act, and those clauses should be prohibited.

Contractor clauses

646. As pointed out in Chapter 9 of this submission on 'Other WR matters', unions are seeking to insert clauses in enterprise agreements that have the effect of:
- a. Placing impediments on employers' ability to independently decide to engage contractors or labour hire workers on a site; and
 - b. Ensure that where such labour is used, project pay and conditions apply.
647. Whether an employer can or will agree to such a clause typically depends on their business model.
648. While recent case law such as the *Esso* decision²¹³, has confirmed that clauses explicitly prohibiting or seeking to limit the use of contractors or labour hire on a site are prohibited matters, even under the current system, in practice all it takes is some careful drafting to link the provisions back to "job security" for them to be considered matters pertaining to the employment relationship. Such strategic drafting to test and game the system is endemic in union practice during the past decade, and requires a capacity to ensure restrictions on content operate as intended.
649. Clauses such as the one below, while they might seem innocuous, actually come with massive restrictions behind the scenes:

²¹³ *Esso Australia Pty Ltd v AMWU, CEPU, AWU* [2015] [FWCFB 210](#), 10 February 2015

"The employer will take all measures to achieve employment security for the direct permanent employees of the employer."

650. Another very restrictive example appears below:

"No employee shall be made redundant whilst labour hire employees, contractors and/or employees of contractors, engaged by the employer, are performing work that is or has been performed by the Employees on the particular site or project."

651. Another example of the contractor clause being pursued in a coal seam gas agreement is as follows:

"If the employer wishes to engage independent contractors to perform work that might be performed by current or future employees under this agreement, the employer will advise the AWU. This will not apply to short term, incidental or urgent works."

652. In AMMA's experience, a union's stated justification for contractor restrictions in bargaining will primarily be "job security" but this ignores the reality of a contractor losing a contract over an uncompetitive deal and the job losses and other employment benefits that invariably go with it. It also does not articulate the unions' underlying concern – that contractors undermine the union's power and influence.

653. It is extremely common in resource industry enterprise bargaining, for both greenfields and non-greenfields agreements, for a union's insistence on contractor clauses to be the main issue holding up the making of an agreement. Other issues often the cause of hold-ups are those seeking to provide rights and amenities for employee representatives (union officials or delegates). This means that where there is able to be agreement on wages and conditions, this is held up by unions pursuing objectionable matters.

654. In most states, particularly in Victoria, unions will insist on a contractor's clause in every agreement to which they are a party.

655. Clauses requiring a "casuals to contractors" ratio of 30% of the permanent workforce was recently rejected by a member of the commission as a matter not pertaining to the employment relationship²¹⁴, but this does not stop unions pursuing such clauses in one way or another.

656. Clauses relating to the use of contractors and labour hire, and to the terms and conditions those parties must be employed under, are an unreasonable incursion into managerial decision-making and must be explicitly prohibited.

Trade union training leave clauses

657. Clauses requiring employers to provide union delegates with paid time off to attend union-provided training abound in enterprise agreements under the FW Act.

²¹⁴ NUW v Phillip Leong Stores Pty Ltd [2014] FWC 6459, 9 October 2014

658. In a construction agreement with the CFMEU, the following clause was certified:

"Each workplace employee representative or union delegate shall be granted up to 5 days paid leave per year to undertake training that will assist them in their settlement of disputes role."

659. And in another agreement with the AMWU:

"The employee representatives in accordance with this agreement will be allowed a maximum of five days paid training leave per 12 month period for the purpose of communications training, provided that only one such employee attends per annum and the timing of the training course is approved by the company. Payment will be for ordinary hours only."

660. And in another agreement in the coal seam gas industry:

"In recognition of the mutual benefits gained, a union delegate or employee representative can apply for 3 days to attend an AWU construction delegates' conference. Approval to attend a conference will not be unreasonably withheld."

661. Unions seeking to include clauses in enterprise agreements that mandate paid time off to attend training provided by that trade union are a clear conflict of interest. As with clauses requiring training funds to be paid into union-controlled schemes, or income protection insurance to be paid into union-controlled funds, such clauses should be prohibited as they have nothing to do with the employment relationship.

662. While such clauses are often couched in terms of "benefits to both parties", the true beneficiary is the union.

Temporary foreign labour clauses

663. Clauses seeking to restrict the use of temporary foreign labour are another area where unions have learned how to draft clauses so they appear inoffensive and can be argued to pertain to the employment relationship as defined under the FW Act.

664. Again, the requirements lying behind a clause such as the seemingly innocuous one below, would place unreasonable constraints on managerial prerogative in managing the ebb and flow of workforce needs:

"The parties to the agreement recognise that there may be a requirement to engage temporary foreign labour to supplement the Australian workforce after extensive sourcing and recruitment efforts demonstrate that there still remains insufficient suitable Australian workers available to do the work."

665. What is disguised is the discussion and evidence required by the employer to convince that union that extensive sourcing has occurred and this has resulted in insufficient suitable workers. Is it up to the union to decide if the employer's efforts have been "exhaustive" enough? Does the union have a power of veto in this situation? It would appear so.

Delegates' rights clauses

666. Delegates' rights clauses are firmly entrenched in FW Act agreements and range from fairly mild clauses through to requirements that employers provide a raft of amenities and facilities to workplace delegates.

667. The below were included in a recent agreement in the coal seam gas industry:

"The employer will, where requested, provide delegates with reasonable access to facilities including phone, facsimile, computer / printer, photocopier."

"The parties to this agreement recognise the value of enabling recognised delegates to attend formal courses that promote the practice of sound industrial relations and which will assist the delegate to resolve issues in accordance with the dispute resolution process set out in [clause x] of this agreement."

668. Again, there is nothing to stop employers agreeing to such provisions with a union but this should not happen within an enforceable enterprise agreement. Once such content is in agreements it has the effect of delaying the finalisation of agreement negotiations and allowing unions to take protected industrial action in support of such clauses.

Union "recognition" clauses

669. Union recognition clauses are now very common under FW Act agreements and seek to entrench a culture of unionism in the workplace at all levels. One recent example being pursued by unions in an agreement in the coal seam gas industry is:

"Collective industrial relations will continue as a fundamental principle of the employer. Union membership will be promoted by the employer to all prospective and current employees."

670. Again, what lies beneath is a prohibition on employers making IFAs with employees, not to mention the freedom of association issues enlivened by the second part of the clause.

Union "encouragement" clauses

671. Clauses requiring employers to actively promote union membership and involvement to their employees massively oversteps the bounds of any semblance of freedom of association, and respect for the rights and choices of individuals.

672. The endorsement of clauses by the FWC under the FW Act flies in the face of promises the Labor Party made in Opposition back in 2007²¹⁵:

²¹⁵ Deputy Opposition Leader Julia Gillard, 3AW interview with Neil Mitchell, 18 April 2007

"I believe in freedom of association, I believe it's your right to choose to join a trade union if you wish to. I believe it's your right to choose not to join that union if you wish to."

673. Despite Labor's pre-election promises that its IR system would respect the right of employees not to join a union, the Federal Government did not object to the approval of the *ADJ Contracting* agreement, despite the Australian Building & Construction Commission (ABCC) at the time opposing the agreement's approval before the federal industrial tribunal in the first instance.
674. While the clauses technically do not require employers to 'coerce' existing or prospective employees to join a union, there is a fine line between coercion and encouragement. A prospective employee might be forgiven for thinking an employer's 'encouragement' to join a union is a veiled instruction to join or else not get the job. What is also not clear from a reading of these clauses is what the union understands them to actually mean and what the union actually expects of the employer.
675. Time spent by management actively encouraging union membership and activities means diverting management resources and turns the employer into a de facto recruitment officer for the trade union movement.
676. Such clauses have no role in a modern IR system. Unions should either win the support of employees in workplaces or not, and our WR system should not allow unions to seek an artificial crutch of employer's support.
677. Not only are the clauses themselves aimed at entrenching union rights in the workplace at the expense of employers, their endorsement as a genuine bargaining item means employees can take protected industrial action over them if employers refuse to agree to their inclusion. It's worth pausing on this; a union can legally strike in Australia in 2015 to force an employer to promote union membership. This is as absurd as the clauses dating back to the 1970s and 80s.
678. Employers that do attempt to push back against the union rights agenda in bargaining are experiencing unions' refusal to negotiate any other matters of importance to the employer until the union rights agenda is settled.

Case study - the *ADJ Contracting* decision

679. AMMA considered the *ADJ Contracting*²¹⁶ case to be of such public importance and significance to its membership that it intervened to support the appeal of the decision. The appeal was unfortunately unsuccessful and the original decision was upheld in the Federal Court.
680. The *ADJ Contracting* agreement was negotiated with the Victorian Branch of the ETU (CEPU) in 2009. In 2007, then-ETU Victorian Branch secretary Dean Mighell revealed his expectations of the FW Act in terms of agreement making:

²¹⁶ *AiG v FWA* [2012] FCAFC 108, 14 August 2012

"I welcome particularly the policy that lets us put anything back in agreements that we can coerce our friendly employers to put back in. That's going to be fun."²¹⁷

681. Mighell was not disappointed. Clauses in the ADJ Contracting agreement to which the tribunal has given its blessing included:
- a. Requiring the employer to actively promote union membership to employees and prospective employees.
 - b. Requiring the employer to encourage employees who are already members of the union to participate in union meetings and exercise their 'democratic' rights.
 - c. Requiring employers to consult with their workforce before deciding to engage contractors and labour hire workers, including consulting about the name of the proposed labour hire company, the number of people to be hired, their qualifications, and the likely duration of the labour hire contract.
 - d. Allowing union officials entry to workplaces without holding a valid entry permit, without giving notice, outside of meal breaks, and without having to abide by any of the right of entry provisions of the FW Act.

Case study – the Esso decision

682. The findings in the ADJ Contracting case remain in place although subsequent decisions have nuanced this precedent to find that some contractor clauses are not permitted matters.
683. In February 2015 a Full Bench of the FWC handed down a decision²¹⁸ on whether unions that bargain for non-permitted matters can be found to be "genuinely trying to reach an agreement" as required under the FW Act before they can apply to take legally protected industrial action.
684. In the original decision in the Esso matter, a single commissioner granted the unions' application for secret ballot orders to take protected action despite the unions initially pushing for restrictions on the company's use of contractors, which was deemed not to be a permitted matter under [s.172](#) given the way it was phrased.
685. The original clause read as follows but was later replaced with one more akin to "job security":

USE OF CONTRACTORS

"The Employer agrees to utilise only Esso employees in designated roles including supervisory, DPIC and team leader roles so as to drive ownership.

²¹⁷ ETU Victorian branch secretary Dean Mighell in 2007 after the proposed Fair Work Act agreement making changes are announced (and were later enacted into law).

²¹⁸ Esso Australia Pty Ltd v AMWU, CEPU, AWU [2015] [FWCFB 210](#), 10 February 2015

Contractors will not be used to replace positions of the permanent workforce.

Where work exists that may require external resources (contractors) this work shall be conducted by supplementary contract labour. If the correct knowledge and resources are available within Esso employee numbers then the work will be allocated to Esso employees.

Or, if Esso employees are unable to fulfil the work requirements based on correct knowledge and resource capacity, relating to the scope of work to be performed, then the work may be let to contractors.

Where the Company does engage a Contractor to perform work covered by this Agreement, they must ensure the wages and conditions of the employees engaged to do this work, are no less favourable than the wages and conditions provided for in this Agreement for equivalent or similar work.

Any disputes arising out of this clause will be dealt with through the disputes procedure of this Agreement."

686. The original commissioner said in relation to revising the above clause to one about job security:

"Such a claim, if it sufficiently relates employees' job security to the terms and conditions of contractors, would not necessarily be a non-permitted matter."

687. The Full Bench also said there was more to consider in relation to whether a union was genuinely trying to reach an agreement than just whether they were pursuing permitted matters. Other relevant factors included:

- a. The subject matter and timing of the claim.
- b. The bargaining representatives' belief as to whether matters were permitted or not.
- c. Whether there was legal clarity about the claim's "permitted status" (highlighting that there are still numerous grey areas under the FW Act in relation to permitted matters nearly five years after it took effect).

688. As AMMA pointed out in its submission to the FW Act review panel in 2012, union bargaining representatives should not be able to obtain secret ballot orders for protected industrial action on the assertion they "believe" they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement" should rely on them actually bargaining for permitted content, not just believing they are or purporting to be.

689. The system should not be used to be tested in this way, incurring expenses for all concerned.

Which matters should be prohibited?

690. Given the fact that many of the current range of matters being pursued by union bargaining representatives do not pertain to the direct employment relationship, a list of explicitly prohibited matters should be updated and inserted into the FW Act.
691. The following list of matters is based on the WR Act's previous list of prohibited matters and all of the below matters should be expressly prohibited in certified agreements going forward:
- a. Payroll deductions of union dues.
 - b. Leave to attend trade union training (this is especially problematic for offshore rosters and as one AMMA member said "the guys are already only on the worksite for 40% to 50% of the year – to have compulsory union training in work time reduces that even further for the employer").
 - c. Paid leave to attend union meetings (why should the employer pay workers to attend union meetings?).
 - d. The renegotiation of a workplace agreement (as this can be used to tie employers down to the union's negotiating timetable).
 - e. Unions participating in dispute settling procedures unless they are the employee's choice.
 - f. Union officials' entry to worksites (rights of access should only be in accordance with the FW Act unless by private invitation which is outside of enterprise agreements).
 - g. Restrictions on the engagement of independent contractors and requirements re their conditions of engagement (why should third parties have any control over where labour is sourced and what terms and conditions apply?).
 - h. Restrictions on the engagement of labour hire workers and requirements re conditions of engagement (while such clauses purport to be about job security they are actually about unions controlling who gets to work on projects and under what terms and conditions).
 - i. Providing information about employees under the agreement to a union or officer of a union unless required or authorised by law (this should include providing unions with information about any IFA subsequently entered into by an individual worker as that worker could then be subject to intimidation).
 - j. The foregoing of paid compassionate leave (this is an important protection for employees).
 - k. The foregoing of personal / carer's leave (under the FW Act, personal leave is conflated with "annual leave". While the cashing out of annual leave should be permitted in line with the current provisions, the foregoing of other types of leave covered by this clause should not be permitted).

- l. Encouraging or discouraging union membership (the freedom to belong or not belong to a union must be upheld as a key plank of freedom of association in this country. Agreement clauses requiring employers or anyone else to encourage or discourage union membership or to participate in union meetings or union activities should be expressly outlawed).
- m. Allowing for industrial action (damaging and costly industrial action must only be taken in accordance with the legislative provisions).
- n. Prohibiting or restricting disclosure of details of the workplace agreement by a person bound by the agreement (it is up to the individual what information they choose to share about their employment arrangements).
- o. Providing for unfair dismissal remedies (unfair dismissal remedies should only be conferred in line with the legislative requirements).
- p. "Objectionable provisions" (these, of course, should not be allowed in agreements and are currently detailed sufficiently in the FW Act).
- q. Restrictions on offering, negotiating or entering into a statutory individual agreement (presuming that type of agreement option exists in future which it does not at the moment. If such an agreement is available there should be no ability to restrict access to it under another form of agreement).
- r. Penalties for not providing evidence of or being absent from work due to sick leave or carer's leave or other absence due to illness, injury or emergency affecting the employee or a member of the employee's immediate family or household (this is an important protection for employees and should be retained).

Not previously expressly prohibited

692. For the sake of clarity, the following provisions should be expressly prohibited in enterprise agreements even though they may not have been explicitly prohibited under the WR Act as it stood immediately prior to the FW Act:
- a. Demands regarding payment rates of third parties (why should unions be able to specify the pay rates of other third-party, non-unionised employees on a project? Pursuing this clause is often unions' first priority in bargaining, despite divergent views about whether it is currently lawful to include).
 - b. Preference to employ union members or union-nominated labour (this is known as a "union preference clause" and often requires employers to choose to fill vacancies with a nominated list of union labour, often filled with the names of friends and relatives of union officials).
 - c. Unions placing material on company noticeboards (such material is often critical of companies and the employment relationship and has no place in modern enterprises or the agreements that cover them).

- d. Union involvement in any commercial activities of the enterprise (as one AMMA member said "They wear no risk and can cause significant damage and harm if they don't get their way.").
- e. Clauses that seek to limit the use of international labour, which AMMA maintains are discriminatory terms.

RECOMMENDATIONS

Recommendation 3.6.1

Restrict the 'matters pertaining to the employment relationship' test under s.172 to matters pertaining to the employment relationship between the employer and its employees and do not extend this to the employer's relationship with the employees' unions as is currently the case. The *Electrolux* definition of "matters pertaining" should ground the new definition.

Recommendation 3.6.2

There be a list of prohibited content applying under the FW Act that includes the matters AMMA outlines in this submission.

Recommendation 3.6.3

Ensure there is a regulation making power for the minister of the day to add to or clarify the prohibited content that is included in the legislation as per AMMA's recommendations.

Recommendation 3.6.4

Remove the current provision that allows unions to apply for and obtain protected action ballot orders on the assertion they believe they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement", and therefore able to take protected industrial action, should rely on a union actually bargaining for permitted content, not asserting it is.

Recommendation 3.6.5

If some clauses are deemed compulsory for inclusion in FW Act agreements, as is currently the case for mandatory flexibility, dispute resolution and consultation clauses, consideration could be given to developing a "model" form of those clauses where one does not currently exist. Consideration could then be given to mandating the inclusion of the model form of the clause in agreements, with no scope to depart from it. However, it would need to be ensured that the model version of the clause was fair to all parties.

Recommendation 3.6.6

Limit the undertakings that the FWC can ask of employers in terms of agreement content when submitting agreements for approval.

Recommendation 3.6.7

Remove the ability to incorporate external documents such as awards into agreements.

3.7. AGREEMENT APPROVAL

"The timeliness benchmarks are intended to set tight performance standards; to that extent they are aspirational. We expect that there will be individual instances where the Commission does not meet its own high standards, for a variety of reasons. Nevertheless, the setting of performance benchmarks and publicly reporting on the Commission's performance are important accountability measures..."²¹⁹

- **The FWC needs to deliver more timely, consistent and transparent agreement approvals, and greater efficiency, less red tape and costs, with robust scrutiny and protection to employees.**
- **Most agreements should be approved within 28 days, and the current 12 weeks is too long a period for the FWC to expect to be able to do its work.**
- **Where agreements have been approved before or are for higher income earners there should be expedited approval processes.**

INTRODUCTION

693. In Australia, the employment terms of professional, manager and other non-award employees is not subject to prior state approval of their agreed terms. In some other countries this applies to all employment, including the lower-paid, those eligible to be trade union members, etc.
694. There is no inherent wrong in this; it's simply a different regulatory approach. In such countries there is still a legal obligation to meet minimum standards throughout the course of employment, but the state does not scrutinise what has been agreed.
695. Australia has charted a very different course. All collective (and in the past individual) agreements have for many years been subject to approval of the FWC, its predecessor the AIRC, or the specialist body that approved AWAs.
696. The existing provisions relating to approval of enterprise agreements appear in Part 2-4 of the FW Act.
697. There are longstanding provisions relating to the scrutiny of agreements. The Work Choices reforms briefly altered the framework for statutory agreement-making. However, the history of the framework has generally involved some process to scrutinise or approve statutory agreements.
698. Employers recognise and accept that there will always be some transactional costs associated with a requirement for agreement approval. However, experience has shown that the timely approval of agreements can be detracted from by processes which unduly delay consideration.

²¹⁹ <https://www.fwc.gov.au/about-us/timeliness-benchmarks>

699. Approval rules should recognise that some agreements may meet certain criteria which allows a quicker process of registration and commencement. For example, there is no differentiation in agreement approval processes between:
- a. Agreements that cover high-income employees in the resources industry, who will without question meet a statutory test against an award.
 - b. Agreements that cover low-income employees in the services sector (i.e. retail or hospitality) where the statutory test against an award is more complex to apply and there is a risk of the test not being met and employees disadvantaged.
700. Where agreements provide terms and conditions that are relatively similar to the modern award, then a longer scrutiny of roster patterns and calculations may be required. This may increase approval times and it is recognised that the more detailed the statutory test is (i.e. against a modern award) this will ultimately reflect on the considerations that need to be made by the designated authority.

What the system needs to deliver

701. The system should deliver greater efficiency, less red tape and costs, with robust scrutiny and protection to employees.
702. The system should ensure that agreements are approved in a timely manner and there are clear criteria known to and applied consistently to all users of the system, including the approval authority, as to what is required for an agreement to meet various statutory tests and criteria.
703. The system should recognise that high-income employees do not require as much oversight over their agreements and an optional fast track approval process should be available.
704. There is also scope for expedited approval when an agreement comes from an employer with a proven track record of successful agreement approval, and the agreement is in like or identical terms to previously approved agreements. This would be part of the system embracing greater trust and learning, and harnessing the benefits and savings of a more pragmatic and best practice approach to regulation.

HOW THE CURRENT SYSTEM IS PERFORMING

705. Currently, the system imposes high transaction costs on employers. Moreover, many agreements are subject to subjective considerations by tribunal members, reflected in the nature of the undertakings that are required from employers and the lack of uniformity in those undertakings.
706. Whilst complexity for approval processes is not new, the degree of complexity and inconsistency in agreement approval has become too high under the current framework. There needs to be substantial improvement to the approval framework for employers to have confidence in the system in the future.

707. Labor's Forward with Fairness policy promised a "fast and simple approval process" and specifically promised that:²²⁰
- "Under Labor's system, collective agreements will be approved by Fair Work Australia within 7 days."*
708. The FWC's own "timeliness benchmarks" show that in the month of December 2014, 97.4% of agreements were finalised within 12 weeks of lodgement²²¹. That leaves some agreements not processed until after 12 weeks. Most agreements appear to be processed within eight weeks²²². Only 48.5% of agreements were finalised within three weeks²²³.
709. It appears that no agreements are processed within seven days. Whilst this was obviously far too optimistic, there appears to be no reason why agreements should take longer than 28 days to be assessed and a decision made.
710. The costs of approval of agreements was not considered in the FW Review Panel's 2012 report²²⁴.
711. AMMA is unaware of any previously reported information on the costs of agreement making for an employer.
712. However, AMMA estimates that the costs to make, vary or approve an agreement are not insignificant for many resource sector companies. Estimates of a typical enterprise agreement (drafting a new one or reviewing an older agreement) can range from \$30,000 to \$50,000 for a medium to large employer operating within the resource sector (100 to 500 employees)²²⁵.
713. There is also a great degree of variability in agreement approval under the FW Act, including inconsistent tribunal approaches to whether an agreement meets statutory criteria, meets the better off overall test, or requires undertakings, for the agreement to be approved.
714. Section [202](#) of the FW Act mandates the inclusion of a flexibility term in all enterprise agreements but importantly requires it to meet the "genuine" needs of the employer and employee.
715. Notwithstanding that requirement, AMMA understands that the vast majority of FWC members fail to enquire as to whether the flexibility term in an enterprise agreement lodged for approval is actually capable of meeting the genuine needs of the parties.
716. Furthermore, if a clause is not capable of meeting the genuine needs of the parties, FWC members are supposed to insert the model flexibility term into the agreement. While some commissioners have done this in scrutinising agreements, it is not

²²⁰ ALP, Forward with Fairness, p.15.

²²¹ <https://www.fwc.gov.au/about-us/timeliness-benchmarks>

²²² Ibid.

²²³ Ibid.

²²⁴ <https://docs.employment.gov.au/node/29150>

²²⁵ The costs to an employer can escalate considerably when the bargaining process is protracted and involve dispute with the relevant union or unions.

commonplace (see Chapter 3.3 of this submission on Individual Flexibility Arrangements (IFAs) for details).

717. We elsewhere note in this submission the proposal in the *FW Amendment (Bargaining Processes) Bill 2014*, currently before Parliament, to:

...amend the Fair Work Act to provide a new additional approval requirement for enterprise agreements that are not greenfields agreements in Part 2-4 of the Fair Work Act. The new requirement will ensure that when approving an enterprise agreement, the Fair Work Commission (FWC) must be satisfied that productivity improvements at the workplace were discussed during bargaining for the agreement²²⁶.

718. Some employers are concerned that such a requirement would also be subject to inconsistent application by the FWC, and be contingent on which member of the tribunal a proposed agreement is allocated to.
719. AMMA consultants and legal staff report that agreements which are identical or similar can be subject to different degrees of scrutiny by the FWC and in a number of instances, different members will have a different view on whether the agreement meets the better off overall test or infringes on the NES provisions.
720. Where a union opposes approval, it is able to intervene in proceedings to stop approval of the agreement or make submissions to the FWC as to whether it should be approved. The ability for a trade union to apply to be covered by an agreement or intervene in the approval process is actively facilitated by the FWC when it publishes details on its website²²⁷.
721. Why should agreements be published to allow intervention by a third party such as a trade union not involved in the making of the agreement, when the proposed agreement has already been voted by a valid majority of employees?
722. It is difficult to understand the purpose of publication in full of lodged enterprise agreements that are yet to be considered by a member of the FWC, other than to allow an opportunity for trade unions to either be covered by the agreement (which they are entitled to do under the current provisions) or to oppose the certification of the agreement.
723. AMMA recommends that registered collective enterprise agreements submitted for approval not be published until they have been approved. Individual statutory agreements should remain confidential to the parties and not be published.
724. For registered enterprise agreements and individual agreements, there should be a recognition that high-income employees and their employers should have the benefit of fast-tracking their approval.
725. AMMA suggests that for collective agreements, where all employees are high-income employees, the agreement is lodged with the industrial tribunal or FWO and

²²⁶ Fair Work Amendment (Bargaining Processes) Bill 2014, Explanatory Memorandum, p.1

²²⁷ Accessible here: <https://www.fwc.gov.au/awards-and-agreements/agreements/agreements-progress>

upon receipt of lodgement or acknowledgement the agreement commences. The agreement would be subject to audit by the FWO. This would be a similar process for registered individual statutory agreements.

RECOMMENDATIONS

Approval by the industrial tribunal

Recommendation 3.7.1

All registered agreements should be approved by the FWC (or its successor) against statutory tests and criteria before they commence.

Recommendation 3.7.2

A performance standard should see agreements approved within 28 days of lodgement and no more than 3 months in exceptional circumstances. Where an agreement will take more than 28 days there should be a requirement for employers to be kept informed on the approval process²²⁸.

Recommendation 3.7.3

The Government conduct an independent review of agreement approval 12 months after the commencement of any new system. If within the first 12 months of operation of a new scheme, agreements take longer than 28 days (on average) to be assessed, an alternative system should be considered.

Recommendation 3.7.4

Suitable arrangements be put in place to allow the commencement of employment of an employee on an individual agreement, pending approval of that agreement within 28 days of lodgement.

Fast track approval process for high income employees

Recommendation 3.7.5

For registered statutory enterprise agreements and individual statutory agreements, there should be a recognition that high-income employees and their employers should have the benefit of fast-tracked approval.

²²⁸ This is not proposed to create any new requirement on the employer to inform employees. A delay in the tribunal should not create any additional regulatory requirement on the employer.

For collective agreements, where all employees are high-income employees, the agreement is lodged with the industrial tribunal or FWO and upon receipt of lodgement or acknowledgement the agreement commences. The agreement would be subject to audit by the FWO. This would be a similar process for registered individual statutory agreements.

Publication of agreements

Recommendation 3.7.6

Collective enterprise agreements submitted for approval not be published until they have been approved. Individual statutory agreements should remain confidential to the parties at all times and not be published.

3.8. GOOD FAITH BARGAINING

*"Our employees know that any new enterprise bargaining agreements will be influenced by unions and are not sure how that is going to play out in bargaining."*²²⁹

- **Bargaining representation under the FW Act needs to be better directed towards efficient negotiations.**
- **There should be a simple and objective code of conduct for all bargaining representatives which clearly sets out expectations for the conduct of bargaining.**
- **The PC should carefully review the impact of the good faith bargaining requirements and the impact they have had on protracted bargaining and disputation and costs.**
- **Employers and employees need greater support for voluntary dispute resolution.**

INTRODUCTION

726. The existing provisions relating to bargaining appear in Part 2-4 of the FW Act.
727. Under the previous iterations of the legislation underpinning the bargaining framework, there was a general reluctance for governments to attempt to regulate the bargaining process which has commenced between employers, employees and/or their representatives.
728. Labor introduced the good faith bargaining principles from 1 July 2009 and has made legislative amendments to the bargaining landscape since that time.
729. The previous WR frameworks generally recognised that there should be no direct oversight in relation to the conduct of bargaining representatives, employers and employees with respect to bargaining for an agreement.
730. Previous iterations of the bargaining framework did recognise that aspects of bargaining which led to industrial disputation should be minimised and provisions relating to cooling off and terminating protected industrial action (or bargaining periods) should be available in certain circumstances because of the damage industrial action causes to employers, employees, markets and communities.
731. The FW Act provides a number of strategic and significant leverage points for trade unions which did not exist under previous schemes. Two of the most important aspects are the ability to coerce an employer to bargain (subject to a majority support determination issued by the FWC) and the application of good faith bargaining rules which automatically apply to the bargaining process (whether that process has commenced voluntarily or coercively).

²²⁹ AMMA Workplace Relations Research Project Survey 1, April 2010, reported by Dr Steven Kates at RMIT University.

732. These comparatively new mechanisms are in addition to otherwise available opportunities to take protected industrial action or utilise other industrial tactics that are used by some trade unions and / or employees.
733. Trade unions have developed over time a range of industrial tactics that are primarily designed to apply leverage on the employer as part of a bargaining campaign. It is probably expected that trade unions will not be divulging details to this inquiry in terms of how they approach bargaining.
734. The highly pressurised environment which can be created in bargaining, coupled with threats of or actual protected industrial action, often leads to enterprise agreements that are sub-standard and lack mutually beneficial outcomes.
735. These agreements can mature over time with further rounds of bargaining once they pass their nominal expiry dates. Unfortunately, such legacy agreements become difficult to amend, particularly where an employer needs to change cultures and work practices.
736. One large resource company reports that in bargaining with unions, significant time can be devoted to arguing about provisions unions may want to retain from historical agreements that the company does not wish to include in future agreements on the grounds of costs and operation imperatives.
737. Tactics, such as withdrawing notices to take protected industrial action at the 11th hour, are encouraged by the present legislation, cause disruption and damage to the employer and serve to alter the dynamic environment of protracted bargaining. There are a number of tactics unions use to ensure their agendas dominate to the exclusion of employers' agendas (these issues are further explored in Chapter 4 of this submission on industrial action).

WHAT THE SYSTEM NEEDS TO DELIVER

738. The system should deliver a framework that requires mutual respect and less adversarial approaches to bargaining.
739. The system should be underpinned by voluntary bargaining supported by good faith bargaining principles to guide the conduct of the parties in attempting to reach agreement. The aim should be to work towards an agreement which delivers mutual benefits to employer and employees, and to secure as many of these agreements as possible without industrial action.
740. The system should equally recognise that bargaining can reach an impasse and it is legitimate for an employer to say "no" to logs of claims and to take a clear line in bargaining negotiations to accept or not accept a claim or claims. This particularly should apply to claims that would ultimately damage the business, its employees or its future viability.
741. The system should attempt to provide as many alternative avenues for expert assistance, such as third party mediation or conciliation, outside of the confines of the tribunal. This would create more avenues for parties to resolve contentious issues

or claims, and reduce the necessity to access orders from the FWC for good faith bargaining or for unions to resort to applying for a protected action ballot order and take protected industrial action at the very earliest stages of bargaining.

HOW THE CURRENT SYSTEM IS PERFORMING

Voluntary v coercive bargaining

742. The FW Review Panel indicated that under the previous system there was no mechanism for a group of employees to require their employer to bargain collectively. Whilst that is true, it is important to note that there has never been any coercive powers to force employers to bargain prior to the introduction of the FW Act.
743. Employers dispute the conclusion of the Review Panel that *"the [former] bargaining framework did not, therefore, actively promote bargaining and agreement making"*²³⁰.
744. The existing provisions which are able to compel an employer to bargain for an enterprise agreement are contrary to longstanding features and principles that have long underpinned Australia's WR framework.
745. Requirements on employers to bargain are the antithesis to the policy goals of creating workplace arrangements which suit the needs of both the employer and the employees, either at a collective or at an individual level that are entered into on a voluntary basis.
746. Labor's FW Review Panel refers to the lack of compulsion within the previous, pre-FW Act framework as a problem identified *"because it considered collective bargaining and agreement making at the enterprise level to be beneficial for both employees and employers"*²³¹.
747. However, there was no analysis by the former Labor Government nor by the Review Panel of the costs or benefits in changing the framework from a voluntary system to a hybrid voluntary / coercive framework.
748. Whilst AMMA does not support the existing coercive elements, if they are to remain in the Act, they need greater rigour. Majority support determinations and the assessment of majority support should require an independently scrutinised secret ballot to ensure the choices expressed by employees are free and voluntary.

Default bargaining representative status

749. Current default bargaining representation rules under Division 3 of Part 2-4 of the Act allow a trade union to be the default bargaining representative without any active or deliberate appointment by an employee whose employment will be subject to a

²³⁰ PIR, p.267.

²³¹ PIR, p.267.

proposed statutory agreement. AMMA believes the rules should require some active appointment process for such employees, and that this could be implemented whilst still protecting the identity of any employees wanting union representation.

- 750. Any formally empowered representative should be appointed on the basis that they will actually assist the direct parties in the bargaining process. AMMA recommends consideration be given to a simple and objective code of conduct for bargaining representatives which reflects the norms and expectations of the community.
- 751. The active appointment would trigger the code of conduct that would apply to both the employer and the employee bargaining representative.
- 752. Employees will be free to continue to appoint a trade union to represent them in bargaining, however, an employee who is a union member will also be able to appoint a third party or themselves.

Large numbers of bargaining representatives

- 753. AMMA is aware that in some bargaining negotiations which span multiple work sites or large operations there can be large numbers of bargaining representatives (mostly employees who have self-nominated). In one instance, an AMMA member company had to deal with 79 bargaining representatives.
- 754. AMMA does not want to restrict representational rights, however, the greater the number of bargaining representatives, the higher the transaction costs and complexity of negotiations.
- 755. AMMA therefore recommends considering an upper limit for the number of bargaining representatives in relation to a proposed agreement or agreements. This could possibly be based on a sliding scale and linked to the number of employees at the site subject to a proposed agreement.

Good faith bargaining obligations

- 756. The results of the FW Act's GFB provisions from an employer perspective are mixed. Employers generally feel they already bargain in a fair and reasonable manner and do not need or are not in any way assisted by the GFB provisions introduced in 2009.
- 757. Employers are also concerned that unions often pay lip service to the requirements and conduct themselves in a manner that flies in the face of the spirit and intent of the GFB provisions.
- 758. Justice Flick in *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 described the statutory bargaining framework by referring to the exchange between Brian and the beard seller in Monty Python's "*Life of Brian*" who haggled about the price of an artificial beard. Such observations are extremely rare and the court appears to have been perplexed with the policy rationale underpinning the current GFB provisions.

759. The KPMG [research](#) AMMA commissioned for this review suggests there are transaction costs associated with the bargaining framework generally and that “*consultation with resource sector businesses suggest that the good faith bargaining principles do not appear to have lessened the protracted bargaining process*”. This reflects AMMA’s direct experience in representing resource companies in bargaining negotiations with trade unions.
760. AMMA makes the following comments and observations based on its direct experience when acting for employers in relation to the GFB provisions.

GFB imposes opaque obligations

761. The FWC has made very few good faith bargaining orders under the FW Act, making the impact of the GFB changes hard to assess. The FWC has consistently maintained that it will be slow to interfere in legitimate bargaining tactics.
762. In a recent Full Bench decision of the *Association of Professional Engineers, Scientists and Managers, Australia v Peabody Energy Australia Coal Pty Ltd* [2015] FWCFB 1451 (3 March 2015), the Full Bench overturned the primary decision of a Senior Deputy President who found that the company was entitled to take a “hard” position during bargaining and not offend the GFB principles.
763. The Full Bench reversed the original decision and in summary ordered the company to (a) meet with the union to discuss the union’s proposal and (b) put forward its own “genuine proposal” and (c) provide sensitive salary information.
764. There remains a significant tension between legitimate scope to take a hard and consistent line in bargaining and the GFB provisions. Where the line is drawn is currently unclear. Such ambiguity imposes additional costs and uncertainties on employers and should be minimised.
765. In AMMA’s experience representing companies in bargaining, it can be a lengthy process to seek and obtain orders and the outcomes are unclear.

No nexus between GFB and protected industrial action / consequences for breaching GFB uncertain

766. The statutory levers available to employers under the current bargaining regime are limited.
767. The requirements of s.228(1) are a minimum standard of conduct and at face value appear fairly anodyne. As the above *Peabody* FWC Full Bench decision suggests, they can have a significant effect when a union is successful in obtaining orders which compel conduct from the employer, despite the legislation clearly stating that an employer does not have to make an agreement nor make concessions.
768. Even when a GFB order is obtained, the time and cost to enforce the order is significant. The benefit of pursuing a breach is also uncertain in terms of how it will impact on the overall bargaining process. AMMA is still awaiting the outcome of

Federal Court proceedings in one matter to assess how the court views a possible breach of a GFB order.

769. There is also currently no statutory nexus between the requirement that a bargaining representative comply with GFB provisions and the requirement that a party is “*genuinely trying to reach agreement*” when seeking to take protected industrial action.
770. The FWC has recently held in a matter involving AMMA that the “genuinely trying” test is not a “moral” code and granted the PABO despite accepting that an employer was “rightly aggrieved” by the union’s bargaining conduct.

Nothing in the GFB framework about the nature of claims

771. Unions and employees can claim just about whatever they like irrespective of the costs of these claims and without any regard to how their claim may impact on productivity or the viability of the enterprise.
772. Despite this, employers are required to give real consideration to union proposals and explain their position even in relation to clearly excessive ambit claims.
773. Employers attempt at the earliest stage to gauge what unions are seeking, how those claims will impact current and future workplace arrangements and what the employer would like to achieve in the bargaining process.
774. To date, the GFB provisions have provided little or no assistance with this. At the very least, the lacuna that currently exists between GFB and genuinely trying to reach agreement needs to be urgently addressed and ameliorated.

RECOMMENDATIONS

External bargaining assistance

Recommendation 3.8.1

There should be greater options for employers and employees to access independent dispute resolution services. Voluntary and external bargaining assistance should be made available outside of the tribunal, including by the proposed AECAS (see Part 8 of this submission). This could include mediation, conciliation and even private arbitration of agreed claims before an appointed dispute resolution service provider.

Majority support determinations

Recommendation 3.8.2

Remove requirements that a “majority support determination” trigger compulsory bargaining. If the existing concept is retained, a majority support determination triggering compulsory bargaining must be conducted via a secret ballot at the request of the

employer, which should be performed on all occasions by an independent third party such as the Australian Electoral Commission (AEC).

Default bargaining representation

Recommendation 3.8.3

Employees and employers should have to actively appoint bargaining representatives in writing to represent them in agreement negotiations. This active appointment would trigger the code of conduct that would apply to both the employer and the employee bargaining representative (see below).

Employees could appoint a trade union, a third party or themselves to represent them in bargaining. Consideration could be given to providing an upper limit on the number of bargaining representatives based on how many employees are in an enterprise.

Current rules pertaining to default bargaining representation for employees, which deem trade unions to be automatic bargaining representatives of employees should be removed.

Code of conduct for bargaining representatives

Recommendation 3.8.4

There should be a simple and objective code of conduct for all bargaining representatives which clearly sets out expectations for the conduct of bargaining representatives.

Bargaining and genuinely trying to reach an agreement

Recommendation 3.8.5

The lack of a required nexus between the current GFB obligations and “genuinely trying to reach an agreement” provisions under the FW Act should be addressed. That is, there should not be two entirely distinct tests for those areas and there should be an established nexus.

Review good faith bargaining obligations

Recommendation 3.8.6

The PC should carefully review the impact of the good faith bargaining requirements and to what extent they have impacted on protracted bargaining, dispute and costs.

4. INDUSTRIAL ACTION AND DISPUTES

4.1. INDUSTRIAL ACTION

*"Once the economy settles down, that's when you'll have more industrial disputes I believe... It's when times get tough that you start to have issues with unions."*²³²

- **The Fair Work system should recognise that protected industrial action should only be accessed as a last resort and when good faith bargaining has been attempted and exhausted.**
- **Current rules for when industrial action can be taken should be strengthened in a number of areas.**
- **The system should recognise how important the resource industry is to the Australian economy and how industrial action can be damaging to employers, employees, third parties and Australia's overall reputation as a stable and competitive destination to invest.**

What is industrial action?

775. The existing and extensive provisions relating to industrial action appear in Part 3-3 of the FW Act²³³. That part of the FW Act covers a range of matters involving both protected and unprotected periods of industrial action by employers, employees and employee organisations. It includes detailed prescription concerning the payments for when an employee has taken industrial action and where industrial action occurs during the nominal life of an agreement.

776. Industrial action is defined in s.19 of the FW Act as follows:

"Industrial action

Meaning of industrial action

(1) Industrial action means action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

²³² AMMA WR Research Project Survey 2, October 2010, reported by Dr Steven Kates by RMIT University

²³³ Other relevant provisions are contained in Part 2-4 and Part 2-5.

(d) the lockout of employees from their employment by the employer of the employees.

Note: In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of dispute and bargaining.

(2) However, industrial action does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

(3) An employer locks out employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

Note: In this section, employee and employer have their ordinary meanings (see section 11)."

777. There are a range of requirements to be met before a bargaining representative is able to take legally protected industrial action. A key statutory requirement is that the FWC must grant a protected action ballot order under Division 8.
778. Division 6 of the FW Act contains detailed rules concerning the ability for an employer, an affected third party, the federal Minister, or a prescribed person to apply to the FWC (or in some cases, the FWC acting on its own motion) to terminate or suspend protected industrial action in a range of prescribed circumstances²³⁴.
779. Restriction on payments to employees for periods of industrial action are prescribed in Division 9. There are differential rules with respect to partial work bans and strict prohibitions on payments to (and requests from) employees during periods of unprotected industrial action.
780. Other prohibitions include persons covered by an agreement or a workplace determination from organising or engaging in industrial action before the nominal expiry date has passed. This is why the nominal duration of an agreement provides a

²³⁴ Sections 423 – 434.

certain amount of predictability and industrial stability, which is vital to the resources sector.

Why is this part of Australia's WR system?

781. The 1993 Keating reforms created a regulatory framework which allowed for the first time the legal right to take industrial action within a context of bargaining for a collective agreement.
782. The 1993 reforms sought to protect certain forms of industrial action, where engaged in for the purposes of negotiating a certified agreement. This immunity was not extended to negotiations to the making of awards and enterprise flexibility agreements. The explanatory memorandum to the IRR Bill 1993 indicates that the immunity provisions were justified on the basis that it was necessary to provide for the right to strike where the strike was related to enterprise bargaining²³⁵.
783. The immunity provisions formerly applied in the following circumstances:
- a. Negotiations related to the conditions of employment in a single business;
 - b. The bargaining period was initiated by the initiating party giving a written notice to the employer and a copy to the AIRC;
 - c. Industrial action would not be protected where it had not been preceded by a genuine attempt to resolve the dispute by negotiation;
 - d. Industrial action needed to be properly authorised by the rules of the relevant organisation.
784. The Minister's second reading speech to the Bill referred to the "*development of a more coherent framework for bargaining*" and emphasised the "*need for a fairer and more effective regime to regulate industrial action and sanctions*"²³⁶.
785. The Minister further noted in this context that "[a] right to take industrial action in the negotiations of agreements, and a distinction between the negotiation phase and the period when the agreement is in force is the norm in most OECD countries"²³⁷.
786. The policy rationale needed to be supported by legal and constitutional provisions at the time. It also required the support of the Accord partner, the ACTU.
787. The right to strike is not explicitly contained in any ILO conventions. However, it is said to arise from two ILO conventions, namely, the Freedom of Association and Protection of the Right to Organise Convention 1948 and the Right to Organise and Collective Bargaining Convention 1949. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on

²³⁵ Industrial Relations Reform Bill 1993, Explanatory Memorandum, p.61.

²³⁶ Second reading speech, IRR Bill.

²³⁷ Ibid.

Freedom of Association has interpreted these two conventions as implying a right to strike.

788. Whilst the Keating Government's reforms were said to rely on the external affairs power of the Constitution and in particular relevant ILO conventions²³⁸ which Australia duly ratified and customary international law, the Explanatory Memorandum to the IRR Bill stated that the immunity provisions were in response to criticism from the ILO's supervisory bodies such as the Committee of Experts (as distinct from the International Labour Organisation)²³⁹:

"Australia has in recent years been the subject of adverse comment made by the ILO supervisory bodies in respect of the unrestricted exposure of trade unions and their members to damages at common law for industrial action. The new sections of Division 4 of Part VIB aim to restrict that exposure in circumstances where the right to take industrial action is peculiarly in need of protection".

789. In *Victoria v Commonwealth* (1996) 187 CLR 416, the High Court found that the right to strike provisions of the IRR Act were a valid exercise of the external affairs power on the basis that they gave effect to Australia's obligations under article 8(1)(d) of the ICESCR and importantly not under the ILO Conventions or under customary international law. Legal commentators have stated that the High Court decision is important as it:²⁴⁰

"[D]emonstrates that the High Court, not the committees which oversee international treaties, is the final arbiter of Australia's treaty obligations for the purposes of domestic law. Consequently, when Australia signs an international treaty overseen by an international supervisory committee, Australia does not cede some of its sovereignty to that treaty supervisory committee."

790. Criticisms as to whether Australia's industrial action laws are consistent with ratified conventions or other international instruments are not new, particularly observations from the supervisory committees of the ILO. For example, In response to a series of questions from Senator Seiwert implying that the FW Bill 2008 was not in conformity with relevant ILO conventions or country-specific observations from the ILO supervisory bodies, the Department of Employment and Workplace Relations responded by stating that the Bill:²⁴¹

"[R]ecognises that employees have a right to take protected industrial action to support or advance claims during collective bargaining, provided it is taken

²³⁸ Section 170PA of the *Industrial Relations Act 1988* (Cth) identifies specific international law sources said to give rise to an obligation to protect the right to strike: (a) Article 8 of the International Covenant on Economic, Social and Cultural Rights; (b) the Freedom of Association and Protection of the Right to Organise Convention, 1948; (c) the Right to Organise and Collective Bargaining Convention, 1949; (d) the Constitution of the International Labor Organisation; and (e) customary international law relating to freedom of association and the right to strike.

²³⁹ Explanatory Memorandum to the Industrial Relations Reform Bill 1993 (Cth), 26 October 1993, p. 6.

²⁴⁰ The Right to Strike in Australia: International Treaty Obligations and the External Affairs Power, Dalton R, and Groom R, *Melbourne Journal of International Law*, Volume 1 [2000]: <http://www.law.unimelb.edu.au/files/dmfile/download162f1.pdf>

²⁴¹ Senate Standing Committee on Education, Employment and Workplace Relations, Questions on Notice (industry-wide bargaining), Inquiry into the Fair Work Bill 2008, Department of Employment and Workplace Relations: http://www.aph.gov.au/~media/wopapub/senate/committee/eet_ctte/completed_inquiries/2008_10/fair_work/gon/gon25_pdf.ashx

in accordance with the rules established by the Bill. Industrial action taken in support of pattern bargaining is not protected industrial action under the Bill."

791. The Howard Government's reforms in 1996 and 2005 made numerous amendments to the legislative scheme. The most notable feature was retaining a nexus to the legal immunity for taking industrial action within the context of bargaining for an enterprise agreement or an individual statutory agreement. Section 414 of the FW Act states:

"Immunity provision

(1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:

(a) personal injury; or

(b) wilful or reckless destruction of, or damage to, property; or

(c) the unlawful taking, keeping or use of property.

(2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action."

792. Industrial action taken prior to the nominal expiry date of an existing registered agreement is unlawful under s.417.
793. The FW Act retains the nexus between taking protected industrial action and the pursuit of bargaining for an enterprise agreement, and allows the taking of protected industrial action.
794. However, the FW Act also allows protected industrial action despite bargaining never having commenced. This was confirmed in *J.J. Richards & Sons Pty Ltd and Australian Mines and Metals Association Inc. v Fair Work Australian and Transport Workers' Union of Australia* [2012] FCAFC 53 (20 April 2012).
795. AMMA initiated judicial review of a FWA decision before the Full Court of the Federal Court. The Full Court dismissed the appeal against the decision of a Full Bench of FWA that a union (on behalf of employees) can be "genuinely trying to reach agreement" even where an employer refuses to bargain, without the need to obtain a majority support determination.
796. AMMA has advocated for reform to these provisions which led to the Panel in its post-implementation review (PIR) report to agree with AMMA that "we do not think this is the appropriate outcome from a policy perspective" and recommending that:²⁴²

"... Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained ..."

²⁴² PIR report, p.117.

797. The Explanatory Memorandum to the FW Bill 2008 noted that²⁴³:

"Industrial action can have a negative impact, particularly in terms of productivity. Regulations that encourage industrial action can have a negative impact on the ability of employers to operate their business and on the take home pay of employees. Bargaining participants should have the right to take protected industrial action and an employer should have a right to provide a proportionate response."

798. Whilst the EM states that the "[t]he provisions in the Bill largely retain previous rules on industrial action, with some provisions streamlined and simplified", the actual reality is that the Bill created a capacity for industrial action to occur in a wider variety of contexts and this is far from the previous rules being streamlined and simplified.

799. The core changes under the FW Act can be summarised as follows:²⁴⁴

- a. Allowing a greater number of matters to be subject to protected industrial action, including those matters that do not pertain to the relationship between employees and employers and cover extraneous matters;
- b. Allowing bargaining representatives to pursue matters that do not pertain, so long as they genuinely hold a view that they do pertain at the time they pursued them;
- c. Allowing protected industrial action to occur without bargaining formally commencing.

800. Relevant extracts from the EM:

"r.283. Protected industrial action will continue to be available only during negotiations for an enterprise agreement.

r.284. A pre-condition for taking protected industrial action will be that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place.

r.285. The requirement to hold a mandatory secret ballot authorising industrial action will be retained. However, provisions will be streamlined and simplified, impacting positively on users of the system. Further details are provided below.

r.286. The protected action provisions will also be changed so that an "unprotected" person joining protected action will be subject to orders and penalties, but the action and its protected participants will not. This change will address any actual or perceived inequities in the current arrangements.

r.287. These requirements are aimed at ensuring that industrial action is only taken during genuine bargaining and not for spurious reasons. This is consistent with minimising the economic impact of industrial action."

²⁴³ Explanatory Memorandum, Fair Work Bill 2008, p.vi.

²⁴⁴ Ibid.

[...]

"1629. It is intended that industrial action that is organised or taken in the context of legitimate collective bargaining and meets certain prerequisites is permissible and therefore protected action.

1630. The current WR Act regulates industrial action and allows for protected action to be taken during a bargaining period so long as certain requirements are met. Although the Bill no longer contains the concept of a bargaining period, protected industrial action is only available during bargaining for an enterprise agreement."

801. The EM to the FW Bill explains the deliberate policy decision to expand the types of content which can be included in an enterprise agreement and therefore be subject to protected industrial action as follows:²⁴⁵

"The proposed workplace relations framework expands what matters an enterprise agreement can be made about to one or more of the following:

(a) matters pertaining to the relationship between the employer or employers that will be covered by the agreement and the employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from salary for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate."

802. The EM also states that a person who reasonably believes they are pursuing claims about permitted matters may still be deemed to be genuinely trying to reach agreement:²⁴⁶

Clause 409 – Employee claim action

1640. The first element of employee claim action is that it is organised or engaged in for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement that are about, or are reasonably believed to be about, permitted matters (paragraph 409(1)(a)).

1641. An enterprise agreement may only contain terms that are either required under this Bill or that are about permitted matters. (The description of clause 172 discusses relevant case law and lists examples of the types of matters are that intended to be permitted matters for enterprise agreements). In most cases, it is clear that particular claims are about permitted matters. 1642. In limited cases it is not so clear. However, industrial action is protected

²⁴⁵ Ibid, p. xxxv.

²⁴⁶ Ibid, p.259.

if – at the time of the action – the person reasonably believes they are pursuing claims about permitted matters (paragraph 409(1)(a)). What constitutes a ‘reasonable belief’ depends on the circumstances of the case and the person concerned. For example, a tribunal would expect an official of an employee organisation with extensive experience in enterprise bargaining to have a greater appreciation of the limits of the permitted matters than a novice employee bargaining representative who has been appointed by his or her colleagues to represent them in bargaining with the employer.

1643. Another factor that is relevant to the question of reasonable belief is whether the employer attempted to advise its employees or its bargaining representatives that they were pursuing claims about non-permitted matters. If the employer did so and the industrial action proceeded nonetheless, then it is much more likely that it would not be found to be protected.”

- 803. This has injected a certain degree of uncertainty in the bargaining process and when industrial action may or may not be protected before the FWC.
- 804. Chapter 3.6 on Agreement content provides greater detail about agreement content.

What the system needs to deliver

- 805. The system should minimise to the extent possible the possibility of employees resorting to forms of industrial action in prosecution or defence of their claims. Threats of industrial action and the taking of industrial action dramatically change the bargaining dynamic into an unavoidable adversarial contest. There appears to be longstanding bi-partisan acceptance that industrial action, in whatever form, is antithetical to harmonious, productive and co-operative workplace relationships and should be avoided to the extent possible.
- 806. AMMA recognises that not all bargaining ultimately ends up with periods of industrial action to apply pressure on an employer to agree to some or all union claims.
- 807. Moreover, many resource sector companies have enjoyed stable workplace arrangements, even with a unionised or partially unionised workforce. It is the approach of trade union leaders and officials which largely brings to bare whether there will be industrial action and to what extent they will use this leverage to force companies to capitulate to bargaining claims.
- 808. However, it remains a fact that industrial action which has either been threatened or taken in pursuit of higher wages and conditions claims has negatively impacted Australia as a reputable destination to invest and do business.
- 809. Instances of unlawful industrial action have unfortunately been a feature in a number of large resource projects with little net gain to the employees involved. There are often long delays in legal proceedings when employees or unions are involved in unlawful industrial action. For example, it took over five years after wildcat strike

action occurred on a resources project for a Federal Court to hand down penalties against 117 workers²⁴⁷.

810. There needs to be recalibration of the way in which bargaining representatives on behalf of union members are able to take protected industrial action, the extent of that industrial action, and where public interest considerations should apply in limiting protected action.
811. Moreover, there should be a recognition that certain employees possess (i.e. high income earners) a high degree of bargaining power than other employees which should ameliorate their reliance on using protected industrial action to obtain greater wages and conditions.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

812. AMMA has been concerned that the current system has provided the legal leverage for trade unions which is antithetical to creating productive, sustainable, flexible workplaces in the resources industry.
813. The current framework allows protected industrial action to be used strategically and tactically in order for a union to achieve its goals. This not only has implications for the employers and its employees, but also has flow-on implications for third parties.
814. Threatened or actual industrial action can adversely impact other companies and their workforce when they are affected by strike action.
815. The content which unions seek to be included in enterprise agreements and under the leverage of protected industrial action can have longer-term impacts. For example, unions routinely pursue "pattern" clauses in enterprise agreements which are aimed at restricting the legitimate use of independent contractors or labour hire²⁴⁸. Independent contractors, often small business owners in their own right, are denied opportunities because of the inclusion of clauses in enterprise agreements.
816. The EM to the FW Bill 2008 states that clauses "*which are intended to be within the scope of permitted matters*" under s.172(1)(a) includes:²⁴⁹

"- terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement;"

817. However, terms "*which are not within the scope of permitted matters for the purpose of paragraph 172(1)(a)*" include:²⁵⁰

²⁴⁷ Director of the Fair Work Building Industry Inspectorate v Abbott (No 6) [2013] FCA 942.

²⁴⁸ For example, see the ACTU Fair Work Bargaining Guide, Version 2.2 (11 March 2011): http://www.gcu.asn.au/index.php/component/docman/doc_download/411-actu-bargaining-kit.

²⁴⁹ Explanatory Memorandum, Fair Work Bill 2008, p.108.

²⁵⁰ Ibid.

"- terms that would contain a general prohibition on the employer engaging labour hire employees or contractors;

- terms that would contain a general prohibition on the employer employing casual employees;"

818. This is a rather artificial distinction as trade unions ensure their provisions are permitted under the content rules in order that their main objectives are met to reduce the incentives for a company to engage a third party labour source.

819. There is no policy rationale provided by the FW extraneous materials, nor the PIR, as to why employers should must bargain with the union, under pain of protected industrial action, over particular claims which are not in the employer's short to longer term interests.

820. Whilst employers recognise that employees may legitimately seek more beneficial terms and conditions in their workplace, there is no cost/benefit analysis of certain claims that are pursued by unions, nor the effect that they have on employees, employers and third parties.

821. A union strategy is to engage in bargaining campaigns with the aim of creating evolving "industry standards". Technical rules on what can or cannot be included in an agreement is important and policy settings need to be mindful of the strategies and tactics that are used by trade unions in pursuing their industrial objectives. Whilst there may be some costs associated with increasing the rules around permitted content, the benefits would outweigh the costs when considered against the restrictive and anti-competitive types of clauses unions routinely seek.

822. The FW Act post-implementation review concluded that there should be no changes to s.172 of the FW Act. The Panel referred to concerns raised by AMMA and other organisations over the relaxation of previous provisions which prohibited certain subject matters/clauses as follows, such as contractor clauses and stated:²⁵¹

"It is true that inclusion of such matters in agreements represents a change from the Work Choices period. However, it also largely represents a return to agreement content rules that developed over more than a century."

823. This is despite the Panel also accepting that the *"capacity to reach agreement over a wider range of matters may lengthen the bargaining process in circumstances where the parties are unable to agree over these additional matters"*²⁵². Previous concepts such as prohibited content were designed to ensure that only claims which could be included in an agreement and which could be pursued through protected industrial action was confined to the employment relationship between an employer and an employee.

824. This is to be contrasted with minimum wages and conditions which are generally focused on certain subject matter pertaining to the employment relationship. For example, content rules for modern awards include: remuneration, allowances,

²⁵¹ PIR, p.159.

²⁵² Ibid.

loading, superannuation payments/funds, rosters, hours of work. The National Employment Standards provide for minimum wages, redundancy payments, paid and unpaid leave, requests for flexible work arrangements and consultation, representation and dispute resolution.

825. This contrasts with the extension of matters which can be subject to bargaining and protected industrial action.
826. Whilst the FW Act Review Panel observed that matters which may or may not be included in an enterprise agreement was *"hotly disputed"* in submissions and in the media, the *"matters pertaining formulation ... accords a fair balance between the prerogative of management to manage and the reasonable desires of employees to jointly govern their terms and conditions of employment"*²⁵³.
827. There is an implicit assumption in the review panel's observations that individual or collective employee wishes and a trade union's wishes were synonymous and interchangeable.
828. In AMMA's experience representing companies in bargaining with a union (and non-union bargaining representatives) and feedback by resource industry companies involved in bargaining, the quality of the representativeness and reflection of union members is extremely heterogeneous.
829. Even in a high unionised workforce environment, there are many instances where an employee or group of employees do not agree with a trade union's agenda, strategy or particular claims.
830. Union solidarity effectively means that many individuals do not express their views for fear of reprisals or retaliations. There is also a problem of information asymmetry for employees who are members of unions where employees are not in bargaining meetings and it is never truly known the type of information which the trade union is providing their members in the workplace.

No nexus to GFB requirements / matters pertaining

831. The resource industry is concerned that a recent Full Bench led by FWC President Ross has established two precedents which will create the capacity for unions to pursue protected industrial action in circumstances where they may not have been bargaining in good faith and/or were seeking non-permitted content.
832. The Full Bench in the matter involving resource company Esso Australia has indicated that *"while there is a relationship between the good faith bargaining requirements and the concept of genuinely trying to reach an agreement, it would be wrong to conflate these terms. A party may not meet a particular good faith bargaining requirement but may nevertheless be genuinely trying to reach an agreement"*²⁵⁴. AMMA believes this nexus should be made explicit. It is incongruent that a party may

²⁵³ Ibid.

²⁵⁴ *Esso Australia P/L v AMWU; CEPU; AWU* [2015] FWCFB 210 (10 February 2015), at [18].

not be bargaining in good faith, yet be found by the FWC to be genuinely trying to reach agreement.

833. It is difficult to reconcile this view when considered against the legislative policy intent. The EM to the FW Bill 2008 states that:²⁵⁵

"Specified persons organising or engaging in industrial action must be genuinely trying to reach an agreement (subclause 413(3)). The question whether a person is genuinely trying to reach an agreement requires a subjective assessment of the actual intention of the person and the overall circumstances. It is not limited to an assessment of whether the person is complying with the good faith bargaining requirements." (emphasis added).

834. Moreover, the Full Bench accepted that the proposed clauses advanced by the unions were in its own words "not-permitted" based on previous judicial authority:

"[71] As to the proposed clause headed 'Use of Contractors' (see paragraph [19] above) we accept the appellant's submission that paragraphs 1, 2, and 3 (and probably 5) of the proposed clause are about non-permitted matters."

Limited options to prevent protected industrial action

835. In a matter involving current bargaining between negotiations between a vessel operator and the MUA, the FWC in rejecting the application by the company to stop threatened protected industrial action concluded his decision as follows:²⁵⁶

"[63] Of course if any resulting industrial action endangers the life, the personal safety or health, or the welfare, of the population or of part of it; or is likely to cause significant damage to the Australian economy or an important part of it, there may be other remedies available to Farstad. Short of that, the Commission should respect the role of the legislature in prescribing industrial behaviour which, under the FW Act, allows (arguably encourages) parties engaged in bargaining to engage in the 'rude and barbarous process of strike and lockout', where force displaces reason."

836. There remains limited capacity to terminate protected industrial action even when it can result in significantly high costs to innocent third parties.
837. For example, in *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360; [2010] FWA 6021, Woodside Burrup Pty Ltd applied to the FWC under s.426 as a third party experiencing significant harm as a result of strike action taken against a contractor.
838. Woodside indicated that the cost for each day of potential strike action would be in the realm of \$3.5 million. The FWC indicated in its decision that substantial losses that Woodside was exposed to as a result of losses caused by delay were not "significant" when considered in the context of the project as a whole to warrant suspension of protected industrial action. This has set such a high bar to companies who feel they

²⁵⁵ Explanatory Memorandum, Fair Work Bill 2008, p.262.

²⁵⁶ *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia* [2014] FWC 8136 (17 November 2014).

need to experience extreme circumstances to meet the threshold of significant harm. AMMA is concerned that the bar is set so high that few companies would be able to sustain such losses and would not be able to apply to the FWC for relief. AMMA recommends that the current thresholds be modified so that the currently ridiculously high bar is set at a level that would meet community expectations for "significant harm" rather than the subjective notions applied by the FWC.

839. AMMA's commissioned research by KPMG provides two illustrative case studies on how damaging actual or potential protected industrial action can be to a company and affected third parties (that research accompanies this submission). Third parties not only include other companies within the supply chain, but also federal and state governments and the public (i.e. through loss to consolidated revenue and related royalties)²⁵⁷.
840. AMMA members have indicated to KPMG that there are a number of reforms that could be made to the current provisions to reduce the level of industrial action and associated costs. These specific reform options include:
- a. Limiting the claims that can be subject to protected industrial action to those of the employer-employee relationship;
 - b. The ability for the tribunal to alter authorised protected industrial action and limit forms of industrial action that would be contrary to the public interest once a declaration of the results is published and upon the application by the employer;
 - c. Protected action ballot forms should require greater precision of the type and duration of specific industrial action. The ability to take unlimited forms of industrial action and/or industrial action for an indefinite duration should be modified. There should be consideration of a maximum number and duration of specific forms of industrial action to provide greater certainty to employers to prepare for industrial action when provided notice;
 - d. A consideration of a high-income threshold applying to employees. Clearly, certain employees possess more bargaining power than other employees. This is already recognised within the current provisions of the FW Act (i.e. ability to enter a high income guarantee and step off the modern award).
841. A high income threshold for protected industrial action is consistent with what the former Labor Opposition indicated in a Joint Media release accompanying the release of the *Forward with Fairness – Policy Implementation Plan* in 2007, indicating that:²⁵⁸

"Australia's dynamic economy demands a level of flexibility between high earning employees and their employers."

²⁵⁷ KPMG Workplace Relations and the Competitiveness of the Australian Resources Sector, 11 March 2015, p.112.

²⁵⁸ Joint Media Release, K Rudd MP, J Gillard MP, Forward with Fairness – Policy Implementation Plan, 28 August 2007.

Workers earning \$100,000 or more per annum should be given the flexibility to negotiate their own employment arrangements.

This is a common sense approach which ensures workers with the most bargaining power are given the option to bargain with their employer".

842. The second RMIT Research Survey commissioned by AMMA indicated strong support for high income employees to be excluded from participating in protected industrial action with 65% of respondents agreeing with the proposition that it should be linked to the high income threshold for unfair dismissals.²⁵⁹
843. Whilst AMMA expects that there will predictably be strong opposition from trade unions about reform options which limits the capacity to take industrial action, it is in the national interest, as well as the interests of employees and employers, that industrial action only occur in the rarest of circumstances and when bargaining in good faith has been exhausted. As stated in the ALP's Forward with Fairness Policy – Policy Implementation Plan states:²⁶⁰

"Labor believes that industrial disputes are serious. They hurt workers, they hurt businesses, they can hurt families and communities, and they certainly hurt the economy".

Fair Work Amendment (Bargaining Processes) Bill 2014

844. AMMA has provided a written submission to the Australian Government's FW Amendment (Bargaining Processes) Bill 2014 and refers the PC to the detail and contents of that submission. In summary, AMMA supports the bill and believes it will assist with the bargaining process and with ensuring that protected industrial action is taken as a last resort.
845. The tribunal should not authorise protected industrial action if the bargaining claims are manifestly excessive, having regard to the conditions at the workplace/relevant industry or would have a significant adverse impact on productivity at the workplace in line with the Australian Government's FW Amendment (Bargaining Processes) Bill 2014.
846. The current requirement on a bargaining representative to show that it is "genuinely trying to reach agreement" with an employer should be amended to reflect the principles outlined in *Total Maritime Services P/L v Maritime Union of Australia* [2009] FWAFB 368 in line with the Australian Government's FW Amendment (Bargaining Processes) Bill 2014.

Fair Work Amendment (Protected Industrial Action) Regulation 2014

847. AMMA strongly supports the Australian Government's regulation which was subject to a failed disallowance motion in the Senate.

²⁵⁹ Second report RMIT Research Survey.

²⁶⁰ FWF – Implementation Plan, p.21.

848. The regulation attempts to address a gap within the existing provisions concerning the ability of a third party affected by strike action to apply to the FWC.
849. Subsection 424(1) of the Act provides that the FWC must make an order to suspend or terminate protected industrial action that is being engaged in, or is threatened, impending or probable, if it is satisfied that the protected industrial action has threatened, is threatening or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it.
850. Following threatened strike action in Port Hedland in early 2014 by the MUA, the Australian Government promulgated regulations to ensure affected third parties, which appeared precluded from applying to the FWC could do so. This was particularly relevant to a number of resource companies that relies on the single port to export commodities overseas such as iron ore. It was estimated that the cost to suppliers who ship out of Port Hedland was approximately \$100 million a day²⁶¹.
851. The following extract outlines the potential threat of a strike which concerned 45 workers on third party companies and Commonwealth/Western Australian Governments²⁶²:

Fortescue Metals Group has threatened to stand down workers if a threatened tugboat strike at Port Hedland goes ahead, as tensions and rhetoric mount over industrial action that could cost hundreds of millions of dollars.

Following BHP Billiton flagging this week that it may use national interest laws to ask the government to prevent the strike, FMG said it would also use the Fair Work Act to intervene.

Tugboat deckhand members of the Maritime Workers Union (MUA) voted to take industrial action last week after failing to reach an agreement with Teekay Shipping.

MUA WA Assistant Branch Secretary Will Tracey says the deckhands are not paid enough, getting only 62 per cent of the \$220,000 that a skipper receives compared to 70 per cent at other Australian ports.

Fortescue chief executive Nev Power said the industrial action would threaten the livelihoods of thousands of Australians and cost millions of dollars in lost government royalties and tax revenues that will put pressure on health, education and emergency services.

"Fortescue employs more than 8000 people, including 1000 Aboriginal people at its operations," he said.

"In the event of a strike, Fortescue will be forced to consider standing down its operations and the associated workforces for indefinite periods of time.

Mr Power said there was something wrong with industrial relations laws.

"There is something wrong with our industrial relations laws when a small group of 45 people wanted to only work 22 weeks a year and be paid a base rate about three times the base wage of a first year nurse in the Victorian health system can hold to ransom an industry that generates more export earnings than any other and is relied upon for significant revenues to state and federal governments," he said.

A strike would mean lost sales for BHP, Fortescue and Atlas Iron that are already under pressure with iron ore prices slumping to 20-month lows and below \$US100 a tonne.

²⁶¹ <http://www.abc.net.au/news/2014-05-12/port-hedland-tug-boat-workers-vote-for-action-teekay-shipping-wa/5447214>

²⁶² FMG threatens jobs over tug strike, Stuart McKinnon and AAP, May 22, 2014.

Mr Tracey said the MUA was happy to meet the employer halfway, so deckhands in Port Hedland were paid 67 per cent of the wage of a skipper.

"We are also asking that deckhands be compensated for receiving no annual leave," he said.

"Currently, deckhands work six swings of 28 days, working 12 hours a day. This equates to almost 54 weeks for an ordinary office worker at BHP, working a standard five day and 37.5 hour week. The difference at the moment is that the office worker gets four weeks paid annual leave, and the tugboat deckhands do not."

Yesterday, BHP iron ore boss Jimmy Wilson warned the strike would stop all shipments out of the port and cost exporters like it, Fortescue Metals Group and Atlas Iron about \$100 million a day.

"In addition, the State and Federal Government stand to lose tens of millions of dollars a day in royalties and corporate tax revenue," he said.

852. As indicated above, the potential strike had the capacity to threaten not only innocent third parties and their workforces but also the state of Western Australia given the potential royalties which would be forgone had the strike impacted suppliers using the Port.
853. Subsection 424(2) of the FW Act provides that the FWC may make the order to suspend or terminate protected industrial action on its own initiative or on application by a bargaining representative for the proposed agreement, the Minister, or the WR Minister of a referring State or of a Territory if the industrial action is being engaged in, or is threatened, impending or probable in that State or Territory.
854. Subsection 424(2) of the Act did not enable a Minister responsible for workplace relations matters in a State that is not a referring State as defined in section 30B or 30L of the Act to make an application to the FWC to suspend or terminate protected industrial action. Unlike applications to suspend protected industrial action under s.426 (which does not apply in relation to threatened protected industrial action), s.424(2) also did not enable applications from third parties that are directly affected by protected industrial action for a proposed enterprise agreement.
855. The FW Amendment (Protected Industrial Action) Regulation 2014 (the Amending Regulation) prescribed for the purpose of subparagraph 424(2)(b)(iii) of the Act the Minister responsible for WR matters in a State that is not a referring State as defined in section 30B or 30L of the Act if the industrial action is being engaged in, threatened, impending or probable in that State. The Amending Regulation also prescribed a person directly affected, or who would be directly affected by the industrial action other than an employee who will be covered by the agreement.
856. AMMA therefore supports the retention of this common sense regulation.

Other matters – strike pay

857. AMMA supports the longstanding provisions which prohibit an employer paying and an employee asking to be paid for periods of unprotected industrial action. AMMA also supports the current provisions regarding protected industrial action, however, the PC should consider the current complexity surrounding partial work bans and whether amendments should be made to these provisions as it is currently extremely

difficult for employers to know how much to deduct for partial work bans by employees, even with teams of lawyers advising them.

RECOMMENDATIONS

Limit protected industrial action to the direct employment relationship

Recommendation 4.1.1

Limiting the claims that can be subject to protected industrial action to those of the employer-employee relationship.

No protected industrial action if contrary to the public interest

Recommendation 4.1.2

Requiring a new test which would require a bargaining representative seeking a protected action ballot order to demonstrate that the industrial action is not contrary to the public interest. This should allow a potentially affected direct or third party the opportunity to make submissions as to whether they are affected by potential industrial action and to what extent before a protected action ballot order is made.

More certainty around duration of forms of authorised industrial action

Recommendation 4.1.3

Protected action ballot forms should require greater precision of the type and duration of specific industrial action. The ability to take unlimited forms of industrial action for an indefinite duration should be changed. There should be consideration of a maximum number and duration of specific forms of industrial action to provide greater certainty to employers.

Genuinely trying to reach agreement further defined and expanded

Recommendation 4.1.4

The current requirement on a bargaining representative to show that it is “*genuinely trying to reach agreement*” with an employer should be amended to reflect the principles outlined in *Total Maritime Services P/L v Maritime Union of Australia* [2009] FWAFB 368 in line with the Australian Government’s FW Amendment (Bargaining Processes) Bill 2014.

Moreover, the requirements that a bargaining representative is genuinely trying to reach agreement should also require clear demonstration that a bargaining representative has met all good faith bargaining requirements.

No protected industrial action if claims excessive

Recommendation 4.1.5

The tribunal should not authorise protected industrial action if the bargaining claims are manifestly excessive, having regard to the conditions at the workplace/relevant industry or would have a significant adverse impact on productivity at the workplace in line with the Australian Government's FW Amendment (Bargaining Processes) Bill 2014.

High income exemption for taking protected industrial action

Recommendation 4.1.6

There should be an exemption for high income employees from taking protected industrial action given the bargaining power they inherently possess over other employees. This threshold could be set at the current high income unfair dismissal threshold of \$133,000.

4.2. DISPUTE RESOLUTION

"People are seeking advice from the union before talking to their employer about their issue or concerns. I think most things can be worked out between the employer and employee if we have the opportunity to sit down and talk without third-party influence."²⁶³

- **Workplace disputes and grievances have the ability to escalate and can be a drain on workplace morale and productivity.**
- **Greater options should be available to users of the system and parties to the employment relationship to assist in resolving all forms of workplace-based disputes.**
- **The system should encourage most disputes to be resolved at the workplace level with escalation to the tribunal and courts according to the threat of the harm to the direct parties or affected third parties.**
- **Parties to the direct employment relationship should have flexibility in determining who should assist with the prevention or resolution of a dispute and which methods will be used to assist in resolving a dispute.**
- **The Australian Employment Conciliation and Arbitration Service (AECAS) as proposed by AMMA could play a key role in being a centre for excellence in the provision of independent and impartial alternative dispute resolution services.**

INTRODUCTION

858. Under the FW Act, there are a range of mechanisms that involve the resolution of a dispute either arising from a minimum standard, an enterprise agreement, or another workplace right. The existing provisions relating to dispute resolution appears in Part 6-2 of the FW Act²⁶⁴.

859. Section 3 sets out the objects of the FW Act and specifically refers to providing accessible and effective procedures to resolve grievances and disputes. This is expressed in s.3(e) as follows:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

...

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and

²⁶³ AMMA member responding to survey in the AMMA Workplace Relations Research Project Survey 2, October 2010, reported by Dr Steven Kates from RMIT University

²⁶⁴ Other parts of the Fair Work Act 2009 also deal with dispute resolution, such as Part 3-4 (Right of Entry) and Part 2-4 (Bargaining disputes).

the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;"

860. The FWC remains as a creature of statute and is only able to act with the powers afforded to it by the Parliament.
861. Powers of the FWC to deal with disputes are provided in [s.595](#). It includes exercising the powers of mediation, conciliation, expressing an opinion or making a recommendation. The FWC can only arbitrate by consent of the parties²⁶⁵.
862. Section 186(6) of the FW Act requires agreements to contain a term which provides a procedure that “requires or allows” the FWC, or another independent third party, to “settle disputes” about matters arising under the agreement or the National Employment Standards.
863. For an enterprise agreement to be approved and meet all of the compliance requirements of the FW Act, it is mandatory for an agreement to contain a dispute settlement procedure. The parties are not compelled nor required to provide recourse to the FWC to determine disputes arising from an agreement. Nor are they required to mandate the form of resolution of a dispute arising from an agreement (i.e. they do not need to specify that resolution requires arbitration)²⁶⁶.
864. The FWC also has a specific role in relation to facilitating bargaining and can provide assistance under Part 2-4 of the Act. Section 240 allows a mechanism for parties to request the FWC to assist in resolving bargaining disputes.
865. Other elements of dispute resolution are more coercive and adversarial. For example, a bargaining representative may apply to the FWC for a bargaining order in relation to the agreement if the bargaining representative has concerns that:
- One or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements;
 - The bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.
866. There are other provisions which require the FWC to arbitrate and make a “workplace determination” in the context of disputes between bargaining representatives, employees and employers. Currently, the powers of the FWC to exercise compulsory arbitration powers can occur when:
- There has been a serious and sustained breach of a bargaining order;
 - There is a low-paid authorisation in operation in relation to a proposed multi-enterprise agreement and one or more bargaining representatives are unable to reach agreement;

²⁶⁵ Re Woolworths [2010] FWAFB 1464.

²⁶⁶ This was confirmed by a Full Bench of the Fair Work Australia in appeal Re Woolworths [2010] FWAFB 1464.

- c. Protected industrial action has been terminated due to:
 - i. the potential for significant economic harm to any employer or employee;
 - ii. the potential for endangerment to the life, personal safety, health, or welfare of the population or part of it;
 - iii. the potential for significant damage to the Australian economy or an important part of it.

867. Other disputes concern individual rights avenues such as unfair dismissal, adverse action (involving terminations) and workplace bullying.

Why is this part of Australia's WR system?

868. Since the *Conciliation and Arbitration Act 1904* (Cth), the foundational underpinnings of Australia's WR system has been focused on conciliation and where disputes have not been able to be resolved between employers, employees and/or trade unions, by compulsory arbitration. The focus of the system has generally been dominated by collective-based disputes, as opposed to individual based disputes.

869. The current provisions generally reflect the evolution of the system commencing with the reforms in 1993 to move away from conciliation and arbitration to a collective bargaining system. Whilst the current framework retains an ability to assist with the resolution of both collective disputes and individual disputes, there are far more statutory causes of action which allow individuals to litigate, which means that a majority of matters that the FWC is dealing with involve individual disputes.

What the system needs to deliver

870. The system should focus on encouraging, to the extent possible, the resolution of disputes at a workplace level. Where a matter is unable to be resolved between the direct parties to the employment relationship, then there should be avenues for dispute resolution.

871. The system generally emphasises resolution of disputes by accessing (in some cases, mandatorily) the FWC or the FW Divisions of the Federal Court or Federal Circuit Court.

872. The system should allow a greater opportunity for parties to disputes to obtain expert third party assistance from other alternative dispute resolution (ADR) service providers.

873. AMMA's Chapter 8 on Institutions provides details on recommended structural changes to the current framework.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

Alternative dispute resolution options

874. The FW Act review panel's report recommended the FW Act be amended to allow the FWC to intervene on its own motion in bargaining disputes. The panel in its report stated:²⁶⁷

"Although we are reluctant to expand compulsory arbitration, we consider that FWC can play a more proactive role in bargaining disputes to the benefit of both employees and employers."

875. The panel recommended that the "FW Act be amended to include a new provision after s.240 which expressly empowers FWA to intervene on its own motion where it considers that conciliation could assist in resolving a bargaining dispute, including in respect of a greenfield agreement"²⁶⁸.

876. AMMA strongly opposes an own motion power, however described. This would be turning back the clock and returning to the days of compulsory conciliation and arbitration. AMMA suspects that unions will raise this in submissions to the PC and call for compulsory powers of arbitration for a range of matters. The PC should be cautious and carefully consider the lack of evidence that such powers are warranted.

877. The review panel in its report noted that FWC president Justice Ross intended to develop "a broader agenda to more actively engage with industry sectors, and that it draws in part on the activities of the United Kingdom's Advisory Conciliation and Arbitration Service"²⁶⁹. Whilst supporting this notion, the panel also indicated that "[t]his aspect of FWA's operations should be clearly distinguishable from its other functions so as to avoid necessary confusion".²⁷⁰

878. AMMA strongly supports a separation of the functions of different institutional bodies, with clearly delineated lines of statutory responsibility, accountability and expertise.

879. It must be recalled the original conception of the former Rudd Government when in Opposition was to establish a "one-stop-shop" called FWA. Labor's "Forward with Fairness" policy outlined its one-stop-shop as follows:²⁷¹

"Fair Work Australia will provide a 'one stop shop', to provide practical information, advice and assistance, to settle grievances and ensure compliance with Labor's workplace laws.

Fair Work Australia will be accessible to all Australian employers and employees. There will be offices in suburbs and regional centres and workplace visits will be available to provide further convenience. There will no longer be a need to contact different helplines and deal with separate

²⁶⁷ PIR, p.149.

²⁶⁸ Ibid.

²⁶⁹ PIR, p.251.

²⁷⁰ Ibid.

²⁷¹ ALP, Forward with Fairness, p.17.

agencies about workplace matters. Fair Work Australia will be responsible for a range of functions, including:

- assisting parties to resolve workplace grievances;
- resolving unfair and unlawful dismissal claims;
- facilitating collective bargaining and enforcing good faith bargaining;
- reviewing and approving collective agreements;
- adjusting minimum wages and award conditions;
- monitoring compliance with and ensuring the application of workplace laws, awards and agreements; and
- regulating registered industrial organisations. Fair Work Australia will also conduct inquiries and may recommend adjustment to Labor's national employment standards.

...

Fair Work Australia's inspectorate will have specialist divisions that can focus on persistent or pervasive unlawful behaviour in particular industries or sectors. The first divisions established will be for the building industry and hospitality industry.

The inspectorate will be empowered to work with other relevant law enforcement agencies including State and Territory health and safety authorities, police, the Australian Tax Office, or the Australian Competition and Consumer Commission.

Fair Work Australia will include a separate division with jurisdiction to hear and determine unlawful dismissal claims, matters relating to Labor's minimum entitlements and freedom of association.

Whenever decisions involve the exercise of judicial power they will be the responsibility of a separate, independent, division of Fair Work Australia created to incorporate the independence and safeguards required by the Australian Constitution. The division would be staffed by Federal judicial officers appointed in accordance with the Constitution."

880. Labor's proposal for a monolithic structure with different components was said to be in accordance with the Australian Constitution and its separation of powers requirements. Whilst the policy was not implemented in full, there are now three separate and distinct institutions:
- a. The FWO.
 - b. The FWC (originally Fair Work Australia).
 - c. FW Divisions of the Federal Court and Federal Circuit Court.

881. Each of the above plays a role in relation to dispute resolution. However, there is clearly a need for a separate and independent body to deal with dispute resolution generally, modelled on the UK's ACAS.
882. AMMA supports alternative pathways to dispute resolution to those which currently exist. Currently, there is limited choices and options for employers and employees to ask for truly independent advice, assistance and different forms of dispute resolution.
883. Many members of the tribunal do not have the background, skills and knowledge of the resource industry to assist them in resolving complex industrial disputes.
884. There is also a perceived lack of genuine independence when matters are adjudicated by the tribunal and also required to be conciliated before the same tribunal. Resource sector companies have indicated that many FWC members do not have an understanding of the complexities of running large scope operations and do not have any direct or indirect experience in business.
885. Conciliation, mediation or alternative dispute resolution should be provided by independent experts. This is the model that has been successfully utilised in the UK and should be considered domestically.
886. Information provided by ACAS on how they assist employers, employees and trade unions in the UK with respect to collective and individual disputes can be found below²⁷².

Resolving workplace disputes

Many issues which may lead to disputes can be resolved informally in the workplace between the individual and their immediate line manager. Issues are best dealt with as early as possible.

Internal procedures should be in place to deal with more difficult cases, and ACAS can provide you with advice about model policies and procedures to help you avoid difficulties. Contact our Helpline on 0300 123 1100 or see our Advice A-Z for more information.

But where issues turn into problems, ACAS provides independent and impartial services to resolve disputes and build effective productive working relationships. We can provide advisory mediation, conciliation and arbitration in collective cases, and can conciliate in matters impacting on individual statutory rights.

Collective disputes is where ACAS (an independent third party) facilitates talks to help resolve disputes between representative groups (usually trade unions) and employers. It is always best to involve ACAS at the earliest stage, before parties become entrenched in their views. ACAS's role is not to direct either party on what to do; but to help them develop options and solutions to resolve the dispute.

Individual Conciliation is where ACAS provides conciliation in cases which could result in a claim to an employment tribunal about an alleged infringement of an

²⁷² <http://www.acas.org.uk/index.aspx?articleid=1697>

individual's statutory employment rights. Since April 2014, anybody intending to lodge an Employment Tribunal claim must first notify ACAS, and we will try to help using Early Conciliation. Reaching a settlement through conciliation is quicker, cheaper and less stressful for all concerned than a tribunal hearing.

In both collective and individual conciliation, the process is voluntary, confidential and both parties must agree to the process. It involves an ACAS conciliator discussing the issues with both parties in order to help them reach a better understanding of each other's positions and underlying interests. And it encourages them to come to an agreement between themselves.

887. AMMA believes there must be greater choice in dispute resolution than is currently provided and the creation of a new body modelled on the UK's ACAS model may increase the potential for disputes to be resolved at an earlier stage and reduce the cost and time associated with matters before the FWC.
888. Public trust and confidence in institutions is vital and employers in the resource industry would have confidence that dispute resolution provided by an impartial agency, not in any way connected with the FWC nor the FWO, would assist in allowing parties to individual or collective disputes a more efficient, cost-effective and informal way of assisting to resolve disputes currently dealt with under the FW Act.

RECOMMENDATIONS

Alternative dispute resolution providers

Recommendation 4.2.1

There should be greater choice in the ability of users of the system to obtain professional expert assistance from other alternative dispute resolution providers such as a new body AMMA is recommending be created called the Australian Employment Conciliation and Arbitration Service (AECAS).

Disputes arising from an agreement

Recommendation 4.2.2

The legislation should allow parties to choose an alternative dispute resolution provider, which could be the industrial tribunal or another provider to assist parties resolve disputes about an agreement.

No compulsory arbitration powers

Recommendation 4.2.3

The PC should not accept calls to create new forms of compulsory arbitration over individual or collective disputes.

Model dispute resolution clauseRecommendation 4.2.4

A new model dispute resolution clause should be developed which parties can include in registered agreements. Best practice guides should be developed to assist parties in resolving disputes.

Dispute resolution best practiceRecommendation 4.2.5

The Australian Employment Conciliation and Arbitration Service (AECAS) proposed by AMMA should establish a suite of modern tools and resources. This could include online tools and resources. AECAS should develop a series of best practice guides to assist with the resolution of disputes (whether individual or collective). The AECAS could be a leading independent and impartial centre for excellence in the provision of advice, information and alternative dispute resolution services for workplace disputes.

5. UNION ACCESS INTO WORKPLACES

"Unions are using the current rules to undertake membership drives and are greatly disrupting to productivity."²⁷³

- **There should continue to be capacity for unions to enter workplaces for the purposes of investigating suspected contraventions, holding discussions with workers, and for health and safety reasons.**
- **Union entry should not be an unfettered right. There need to be suitable controls and responsibilities for those entering employer premises / worksites.**
- **Unnecessary disruptions to business and unnecessary costs should be reduced.**
- **Unions should need to have a connection to the workplace before entering for discussion purposes.**
- **The current rules are flawed and are leading to unacceptable and damaging outcomes, inconsistent with the requirements of a modern workplace relations system.**
- **Urgent change is needed to return to stable, balanced and well understood union entry rules.**

INTRODUCTION

889. AMMA welcomes the PC's consideration of union access to workplaces (also known as union "right of entry")²⁷⁴. The question the PC poses to stakeholders is:

"Do the existing rights of entry laws sufficiently balance the interests of employees and employers, and if not, what are the appropriate reforms?"

890. AMMA would like to emphasise at the outset this is a major area of concern for AMMA members in terms of productivity and operational impacts, particularly for union entries into workplaces that are peripheral or unrelated to the genuine needs of the workers that unions purport to represent.

891. In the same way that the FW Act's union entry rules are divided into two streams, AMMA has distinguished between the two streams in this submission:

- a. **Subdivision A:** Entry to investigate an alleged contravention under [s.481](#). This basis for entry is aimed at meeting genuine employee needs at the workplace (although it is not always used that way in practice). AMMA's submission largely focuses on ensuring the rules for this type of entry are observed, there is reasonable scrutiny over the purported grounds for access, and penalties are in place for non-compliance to deter future inappropriate use of these provisions.

²⁷³ Respondent to AMMA Workplace Relations Research Project Survey 4, October 2011.

²⁷⁴ Issues Paper 5, p15

- b. **Subdivision B:** Entry to hold discussions under [s.484](#). Entry under this section is typically used to recruit new members, compete with rival unions, or disrupt workplace harmony to stir up support for union interference at the workplace. As such, AMMA sees this type of entry as “discretionary” or “non-essential” and the need for current access privileges to be subject to appropriate limits. Any positive legislative reforms in this area will have significant cost benefits to businesses across the country and better deliver on the PC’s terms of reference than the status quo under the FW Act.

GUIDING PRINCIPLES AND PRIORITIES FOR EMPLOYERS

892. AMMA and its members have no objections to balanced union access to workplaces as long as it is for valid reasons and conducted in a safe and controlled manner.
893. Given the size, location and type of machinery used on major resource projects, as well as their incredibly high safety and quarantine standards, employers must retain the capacity to reasonably direct permit holders in relation to their visits.
894. Other than in exceptional circumstances, decisions around the timing, location and frequency of union visits should rest with the employer and /or occupier.
895. Site management should have absolute awareness and control over union officials’ whereabouts at all times in order to ensure everyone’s safety (as they do with all other visitors to the workplace as required under work health and safety laws).
896. Any rules empowering unions to enter employer premises must be subject to appropriate checks and balances in the same way as any other visits to a site (by the public, by media, by clients, etc.).
897. The object of the FW Act’s union access provisions, according to [s.480](#), is to establish a framework for officials of organisations to enter premises that ensures a balance between the right of unions to represent their members in the workplace, hold discussions and investigate suspected contraventions with the rights of employers and occupiers to go about their business without “undue inconvenience” (i.e. it says nothing about entry to recruit members).
898. Any system imposing union entry on employers and occupiers must operate proportionately and reasonably with a maximum of clarity and a minimum of disputation.
899. AMMA and its members support a union access regime being subject to the following broad principles:

When entering a site for any purpose

- a. Every union official seeking to exercise right of entry for any purpose must hold a valid entry permit.

- b. Disputes must be minimised by having very clear rules and quick and simple access to decision-making in cases where rules have been breached or disputes arise.

When entering to hold discussions under s.484

- c. A union must have constitutional coverage of the work being performed.
- d. A collective agreement or other industrial instrument by which the union is covered must operate at that workplace or the union must be seeking to make such an agreement (and no other union has an agreement in place or an established industrial history of membership or agreement coverage of the site).
- e. Unions must be required to provide reasonable notice in writing to all employers and occupiers on a site of an impending visit.
- f. Employers and occupiers must be able to place reasonable limits on union access for discussion purposes based on safety, security, operational and other relevant concerns.
- g. Other than in exceptional circumstances, employers and occupiers must be able to designate the location of union discussions as well as the routes to and from them.

When entering to investigate suspected contraventions

- h. Unions must be able to demonstrate they have members onsite that are affected by an alleged contravention and that those members have requested the union's presence.
- i. Unions must be required to provide adequate details about any breaches of workplace laws they are seeking to investigate.
- j. Reasonable notice in writing must be provided to all employers and occupiers on a site of an impending visit to investigate a contravention.

THE ROLE OF UNION ENTRY ONTO WORKSITES

What is union 'right of entry'?

- 900. Trade unions throughout the world assert they need to meet with employees at their place of work to properly represent them. In many situations, unions and employers are able to agree on arrangements for unions to enter worksites to meet with their members.
- 901. Some WR systems, including in Australia under the FW Act, create a capacity for trade unions to enter workplaces lawfully without being subject to charges of trespass or other sanctions that would ordinarily apply to a person demanding access to premises lawfully controlled by another legal person (in this case a business). Under

such systems, all developed in the 20th century, the capacity to meet with employees at their place of work has been considered a necessary support for unions to undertake their representative functions.

902. AMMA notes in passing that the International Labour Organization (ILO) [Convention on Freedom of Association](#)²⁷⁵ does not explicitly state that entry onto worksites is necessary for the representation of workers' interests, and there are mixed views on: whether entry is required in countries that have ratified the Convention; what the terms of entry must be; and the rules that can be attached to it.
903. In any event, the scope and conditions, checks and balances placed on unions seeking legal access to workplaces is a significant policy consideration. It is an area that is particularly relevant to this review given the impact the current rules are having on workplace productivity and industrial stability.
904. Due to the significant changes to union access laws on 1 July 2009, and again on 1 January 2014, employers are now faced with greater costs and more frequent disruptions to their businesses than before, with less control over visits and fewer consequences being applied to inappropriate behaviour by permit holders.

Key questions for the PC

905. Some questions the PC should consider as part of its deliberations in this area include:
- a. Why should a union that has no members on a worksite have an automatic right to enter to hold discussions with employees, not to mention a legal right to do so against the wishes of the employer or occupier?
 - b. Why should unions be able to advertise their wares to a captive audience in lunch rooms and on remote sites rather than meeting with interested members or potential members offsite, or better yet, appealing to them through modern technologies such as the internet or social media?
 - c. If employees are interested in a union and what it has to offer, why can't they seek the union out and arrange to meet with its representatives outside of work?
 - d. Why are companies required to facilitate access to their sites, including to remote and isolated locations, when access is often used to damage the employer's standing with its own employees?
 - e. Why are unions not required to comply with standards of decency and respect (as are others in the workplace) when exercising entry rights?
 - f. If unions have a good product to sell, and can win the hearts and minds of members and customers, why should they not have to do so on the open market like everyone else?

²⁷⁵ ILO Convention 87 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)

- g. Why should our WR legislation provide unions with unique powers to gain access to their potential customer base given the government provides few other private organisations with such an advantage (and indeed contemporary innovations such as the “do not call” register and privacy laws restrict how businesses can deal with their potential customer base)?
- h. Company owners have no rights to exercise their business interests on union premises, yet unions have largely unfettered rights to access, disrupt and incur significant costs to the occupiers of sites, which are attempting to run commercially viable enterprises with as few overhead costs as practicable.

Declining union membership / freedom of association

- 906. Unions’ current entry privileges have to be contextualised in a landscape of declining union density.
- 907. There has been a steady decline in union membership in Australia since the 1980s²⁷⁶. From a high point of 57% in 1985, private sector union membership has dropped to 12% of the Australian workforce²⁷⁷. In the mining industry, including oil and gas, union density is currently at 16%.
- 908. This marked decline is one key reason the legislation around entry rights for union officials requires wholesale amendment and review. Union entry to workplaces under the FW Act increasingly sees unrepresentative and unsupported unions attempting to force their product (union membership and representation) on uninterested employees, who are well aware of what unions have to offer and choosing not to join or participate. Non-union members are exercising a fundamental right not to join a trade union and our rules around entry should better acknowledge and accommodate those rights, which are being exercised by 88% of private sector employees.

Interactions with other parts of the system

- 909. The FW Act’s union entry provisions taken as a whole interact with other parts of the system in the following ways:
 - a. **Collective bargaining** – Unions are entitled to enter worksites as part of bargaining discussions for new agreements, and exercising union entry powers under the FW Act is a key tool of unions in pursuing bargaining claims.
 - b. **Dispute resolution** – Unions are entitled to enter sites to deal with workplace disputes under many enterprise agreements. In fact, this is an area where unions can expand further on legislative rights by including clauses in agreements allowing them virtually unrestricted entry to assist in “resolving disputes”.

²⁷⁶ AMMA submission to Senate inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004, published in February 2005

²⁷⁷ *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013*, Catalogue 6310.0, published by the ABS in June 2014

- c. **Agreement making** – Unions are no longer prevented from entering worksites where other unions have agreements in place with the employer, including on greenfields sites. There is therefore an interaction between rights of entry and agreement-making although not in a way employers could support, nor in a way which assists in furthering the aims of the FW Act or the terms of reference for this review.
- d. **Protected industrial action** – Union entry visits can lead to workers downing tools and taking protected or unprotected industrial action at the union's instigation. Unions can also take protected industrial action in support of the inclusion of generous right of entry clauses in enterprise agreements given those clauses are no longer prohibited (see the Agreement content chapter in Part 3 of this submission for details).
- e. **Adverse action / general protections** – Union entry visits can have perverse consequences for businesses on major projects, as outlined below.

Case study – union stickers on company equipment

One AMMA member company on a major oil and gas project recently had a series of incidents where union officials were bringing onto a remote site offensive stickers during their entry visits under the FW Act.

Officials not only wanted workers to be able to display the stickers on their personal items, but also to put them on company equipment.

When the company refused, the union brought an "adverse action" claim under the FW Act's general protections provisions, alleging the company had denied employees the "workplace right" to represent their union.

This case shows that right of entry visits, especially those for non-essential purposes such as discussion and recruitment, are often used for inappropriate ends and can have not only the direct costs associated with managing the entries themselves, but indirect costs by providing the ammunition for further unmeritorious claims and litigation.

Defending the above adverse action claim, however unfounded, will cost the company great expense in legal costs when it goes before the courts.

Comparisons with previous systems

- 910. The union entry laws that were in place immediately before the FW Act took effect pre-dated Work Choices and were the evolution of a long-standing system, refined under both political parties. They were quite well understood and accepted until deliberately and wrongly unbalanced by the changes in the passage of the FW Act in 2009.
- 911. The following table shows what Australia's union entry regime has looked like in key areas under the past four IR frameworks.

Entry rights able to be exercised	Industrial Relations Act (1988 to 1996)	Workplace Relations Act (1996)	Workplace Relations Act Work Choices reforms 2006	Fair Work Act (2009)
Entry to workplaces where no members employed for discussion purposes?	N/A, entry for discussion provided for in individual awards	Yes, if employees at the workplace are covered by an award that binds the union (s285C). Note that collective agreements did not exclude the operation of the award, meaning that a right of entry remained even when the collective agreement was in operation	Yes, if employees at the workplace are covered by an award or agreement that binds the union (s760). Note that a non-union collective agreement excludes the operation of an award	Yes, if entitled to represent the industrial interests of employees at the workplace (s484)
Entry to workplaces where no members employed for investigation purposes?	Yes, including a requirement that the union must be bound to the award or agreement being investigated (s286)	No (s285B)	No (s747)	No (s481)
Union access to non-member records?	Yes, for purpose of ensuring compliance with award or order (Reg 131L of IR Regulations)	Yes, provided relevant to suspected breach (s285B(3))	Yes, but with limitations. Commission may order access if necessary to investigate a breach (s748(9))	Yes, but with limitations. Commission may order access if necessary to investigate a breach (s483AA)
Express privacy protections?	No	No, although Privacy Act may have applied	No, although Privacy Act may apply	Yes (s504)
Requirement to be a fit and proper person to receive permit?	No, secretary of a union could authorise any officer to enter premises (s286(1))	No, registrar could issue a permit to any officer or employee of a union (s285A(1))	Yes (s742(2))	Yes (s512)
Union must give notice of entry?	No	Yes, at least 24 hours (s285D(2))	Yes, at least 24 hours (ss749 & 763)	Yes, at least 24 hours (s487)
Employer can request location of discussions/interviews?	No	No	Yes (s765(3) & 751(3))	Prior to 1 Jan 2014 - Yes, but with conditions (s492) Post 1 Jan 2014 - No, unions have default access to lunch rooms
Mandatory revocation/suspension of permits?	N/A – no permit system.	No	Yes (s744(5))	Yes, two additional grounds for mandatory revocation relating to breaches of NPP2 of the Privacy Act (s510(b) & (c))
Industrial instruments able to include clauses conferring entry rights?	Yes, as long as clauses pertained to the employment relationship	Yes, as long as clauses pertained to the employment relationship ²⁷⁸	No, expressly prohibited under the Workplace Relations	Yes, although clauses unlawful if inconsistent with the legislation

²⁷⁸ AIRC 'Schefenacker' (three agreements) decision [2005] PR956575, 18 March 2005

Entry rights able to be exercised	Industrial Relations Act (1988 to 1996)	Workplace Relations Act (1996)	Workplace Relations Act Work Choices reforms 2006	Fair Work Act (2009)
			Regulations 2006 (s8.5(1)(g))	under s194 (f) and (g)

912. While the changes involved in moving from the previous system to the FW Act might seem minimal at first glance, a massive change was the linking of union entry for discussion purposes to unions' eligibility rules rather than requiring a union to have a connection to an agreement or award applicable to the site to be entered.
913. The ramifications of this change for employers were huge and opened up sites to union access visits where they had never been before or not for many years.
914. The reliance on union eligibility rules replaced a reasonably well-understood system regulating union entry with considerable complexity, and for example, a requirement for employers to examine the most arcane and specialised industrial laws (union rules) to determine which unions could or could not come onsite. It is little wonder union officials asserted a newfound belligerence when dealing with employers who often could not validate or invalidate the legitimacy of the "right" of entry being claimed.
915. Site managers that had never before had to deal with union entry requests were now faced with a huge number of requests along with interpreting complex union eligibility rules on the spot to ascertain whether a union was entitled to enter a site to speak with workers. We shall return to this, but by huge numbers we mean visits on a daily or near daily basis.
916. The FW Act changes also meant competing unions now had entry to the same sites and the same groups of workers to hold discussions, which was not a feature of the previous system. Union competition and internecine politics were now played out in workplaces using the "right of entry" free for all created by the 2009 amendments.
917. The previous rules did not place particularly difficult obstacles on unions but balanced the general principles and interests that should underpin an effective legal right for unions to enter workplaces.
918. There was never any strong public sentiment against the previous rules and at no time did former Prime Ministers Rudd or Gillard suggest they had an election mandate to open up union access to workplaces. In fact, while Labor was in Opposition, then-Deputy Opposition Leader Gillard asserted precisely the opposite in relation to changing the pre-2009 union entry laws²⁷⁹:

"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it."

²⁷⁹ Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

919. Under the previous rules, unions were not able to use workplaces and business resources to compete for the allegiance of the ever-declining numbers of employees who choose to associate with them.
920. Abolishing the ability to make new Australian Workplace Agreements (AWAs) with the Workplace Relations Amendment (Transition to Forward with Fairness) Act in March 2008 also had a huge impact on unions' access privileges.
921. After that date, individually negotiated agreements could no longer protect employee choices not to be represented by unions and to bargain directly with their employer. Widespread individual agreement coverage was no longer possible and so no longer translated into ongoing protections against unwanted harassment at work.
922. By introducing the capacity to include clauses in enterprise agreements that confer additional access privileges above and beyond those contained in the legislation itself, the FW Act also allowed unions to negotiate rights to access workplaces virtually unfettered and without any of the legislative constraints elsewhere imposed.
923. On top of that, since 1 January 2014 under Labor-enacted laws²⁸⁰, unions have been entitled for the first time in history to be supplied with employer-provided transport and accommodation to and from remote worksites, as well as to meet with employees in lunch rooms as the default location rather than a reasonable employer-designated location as was previously the case.
924. The fact is that AMMA members were willing to work within the rules governing union access to workplaces that existed prior to 1 July 2009. However, employers now face serious impediments to productivity and a virtual free-for-all in terms of union entry to Australian workplaces.

DOCUMENTED PROBLEMS

925. Specific problems arising from the current FW Act rules have been well-documented by AMMA and include the following.

Entry no longer tied to agreement coverage

"[There is] greater access regardless of the industrial instrument in place. [There are] attempts by competing unions to attract membership."²⁸¹

926. As mentioned, under the current system, unions can enter workplaces for 'discussion' purposes under [s.484](#) of the FW Act where no union member is onsite as long as the union is eligible to represent the industrial interests of employees. This is meant to hinge on those employees wishing to participate in discussions although in practice the wishes of employees are very rarely tested.
927. The fact that employee attendance at such discussions is often poor does not negate the time and expense employers have to devote to managing the visits. Nor

²⁸⁰ The Fair Work Amendment Act 2013

²⁸¹ AMMA Workplace Relations Research Project Survey 1, April 2010

does it seem to dampen the ardour of many union officials, who will simply keep visiting to sell their product, or in fact to harass the employer and sow the seeds of disharmony, regardless of the lack of take-up.

928. While under the FW Act, employers and unions are no longer “bound” by awards or agreements, the principles which applied prior to 2009 could easily be re-applied to ensure that unless a union was covered by an agreement onsite, or attempting to reach one with the employer, they would have no right to enter under s.484. If they had a member onsite affected by a suspected contravention, they could of course still enter to investigate that breach with appropriate checks and balances (see the end of this chapter for details of AMMA’s proposed reforms).

Entry now based on complex union eligibility rules

“The concern is that a union can now gain lawful access to a site based upon the scope of their rules as distinct from any real connection to the workforce or workplace.”²⁸²

929. In a 2009 submission²⁸³, AMMA warned that reliance on union eligibility rules for entry rights without regard to historical award or agreement coverage would see a significant overlap of union representation and increase the likelihood of unproductive “turf wars”. AMMA’s submission also pointed out that:

“Employers must be certain about which organisations are ‘eligible to represent the interests of relevant employees’. They must be able to properly determine their position on the legitimacy of union officials seeking right of entry and be able to assess the capacity of the union to request [the federal industrial tribunal] to make a range of orders (including scope, majority representation, good faith bargaining, workplace determinations, union coverage of agreements, etc.).”

930. Employer concerns were ignored in the making of the FW Act, and the problems we foresaw were rapidly apparent.

931. When the FW Act’s new rules took effect, there was a distinct lack of knowledge for almost all site-based managers and responsible employees as to how to handle a visit from a union official under new eligibility rules. As one AMMA member put it²⁸⁴:

“It is difficult to fully ascertain the eligibility rules of each and every union; they are difficult to obtain, read and make sense of ... This has resulted in additional resources being required to manage right of entry requests to deal with union delegates when they arrive – they are often quite aggressive.”

932. Many unions have not modernised their rules in some years, which makes deciphering relevant and applicable classifications of workers with whom the union is entitled to meet difficult. As stated above, union rules are one of the most arcane and complex, if not Gordian, elements of our complex WR laws and were never intended for day-to-day use at the workplace level to discern the legal capacities

²⁸² Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012

²⁸³ AMMA submission to DEEWR on union representation rights under the Fair Work Bill, January 2009

²⁸⁴ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

of union officials, much less to adjudicate the competing claims of competing union officials.

933. Site managers not only have to be across complex union eligibility rules but also across the latest case law which is continually evolving in terms of employers' obligations and permit holders' rights. They need to do so in the face of often aggressive union officials asserting a legal right to enter and threatening the consequences of denying entry.
934. Onsite employer representatives are being asked to interpret "on the fly" areas of law and practice that are so complex that the judges who made them have difficulty interpreting them even with the benefit of testimony from expert legal practitioners.
935. This unnecessary impost on employers massively increases the costs of complying with the FW Act with no discernible benefit to anyone and it created a myriad of workplace disputation and angst with no gain for either employees or employers.
936. On that note, paragraphs 214 and 215 of the FW Act Explanatory Memorandum confirm that under the current rules, as opposed to the previous ones, while entry to hold discussions must be only used to meet with workers eligible to become members of the union, "it does not mean that if other workers choose to attend or participate in discussion that the entry is invalid or contrary to the Act".
937. This is in contrast to the previous provisions which should be restored.

Inter-union competition encouraged

938. As mentioned, union demarcation disputes have seen new life under the FW Act. Union "turf wars" were largely a thing of the past under the previous system given that entry to worksites was tied to agreement coverage. If a union was not a party to an agreement onsite, or agreements covering the site were made directly with individual employees or other unions, a union had no right of access for discussion purposes.
939. There is a long history of demarcation disputes between the AWU and CFMEU (construction and general division) which has re-emerged under the FW Act. This ongoing dispute has historically been over union coverage of non-trades classifications working on civil, mechanical and electrical engineering construction projects within the resource industry.
940. This is disputation which harms employers and does nothing for employees, and it flies directly in the face of the very *raison d'être* of the Australian WR system for more than a century, which has been to foster and maintain industrial peace.
941. As one AMMA member noted:

"As multiple unions have potential coverage, it means an increase in entries and therefore time taken out of my day. The unions spend a lot of time bagging out the other unions, [which] places confusion in the workforce. This then [in] turn increases the entries on each site so that each union can

maintain face, strength and counter attack. The entries are about who can be the unions with the most membership and not about the employees. They spend so much time focusing on large projects because it sparks more media attention rather than on mid-tier or small businesses who generally need to improve safety and look after employees better.”²⁸⁵

942. While under the current greenfields agreement-making rules, employers have the right to make an agreement with just one union as long as it is entitled to represent the majority of employees (see Part 3.4 on Greenfields agreements for details), doing so almost always raises the ire of competing unions. Under the FW Act, those disgruntled rival unions now have the right to come onsite and upset the industrial arrangements between the business and another union or, as can be the case with non-greenfield agreements, between employers and employees.
943. This is exactly the type of union behaviour that undermines bargaining and agreement-making but which the FW Act does nothing to discourage. It is illustrative of the regulatory schizophrenia and tensions in the 2009 changes which this review should identify and make recommendations to redress.
944. Tying entry back to agreement coverage rather than union eligibility rules (when rival unions may have overlapping coverage) would remedy a significant problem for resource industry employers and allow a return to stable industrial arrangements and a reward for effort.

No requirement for unions to identify members

“Without the knowledge as to whether or not employees are members of a union, we could face a request for entry purely based on a ‘fishing expedition’ by a union.”²⁸⁶

945. In order to enter to investigate a suspected contravention under s.481 of the FW Act, a union must have at least one member onsite to whom a breach relates.
946. In reality, it is far too easy for a union official to fabricate a complaint from an anonymous member and come onto a site to have a look around. From there, it is easy to manufacture an industrial or safety issue to put pressure on an employer to concede to the union's demands.
947. Given that the FW Act requires a union member to be affected by an alleged breach, union officials should have to prove the existence of that member. Employers are currently required to take it on faith that:
- A union has even one member onsite.
 - The affected member is actually eligible to be a member of that union.
 - The union's one member works for a particular work group where any alleged contravention has occurred.

²⁸⁵ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

²⁸⁶ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

948. Under the current system, even where unions are required to get an "affected member certificate" under [s.520](#), the FWC will grant the union's application as long as they can prove they have a member onsite, regardless of who that member is or where they work.
949. Employers are given no opportunity to respond to applications and are not entitled to know the identity of the affected member on the grounds of protecting their privacy and guarding against discrimination.
950. However, it must be remembered there are protections in place to ensure that does not happen:
- a. There are general protections / adverse action provisions in place that protect employees from being discriminated against on the basis of their union membership; and
 - b. There are other approaches that could be implemented to protect union members / complainants while at the same time allowing the proper verification of union claims of employee need.
951. Greater rigour is needed in this area, and again the status quo is unbalanced and impractical.

No real protection against inappropriate use and disclosure

"[Due to the entry] right being based on the ability to be a member, the union doesn't have to show cause and [there is] extensive ability to have access to company records."²⁸⁷

952. Under [s.482](#) of the FW Act, unions can access any documents kept onsite other than non-member records when entering to investigate a suspected breach.
953. Under [s.483AA](#), a permit holder can also apply for an order from the FWC to inspect and make copies of specific non-member records or documents. The tribunal can make orders for access if it deems it necessary to investigate a suspected breach.
954. Express use and disclosure requirements under the [s.504](#) cover the records that unions are able to access as part of their entry privileges. Unauthorised use or disclosure of information obtained while exercising entry rights is prohibited under [s.504](#). However, even in cases where transgressions are clear, offenders are often not punished to deter them from future transgressions.
955. While the current use and disclosure provisions are meant to provide rigorous checks and balances against misuse, there continue to be union abuses of the FW Act's document access provisions. This is costly to employers given the resources required to provide those documents in the first place, but also because business interests or employee trust may be damaged depending on the use unions make of the information they are able to access.

²⁸⁷ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

956. In a particular case that went before the tribunal in 2011²⁸⁸, a union official was found to have misused information collected after obtaining a right of entry order to access non-member records, which he argued were relevant to a suspected breach.
957. The union used the records (and footage obtained covertly) in unauthorised and inappropriate ways, including to send invitations to non-members to join the union. The official that obtained the information did not have his entry privileges revoked or suspended, despite the commissioner finding:

"It is inconsistent with the basis upon which the application for union access to non-member records was made and it is inconsistent with access for the purposes of investigating suspected contraventions in terms of award compliance and allegations of anti-union behaviour inconsistent with the FW Act ... The use of information, including employee names, obtained through that right of entry process for invitations to a union meeting reflected an abuse of the basis upon which that information was provided and was contrary to the privacy employees were entitled to expect."

958. While the FWC said it regarded the filming of employees as "particularly significant instances of misuse", it said taking action against individual permit holders was not appropriate given the actions of most concern were carried out by multiple NUW staff.
959. This case and others like it underscore the need for access to employment records to be tightly controlled with strict consequences in place to prevent information being used for fishing expeditions, membership drives, or to bully and intimidate non-union members.
960. Such cases also underscore the need for proper and effective enforcement of the rules for union entry and proper sanctions where rules are misused. Unions need to be held to the same standards of enforcement and sanction that, for example, companies are held to in relation to client information or in compliance with their legal duties on trading or financial compliance.

Bar for proving 'misuse' set too high

961. The tribunal has the power under [s.508](#) to restrict entry rights for a union or its officials if it is satisfied they have misused those rights. However, only a Vice President, Deputy President or Full Bench can take action under that section.
962. The section also allows tribunal members to impose conditions, suspend or revoke permits or require future entry permits to be issued subject to conditions. It is of note that between July 2011 and December 2014, it appears that only two permits were suspended or revoked by the FWC²⁸⁹.
963. Section 508 also allow the issuing of entry permits to be banned for a period of time in relation to a union generally, or to officials specifically. However, the tribunal can only take that action on its own initiative or on application by an inspector, which

²⁸⁸ Fair Work Australia [2011] FWA 4096, 29 June 2011

²⁸⁹ FWC annual and quarterly reports

again limits the deterrent value of those provisions. The bar is also set very high and requires union officials repeatedly and deliberately misusing their entry rights by obstructing or hindering at the workplace (almost impossible to prove), or encouraging someone to be a member of the union in a way that is "unduly disruptive" (also difficult to prove).

964. A recent case shows the punishment for particular transgressions, even when serious safety breaches are involved, do not necessarily fit the seriousness of the crime²⁹⁰.

Curtis Island entry

In this case, around 15 CFMEU officials flouted established safety protocols in their unannounced entry to a Bechtel site on Curtis Island in 2012 and 2013 when they turned up without notice via a privately chartered boat.

The union officials declined to use the company-operated ferry to the island despite being instructed to do so.

When arriving on the island they:

- *Avoided normal entry requirements that were in place for OHS purposes;*
- *Walked on roads when it was dangerous to do so, including the heavy vehicle "haul road";*
- *Left their escorts;*
- *Conducted meetings at times and in places they were not authorised to;*
- *Claimed to have permits they did not in fact have;*
- *Disrupted employees in their duties;*
- *Abused Bechtel employees;*
- *Entered places without proper authority;*
- *Entered places in dangerous ways;*
- *Removed the protective equipment they were required to wear.*

The FWC heard the matter under s.505 of the FW Act as the entry was in part exercised under s.484 to hold discussions with employees.

Both the CFMEU and the company were represented by QCs in the dispute, again highlighting the significant cost burden such entries place on contractor companies.

As the commissioner pointed out in the decision:

"The arrival, unannounced, of individuals at Curtis Island, a complicated construction site comprising three large, separate projects, whether by ferry or private vessel, is itself a major OHS issue. Bechtel had every reason to know who is on site and where they are to ensure safety. I also find the requirement that pedestrians do not walk on the roads reserved for heavy haulage or light vehicles, in accordance with signage, is a reasonable OHS requirement. The haul road is potentially dangerous and carries mainly heavy vehicles with strict controls over light vehicles entering the road, prohibited to pedestrian traffic and marked as such with signs."

965. As part of the outcome of the above dispute, the commissioner suspended some of the officials' entry permits for four months, but did not make orders against the union or suspend the union from entry even though it was open to the commission to do that. The orders made would also incur significant further costs for the company given they involved the company and the union investing in further training of union officials about the specific requirements of the site.

966. A significant amount of time had elapsed between the company making its first application to the FWC to resolve the dispute, and the decision being handed down

²⁹⁰ *Bechtel Construction (Australia) Pty Ltd; Bechtel Australia Pty Ltd v CFMEU et al* [2014] FWC 5900. 18 September 2014

-around two years - during which time there was no onus on the union to alter its conduct.

967. Given the seriousness of these transgressions, and the multiple number of union officials involved, it would seem appropriate to make orders against the union generally, and to revoke completely or suspend for at least 12 months those officials' entry permits. Again, there need to be rules and there needs to be proper enforcement and sanctions, and this is an area in which the system is failing and can be improved.
968. Given the wide discretion of the FWC in applying the current rules, there are often few or no negative consequences for unions who misuse their entry privileges and still fewer consequences for the unions that encourage them to do so.
969. Where serious safety breaches are concerned, as with employees, union officials should forego the right to be on that site and this should be built into the legislation in terms of automatic penalties for misuse of entry permits (AMMA's specific reforms in this area appear at the end of this chapter).

Entry permits seldom suspended or revoked

*"There is no doubt that union organisers who do not have entry permits will be less capable of performing their functions. There is also a possibility that this may lead to the CFMEU requiring the organisers to take unpaid leave, with consequent personal difficulties or hardship for them."*²⁹¹

970. Entry permits under the current legislation are seldom if ever suspended or revoked. It appears to be the view of the legislation, and the FWC in applying it, that to revoke or suspend someone's entry permit is too harsh a punishment for all but the worst transgressions.
971. We invite the PC to reflect on whether, by way of comparison, the Australian Securities and Investments Commission (ASIC) often considers it harsh to bar persons from acting as company directors.
972. In theory, there exists a system of "mandatory" revocation or suspension of permits where certain conditions are met under [s.510](#). The FWC is technically required to suspend or revoke a permit if:
- a. A permit holder has contravened [s.503\(1\)](#), i.e. misrepresented what they were entitled to do while exercising entry. However, there is a caveat to that in cases where the permit holder did not intentionally misrepresent their rights and actually believed they were entitled to do what they purported;
 - b. A permit holder has contravened [s.504](#) which deals with unauthorised use or disclosure of information or documents;

²⁹¹ Parker, Hanlon, Kera, Mitchell [2011] FWA 2577, 13 May 2011

- c. There has been a substantiated complaint under the *Privacy Act 1988* in relation to documents the permit holder obtained;
 - d. The permit holder or another person was ordered to pay a penalty under the FW Act for breaching the right of entry provisions;
 - e. A court or other person or body under a state or territory industrial law has cancelled or suspended a right of entry for industrial purposes or disqualified them from exercising or applying for a right of entry for industrial purposes under that law;
 - f. A permit holder has, in exercising a right of entry under a state or territory OHS law, taken action not authorised by that law.
973. The problem is the FWC retains the discretion to decline to revoke or suspend a permit if to do so would be "harsh or unreasonable in the circumstances". This discretion is regularly exercised to let transgressing union officials off the hook and it is because of this discretion that many transgressions occur with impunity. The law is failing to send any signal to unions that they need to comply with its terms, and the current system of enforcement through the FWC seems to be failing.
974. The construction industry regulator, FW Building & Construction (FWBC) agrees right of entry breaches are a big problem in the building and construction industry. FWBC currently has 44 investigations into alleged right of entry breaches and 16 right of entry cases in court.
- "FWBC recently applied for four CFMEU officials, including SA State Secretary Aaron Cartledge, to have their right of entry permits revoked or suspended after they admitted in the Federal Court to intentionally hindering and obstructing site managers at a \$75 million project."*²⁹²
975. AMMA notes that while the FWC does not currently publish details entry permits that have been revoked, FW Building & Construction (FWBC) publishes its own "no permit list" on its website at www.fwbc.gov.au which currently has 21 names on it. The above problems are not isolated or exaggerated. The current laws on union entry are fermenting a very negative and unhealthy culture amongst trade union officials who have been sent a clear signal that the law is there to be tested, or outright ignored.

Wide discretion to deem someone 'fit and proper'

976. A union official is required to be a "fit and proper" person in order to receive an entry permit under [s.512](#) of the FW Act. Under [s.513](#), the factors the FWC must take into account in deciding whether someone is fit and proper include:
- a. Whether that person has received appropriate right of entry training.
 - b. Whether they have been convicted of an offence against industrial law.

²⁹² *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] [FCA 1047](#) (2 October 2014)

- c. Whether they have been convicted of an offence against a Commonwealth, state, territory or foreign country law involving entry onto premises or fraud or dishonesty or intentional use of violence against another person or intentional damage to or destruction of property.
 - d. Whether they have been ordered to pay a penalty under the FW Act or other industrial law.
 - e. Whether a permit issued to the official has been revoked or suspended or made subject to conditions.
 - f. Any other matters the FWC considers relevant.
977. However, the FWC can still deem someone fit and proper if any or all of the above things are true. There is also the question of people who have committed general criminal offences, have displayed violence or bad character in the workplace that should disqualify people from holding permits, aside from any WR-specific transgressions.
978. In AMMA's view, if any of those factors are true, the official is not a fit and proper person and should not be given an entry permit under the FW Act. If a permit has already been issued, it should immediately be revoked.
979. Given that the suspension or revocation of an entry permit will always have a detrimental or "harsh" impact on an individual, the FWC's discretion must be removed if those provisions are to have any teeth whatsoever.
980. Additionally, all permit applications should be posted publicly to the FWC website so that interested parties can be heard in relation to whether someone is a fit and proper person.
981. At present, the FWC website only publishes information about who has a permit, the date on which it was issued and the date on which it expires, with no information about whether it has since been suspended, revoked or had conditions applied.
982. In addition to stringently applying the current fit and proper person test, AMMA advocates a **code of conduct** that permit holders should be required to comply with or else have their permits automatically revoked.
983. A FW Act permit holders' code of conduct would pick up some of the elements in the [code of conduct](#) applying to officers of the public service. The public service code is relevant given that two key IR agencies, the Office of the FW Ombudsman and FWBC are expected to comply with that code as employees of the Commonwealth, and they exercise similar powers to entry permit holders.
984. Relevant parts of that code of conduct to a permit holder code of conduct under the FW Act would include:
- a. When acting in connection with entry privileges under the FW Act, "treat everyone with respect and courtesy, and without harassment".

- b. "Behave honestly and with integrity in connection with your exercise of entry rights".
- c. "Obey all directions from those controlling the site / representing the employer" (emphasising the requirements in this regard already under the FW Act).
- d. "Act with care and diligence".

985. Such codes are already an accepted part of the FW Act system, such as the Small Business Fair Dismissal [Code](#).

Industrial agreements expand on legislative rights

986. Under [s.490](#) of the FW Act:

- a. Permit holders may exercise entry rights only during working hours;
- b. They may only hold discussions under s.484 during meal times or "other breaks" (although there are some grey areas here).
- c. They may only enter premises on a day specified in the entry notice unless they provide an exemption certificate.

987. However, on 1 July 2009, the FW Act removed the prohibition on union entry clauses in enterprise agreements that could confer much broader and looser entry rights on union officials and meant they did not have to comply with the above three criteria, including having to be a permit holder.

988. The first major case to look at that issue under the FW Act was the *Dunlop Foams* case. The clause proposed for inclusion in the agreement, which was eventually rejected by a Full Bench of FWA²⁹³ said:

"An authorised NUW representative is entitled to enter at all reasonable times upon the premises and to interview any employee, but not so as to interfere unreasonably with the employer's business."

989. The Full Bench rejected the clause because it provided an entitlement that covered the same ground as the FW Act did in its provisions allowing entry under s.484 for discussion purposes and s.481 for investigation purposes.

990. However, in rejecting the drafting of the clause, the Bench said it was willing to approve it if an undertaking was given that any entry for purposes outlined in s.481 and s.484 would be done in accordance with the rules of the FW Act, while entry for other purposes could operate in the way the clause allowed.

991. The decision confirmed that with careful drafting unions could include "open slather" entry clauses in agreements as long as they were worded correctly to hinge entry to

²⁹³ Australian Industry Group [2010] [FWAFB 4337](#), 11 June 2010

resolution of a dispute. That is exactly what happened when the ETU drafted the right of entry clause in the *ADJ Contracting* agreement in 2011²⁹⁴.

992. The right of entry clause in the agreement was the template for the entire Victorian electrical contracting industry and survived several legal challenges that AMMA was involved in.
993. The clause:
- a. Did not require that a union official be a permit holder under the FW Act to gain entry.
 - b. Permitted entry at any time without a written notice (not restricted to meal and other breaks as is the case under the FW Act generally).
 - c. Did not require authority documents to be produced.
 - d. Prevented the FWC from dealing with a right of entry dispute if the entry was under the clause.
994. In the initial decision, later [upheld](#) by a Full Court of the Federal Court, Senior Deputy President Jennifer Acton said because the clause was phrased to only deal with entry for “dispute resolution” purposes, it did not cut across entry under other sections of the FW Act, and was legitimate. What it meant in practice was union officials were entitled to enter Victorian electrical contracting industry worksites at any time with virtually no constraints as long as they notified a dispute first.
995. AMMA can see no benefit to employees or business in allowing union officials to enter sites at any time without notice and without proper permits as this can only lead to chaos and uncertainty for all concerned. No extension to the already generous entry rights under the FW Act is warranted. Agreements should in future not be able to address right of entry and the provisions of the legislation, reformed as we recommend, should become a code which cannot be detracted from in bargaining at the behest of unions (see AMMA's recommendations at the end of this chapter for details of this and other proposed reforms).
996. Under the laws immediately preceding the FW Act there was clarity for all parties given the regulations specifically prohibited clauses conferring additional entry rights on union officials. That level of clarity no longer exists, leading to significant incursions into business in terms of time and resources.

Not all employers required to be notified

“Right of entry notifications are given to the occupier of premises for union visits. Given our employees work on other companies’ sites to undertake construction activity, those notices are given to parties other than the employer. Some principals manage this well and ensure we are notified and involved in visit management, however, others aren’t, leading to detrimental

²⁹⁴ *ADJ Contracting Pty Ltd* [2011] [FWA 2380](#), 28 April 2011

*impacts on our business. In my view, such notices should be required to be lodged with the employer, or both the occupier and employer."*²⁹⁵

997. Under the FW Act, unions must give 24 hours' to 14 days' notice of entry for discussion and investigation purposes under [s.487](#).
998. A permit holder entering to investigate a breach must give the occupier of the premises, and any affected employer, notice of entry. If entering for discussion purposes, permit holders only have to notify the occupier.
999. Given the complex logistics and safety procedures involved, particularly in the resources sector, all employers on a site, including contractors and sub-contractors, should be given notice of a union's planned entry for either purpose under the Act. While the current system is predicated on an owner-occupier model, it needs to better take into account the complex site arrangements that characterise resource projects along with the propensity for union officials to meet with employees of other companies in addition to the notified company once onsite.

Dispute orders rarely made and often belatedly

1000. While employers are technically able to bring disputes under s505 of the FW Act about the frequency of entry visits in relation to their operational requirements, in practice orders are rarely handed down.
1001. In 2014, there were only three dispute orders issued under s.505, one such order in 2013, two in 2012 and 13 in 2011²⁹⁶. That is a total of 26 orders over four years.
1002. While dispute orders are rarely made, in the event they are it can take years from an application being lodged for a dispute to be finalised before the FWC. The Bechtel case referred to earlier in this chapter took two years to finally get dispute orders from the FWC after the first application was lodged by the employer over serious entry transgressions by numerous CFMEU officials.
1003. Another AMMA member in metalliferous mining cites a right of entry dispute that has taken 15 months and is still ongoing before the FWC. Until that dispute is resolved, unions continue to have entry onto that site in the way they allege.
1004. Recall that we are discussing real time events and the efforts of unions to misuse their legal capacities for entry as part of immediate organising campaigns and attempts to secure workplace agreements. Justice delayed is justice denied, with decisions many months after the event offering little redress for employers.

Employers must provide accommodation and transport

1005. Last-minute amendments by the outgoing Labor government saw employers required to provide new subsidies and facilitation for unions seeking to enter their workplaces. The types of sites that are affected by the provisions of the FW Amendment Act 2013²⁹⁷ include not only those in the middle of a body of water, but

²⁹⁵ Respondent to AMMA Workplace Relations Research Project Survey 6, October 2012

²⁹⁶ FWC annual and quarterly reports

²⁹⁷ That took effect on 1 January 2014

those that are onshore in remote, desert-like locations which are just as complex to manage from an operational perspective.

1006. Requiring employers and occupiers to facilitate transport and accommodation to such areas creates a huge financial and operational impost where it occurs.
1007. In reality, many remote locations, including offshore facilities and vessels, are accessible only by commercially available transport. That is precisely how the occupier arranges, and pays, to transport workers and contractors to and from a site.
1008. The 1 January 2014 changes impose an obligation on the occupier to provide the commercially available transport that it has arranged for its own workers and forces it to extend that to the union.
1009. Unions seeking access to those locations should have to demonstrate why they cannot more appropriately meet with workers onshore or in more accessible locations rather than tying up employers' time and resources.
1010. AMMA notes the FW Amendment Bill 2014 that is currently before parliament seeks to repeal those requirements which is something AMMA supports as a matter of urgency (see later in this chapter for further details).

Lunch rooms now the default meeting locations

1011. Under [s.492](#) of the FW Act, which was amended on 1 January 2014, a union permit holder must conduct interviews / hold discussions with workers in rooms or areas of a premises agreed with the occupier.
1012. However, if the permit holder and occupier cannot agree on a location, the lunch room or crib room becomes the "default" meeting place.
1013. In simple terms, it is no longer up to employers to designate reasonable onsite meeting locations according to their operational needs, which had been the long-standing and accepted situation. This represents yet another massive winding back of occupiers' control over third-party intrusion onto their premises and into the private time of their workforces.
1014. A substantial amount of case law has been devoted to interpreting the meaning of the "lunch rooms" access provisions since they were introduced. As those provisions were introduced by Labor at the behest of unions, unions have wasted no time taking up the new artificial opportunities created by favourable legislative amendments.
1015. In a case concerning one AMMA member in metalliferous mining, unions sought to push the boundaries of the requirement to give them access to the room in which "one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks" and that is "provided by the occupier for the purpose of taking meal or other breaks" ([s.492\(3\)](#)).
1016. The company provided the union officials with a lunch room after the union disputed the venue allocated by the company. However, the union then disputed the

allocation of a particular lunch room, stating the permit holder could choose the lunch room they wished to use, despite it not saying that anywhere in the statute.

1017. There has also been case law on micro issues such as whether unions are able to approach employees in lunch rooms or must wait for the employee to show interest.²⁹⁸ This is absurd. Employees should have a right to eat their lunch in peace, free from unwanted political sales pitches.
1018. It is these sorts of unproductive arguments and situations that are encouraged by the current system given the boundaries are no longer clear for either party. Surely there is a better use of the FWC's time and resources than dealing with these types of disputes.
1019. It is also worth noting that one AMMA member spent approximately \$500,000 in constructing a number of purpose-built facilities so unions could hold meetings and discussions with interested employees, but since the post-1 January 2014 default lunch room provisions were introduced, disagreements have occurred over whether these are suitable locations even though they had been used without complaint in the years prior.

AMMA's earlier research shows the extent of the impacts

1020. From April 2010 to October 2012, AMMA comprehensively surveyed its members as part of a research collaboration with RMIT University on the impact the FW Act changes were having on resource sector businesses. The survey results were independently analysed and reported by RMIT University in six comprehensive reports six months apart, which AMMA commends to the PC for further reading (available on the AMMA website at www.amma.org.au under "Publications").
1021. Those surveys, particularly the first one when the FW Act's right of entry provisions had been in force for just 10 months, revealed immediate changes to the number and nature of union site visits as soon as the legislation took effect.
1022. Issues surrounding their changed obligations under right of entry laws consistently rated among the top three concerns of AMMA members during that time and added significantly to the costs of doing business.

A greater number of different unions sought and gained entry

1023. In that first survey, AMMA members were asked if a greater number of different unions had access to their worksites under the FW Act, to which 58.7% answered 'yes'.
1024. Asked if a greater number of different unions actually entered their sites, 37.2% said 'yes'.
1025. Asked if unions were entitled to enter their worksites for the first time under the FW Act, 55.6% said yes'.

²⁹⁸ *NUW v Coles Group Supply Chain Pty Ltd* [2014] [FWC 1674](#) (12 March 2014)

1026. Asked how the number of visits under the FW Act stacked up against a comparable period under previous legislation, 30.2% of respondents said union visits had “significantly increased”.
1027. As one AMMA member said after the new rules had been in place for more than 12 months²⁹⁹:
- “There has been increased agitation by unions wanting to get onsite; unions trying to gain right of entry without following the legislative steps required. Due to increased union activity, we have been asked to ensure there are workplace delegates in place.”*
1028. AMMA notes that the Explanatory Memorandum to the FW Amendment Bill 2014 gives a comprehensive assessment of some of the costs associated with union entry visits.
1029. The EM estimates that the direct administrative costs of a right of entry visit, which took on average two hours of labour to process and oversee, at \$86.45 an hour for tasks performed by the HR manager.
1030. While those figures are helpful as a starting point, AMMA believes these are conservative estimates that do not take into account other costs associated with the visits such as transport costs and lost productivity.
1031. One AMMA member in metalliferous mining has received 140 entry requests on their project to date, 49 in the first two months of 2015, which amounts to around one request a day. On any reasonable reading, this is not an organising strategy or response to employee concerns. It is a deliberate campaign to disrupt the workplace and harass the employer into dealing with the union.
1032. Typically, one external adviser along with a supervisor from the contractor company are required as escorts. Visits with workers themselves typically last for 30 minutes, however, these require pre and post-escort discussions and issue resolution. The estimated time per visit is actually four hours including issues resolution, reporting and documentation.
1033. With that in mind, the total project cost to date arising from union entry visits for a variety of purposes was four hours per visit at \$200 an hour, equating to a total cost of \$112,000 on the project so far. In the current year to date, the cost has been \$39,200.
1034. An [analysis](#) performed as part of this review on AMMA's behalf by KPMG Consulting assesses the true costs associated with union entry visits. That analysis was submitted with AMMA's submission to this review and is commended to the PC for further reading.

²⁹⁹ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

Entry for recruitment and discussion the most common reason

1035. By far the most common union entry reason cited by respondents to the AMMA Workplace Relations Research Project was for “discussion purposes” under s.484 (i.e. non-essential visits).
1036. Asked what their greatest WR concerns were at that point, one AMMA member said³⁰⁰:
- “Managing the roles of unions on our worksites – while there is very little [employee] involvement, the right of entries are required to be managed tightly.”*
1037. This points to a critical disconnect in the current post-2009 rules. Despite employees often having little or no interest in what a union is offering, and choosing not to join a union despite repeated entreaties to do so, unions can keep coming and coming, effectively without limits.
1038. This is an extraordinary situation. The current Australian system contains virtually no respect for the freedom of association choices of ordinary working Australians who choose not to join a union and simply want to be left in peace.

Specific costs of the current system

1039. The costs associated with union visits to worksites include but are not limited to:
- a. Staff training.
 - b. Consultancy advice.
 - c. Management time.
 - d. Chaperone or escort time. Contrary to popular belief, this is not always a HR person because on some remote sites there is no-one from HR based there so someone must down tools to escort a union official around – leading to further productivity impacts.
 - e. Preparing for the visit.
 - f. Documenting it afterwards.
 - g. Indirect costs arising from other litigation that might flow from visits such as adverse action claims.
 - h. Administrative costs.
 - i. Site inductions for union officials.

³⁰⁰ Respondent to AMMA Workplace Relations Research Project Survey 3, April 2011

- j. Disruption to the enterprise and employee attitudes (i.e. the breaking of employee engagement).
- k. The time taken up dealing with disputes before the FWC.
- l. Uncertainty as to current requirements (ongoing legal advice needed).
- m. Preparing for visits that never happen. It is commonly the case in Western Australia that unions will notify 50 visits across five days given that they want to hit a variety of locations and companies on a site but do not know exactly which days they will end up where. What this means in practice is that projects and the companies working on them prepare for widespread disruptions over the course of that week because they also do not know when the union will turn up to meet with their employees. AMMA maintains that it is fair and reasonable to ask for specificity in relation to union visits. Employers do not ask for the world but they do have businesses to run that should be taken into account by the system. Union officials should be required to nominate the time and day of their visit and turn up at that time only. Furthermore, a right of entry notice should only cover the visit of one union official at a time, not multitudes.
- n. Travel associated with entry visits. These included travelling costs for staff or external providers who are required to be onsite for union visits, along with transporting union officials themselves. Even where unions pay for travel costs, employers still have to go to the time and expense of chartering transport.

Case study – Transport costs on offshore oil and gas projects

1040. The following case study shows the logistical difficulties and financial impost for businesses associated with having to facilitate union transport and accommodation to remote sites under changes that took effect on 1 January 2014. While employers are technically entitled to be reimbursed for direct expenses, it is by no means guaranteed they can recoup all the costs of the exercise.

Transport to remote offshore site

Helicopter flights are a major cost to offshore construction projects as well as being the focus of complex logistics and stringent safety procedures.

Incoming personnel are typically flown into a city like Melbourne on commercial flights and accommodated in a hotel overnight before mobilising to the project. Buses transport incoming and outgoing personnel between cities and the embarkation airports.

The helicopters used typically have two pilots and capacity for up to 18 passengers. Seats on each flight are always in high demand and empty seats are rare. Each flight can cost more than \$30,000.

Additionally, the embarkation airports typically require two security staff to administer breath tests and search bags, plus two administrative staff to weigh and check in passengers and their luggage. Administrative staff also provide a pre-flight briefing and assist passengers to correctly assemble the personal protective equipment required for each flight. Helicopters are serviced and refuelled by a team of permanent ground support staff.

If union officials are required to be transported offshore for a workplace visit, they require at least two seats – one for the union official and one for an IR specialist to escort them. Offshore

hydrocarbons projects also require a dedicated escort for all casual visitors who are not part of the construction crew.

On many offshore projects, there are times when seats are just not available to cater for a union official's visit. This then requires a special flight just for the union officials. When such flights have to be scheduled on the weekend, costs can easily exceed \$40,000 for a single flight. But in reality two flights would be required – one to deliver the union official to the offshore barge or vessel, the other to pick them up later that day.

It is important for the PC to realise that helicopters cannot remain on a barge or vessel helipad for any length of time. They can only land, upload, reload and take off again. Under this scenario, the cost of a single union visit would be at least twice \$30,000 plus on-ground support staff for the day.

The costs of an offshore union visit also often entail an onboard specialised crew including a fire safety team to meet the helicopter. This would be around 10 people, most of whom have other duties aside from managing helicopter arrivals and departures and would be drawn away from their normal duties. Safety personnel are also required after union officials arrive onsite to provide an induction briefing and tour of safety features of the barge / vessel / platform.

If, due to timing, union officials meet with workers outside their meal breaks, they draw those people away from their construction jobs. Productive working time lost offshore is extremely high-cost compared to onshore construction projects due to the cost of mobilising personnel to each location.

Accommodation

If union officials request to be accommodated offshore, as they are currently entitled to do, the costs escalate further. Rooms and beds are in even greater demand than helicopter seats, particularly on offshore oil and gas platforms.

The number of people on board at any given time is also an issue in terms of service provision. Catering numbers are governed by trigger points and just one extra person can trigger the need for a catering staff ramp-up.

1041. The above case study highlights the vast range of potential costs that employers incur that are not necessarily reimbursable as direct costs under [s.521C\(3\)](#) and [s.521D\(3\)](#) of the FW Act.

Case study – Exponential growth in union visits

1042. The case study below shows what happened as soon as the FW Act took effect on 1 July 2009 and demonstrates the magnitude of the change in terms of the cost impost and diversion of resources.

On the Pluto liquefied natural gas (LNG) project near Karratha in Western Australia (a project with a capital expenditure at the time exceeding \$5 billion), there were no union visits for the first two years of construction between 2007 and 2009. Unions had no access privileges at that time because they had no members onsite and were not covered by an award or agreement onsite.

When the FW Act commenced on 1 July 2009, all that was required was that there be employees onsite that were eligible to become a member of a union (i.e. who could theoretically become a member of a union) for that union to have access.

Following no visits in two years, in the four months between 1 July and 27 October 2009, despite no change in the project's industrial arrangements, the four unions eligible to represent workers on the project made 217 entry requests. By May 2010 (i.e. after 10 months), that number had grown to

450³⁰¹ – an average of 10 times per week that unions sought to meet with the employees of multiple contractors.

1043. Another AMMA member company in metalliferous mining has had 160 entry requests in a matter of months.
1044. An AMMA member in the NT has had 900 union entry visits over three years. Visits can occur 365 days and nights per year. It is not uncommon for the project to have two or three organisers coming onto the site on the same day at the same time. Given the regulatory burden of such requests, the company pays a third party to manage those visits for them, which is a cost without any productive or competitive return.
1045. Another AMMA member has had a combined total of 2,000 visits across its various sites since commencement of construction of its projects. Of those, 1,230 have occurred on one project across multiple sites since 2010 and 740 on another since 2011.

FW Act review panel recommendations

1046. In August 2012, the FW Act review panel proposed three key changes for union access to worksites:
- a. Amend [s.505](#) of the Act to provide the FWC with greater power to resolve disputes about the **frequency** of union visits to a workplace in a manner that balances the right of occupiers and employers to represent their members in a workplace and the right of occupiers and employers to go about their business without 'undue inconvenience'. This recommendation was adopted under the FW Amendment Act 2013 but its value to employers is questionable under the current rules.
 - b. Amend [s.492](#) and [s.505](#) to provide the FWC with greater powers to resolve disputes about the **location** of union interviews and discussions. This recommendation was not adopted in the way suggested and ended up with the former Labor government going much further and legislating default union access to employee lunch rooms.
 - c. Continue the capacity for a permit holder to enter premises under [s.481](#) to investigate a suspected contravention relating to a member, with appropriate limits, following the end of the member's employment. This recommendation was not adopted and is not something AMMA supports.
1047. The review panel made no recommendations to require employers to facilitate union access to remote worksites yet that is exactly what happened under the FW Amendment Act 2013 which took effect on 1 January 2014 (and remains in effect despite legislation currently before the parliament to repeal those provisions).

³⁰¹ CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture [2010] FWA 2341, 29 March 2010

1048. Specific problems with the 1 January 2014 changes include:

Transport and accommodation to remote sites

- a. Remote site visits by unions can compromise safety, environmental and quarantine obligations.
- b. They ignore the widespread accommodation shortages employers are already facing on remote sites.
- c. They risk overriding existing protections for employees not to be disturbed in their private accommodations.
- d. They ignore the lack of available seats on most transport to remote operations, particularly to offshore operations, along with the high upfront costs of providing transport to union officials.
- e. They overlook the fact that unions can more easily and safely talk with workers at transit points or via remote technologies.
- f. They restrict employers' ability to recoup their full expenses of providing the transport and accommodation in the first instance.

Lunch rooms

- g. Those changes removed important existing rights for employers to designate union meeting places, thereby removing one of the only remaining controls employers and occupiers had over union site visits for discussion purposes.

Disputes over frequency of entry

- h. The existing dispute resolution provisions for excessive union visits invoke an extremely high bar and there is no evidence that the bolstered provisions have alleviated the concerns of businesses in this area.

Coalition policy / proposed legislation

1049. The current Government's FW Amendment Bill 2014 was tabled in parliament on 27 February 2014. It passed through the Lower House exactly six months later on 27 August 2014 but has since been held up in the Senate.

1050. The Bill proposes numerous amendments to the FW Act in relation to right of entry including:

- a. **Removing** entirely the 1 January 2014 requirements for employers / occupiers to facilitate union access to remote worksites by providing them with transport and accommodation.
- b. **Removing** the 1 January 2014 provisions giving unions "default" access to employee lunch rooms for discussion purposes in the absence of agreement

between the parties on another location. AMMA supports this part of the Bill and believes it should be implemented immediately.

- c. **Amending** the basis of entry for discussion purposes according to whether the union is covered by an enterprise agreement onsite. If a union is covered by an enterprise agreement, they would continue to enter sites based on the current FW Act rules as they stand (i.e. as long as their eligibility rules allowed them to represent members). If a union is not covered by an enterprise agreement onsite, under the Bill it can still enter to hold discussions but must be invited in by a member or prospective member, with a new system of "invitation certificates" coming into effect for when an invitation is in doubt. AMMA supports this part of the Bill up to a point but believes it can and should have gone further and that no invitation certificates should be able to be applied for if there is an agreement in place with another union covering that work.

SPECIFIC RECOMMENDATIONS

Basis of entry for discussion purposes

Recommendation 5.1

Where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site for discussion purposes unless it is covered by an agreement operating on that site or is in the process of negotiating one. Entry to agreement-covered sites by non-agreement covered unions for discussion purposes should be prohibited.

Recommendation 5.2

The system of "invitation certificates" proposed in the FW Amendment Bill 2014 should only be used to gain entry to non-agreement covered sites where the invitation of a member is in doubt. Invitation certificates should not be able to be applied for to gain entry onto sites for discussion purposes where agreements with other unions are in place.

Recommendation 5.3

If union site access for discussion purposes continues to be based on union eligibility rules in whole or in part, unions should be required to first obtain a certificate from the FWC confirming they have the right to represent workers before they are able to enter that site for discussion purposes.

Recommendation 5.4

Union officials are only entitled to hold discussions with employees who are eligible to be members of their union. The presence of persons at those discussions who are not eligible should void that particular right of entry visit.

Proof a union has members onsite

Recommendation 5.5

The FWC should be required to confirm the existence of a member onsite that has requested the union's presence to investigate a suspected contravention, with the employer entitled to know the specifics.

Recommendation 5.6

There must be strict rules for when unions meet with workers they are not entitled to meet with. In cases where this occurs, automatic suspension or revocation of an entry permit is warranted, along with the voiding of that particular visit.

Appropriate checks on permit holders' eligibility

Recommendation 5.7

Applicants for an entry permit should be required to provide sufficient evidence to the FWC that not only are they a "fit and proper person" but that they are authorised to represent the union named in the application.

Recommendation 5.8

Union officials should be required to carry photo identification at all times in order to enter a worksite under right of entry laws, consistent with the Coalition's Policy to improve the FW laws. That ID must not be able to be tampered with in any way. It must be required to be produced on attendance at the site, not merely upon request.

Misrepresentation of entry rights

Recommendation 5.9

The caveat should be removed from the FW Act which states the requirement for union permit holders not to misrepresent their entry rights does not apply if the permit holder "reasonably believes" their activities are authorised.

Obeying lawful instructions

Recommendation 5.10

The FW Act should be amended to explicitly state the consequences for non-compliance with a reasonable request. The requirement should include complying with the reasonable requests of not only the occupier but any other employer onsite with regard to health and safety. Consequences of a failure to comply should include automatic suspension or revocation of an entry permit.

Automatic suspension or revocation

Recommendation 5.11

The FW Act should be amended to remove the FWC's discretion not to revoke or suspend an entry permit for misuse if to do so would be "harsh or unreasonable". If any of the acts specified under s.510 have occurred, there should be automatic suspension or revocation of an entry permit.

Recommendation 5.12

The FW Act should be amended so that if a permit holder is found to have breached that section, i.e. they have intentionally hindered or obstructed while onsite, their entry permit is automatically suspended or revoked.

More detailed information about entry permits

Recommendation 5.13

There should be a requirement that any suspension or revocation or conditions imposed on an entry permit is publicly posted to the FWC website, along with all revocations of permits by holder name, for a period of up to 10 years.

Recommendation 5.14

There should be an explicit requirement for the publication of all applications for right of entry permits in advance of the applications being granted, giving all interested parties the chance to be heard in relation to an application.

The fit and proper person test

Recommendation 5.15

If any of the circumstances described in s.513 are enlivened, the permit holder should not be deemed to be a "fit and proper person" to hold an entry permit. If that person already has a permit, it should be automatically suspended or revoked.

Recommendation 5.16

In addition to a more rigorous application of the existing “fit and proper person” test, union permit holders should be required to comply with a code of conduct based on treating others at the workplace with dignity and respect.

Recommendation 5.17

When a union official submits a right of entry notice containing false information, such as asserting that they are a permit holder when that is not true, that should be prima facie evidence that he or she is not a fit and proper person.

Notification requirementsRecommendation 5.18

There should be a requirement that all employers, occupiers, contractors and sub-contractors on a site are notified of an impending union visit. This would mean amending s.487 which currently only requires a union official when entering for discussion purposes to notify the “occupier”, and when entering for investigation purposes to notify the “occupier and any affected employers”.

Recommendation 5.19

Notices of entry must contain enough specificity to enable businesses to run their operations with a degree of certainty. Open-ended entry notices or those spanning days or weeks should not be a feature of the system. Notices must specify a particular date and time and those times should be adhered to.

Recommendation 5.20

The legislation should confirm that a single entry notice covers the entry of one union official, not multiple officials.

Use and disclosure of informationRecommendation 5.21

The FW Act should be amended to make not only tribunal consent a requirement but to explicitly require the consent of an employee to whom a record applies before a union is given access. This would overcome the shortfalls arising from the current employee records exemption under the Privacy Act 1988.

Allowable matters in enterprise agreements

Recommendation 5.22

Enterprise agreement clauses relating to union right of entry should be expressly included in the list of unlawful terms (prohibited content) as was the case under the Workplace Relations Regulations 2006.

Union access to remote sitesRecommendation 5.23

The provisions implemented on 1 January 2014 requiring employers to facilitate union officials' transport and accommodation to remote sites should be removed in their entirety.

Appropriate meeting places and timesRecommendation 5.24

The provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location should be removed. The pre-1 January 2014 provisions that allowed employers to designate reasonable meeting locations and routes to and from them should be re-legislated.

Recommendation 5.25

Union right of entry should not be extended to private accommodations. Existing employee protections in that regard must remain.

6. SAFETY NET

6.1. INTRODUCTION

"... Over time, the safety net would inevitably become simpler. We would have fewer awards, with fewer clauses."³⁰²

- **Australia has a safety net in name only, falling well short of the long-recognised genuine minimum safety net our nominally bargaining based system requires.**
- **The PC should articulate principles for a genuine safety net to underpin and encourage workplace level bargaining, and a roadmap to ensure our system delivers on them.**

1051. One of the key functions of any system of labour market regulation is setting minimum standards in relation to particular matters that form key parts of the contract of employment between employers and employees, i.e. wages and conditions. This effectively sets a floor or mandates outcomes in a particular regulatory system for wages, leave, hours etc. – the terms and conditions of employment.

1052. The PC frames this in terms of "guarantees" in Issues Paper 2:

The workplace relations (WR) system provides employees with various guarantees about their wages and conditions, most notably through various minimum wages, a multitude of awards and obligatory employment standards (the National Employment Standards (NES)).³⁰³

1053. Issues Paper 2 charts the current safety net, and poses some very relevant and important questions. However, considerations in the terms of reference invite more fundamental, framework-level consideration of the role, formulation and structure of the safety net, including:

*... make sure that the FW laws work for everyone.
...fair, productive, and effective workplaces.
...make sure that the FW laws are balanced and effective.
... identify future options to improve the laws...
...the need to ensure workers are protected...
... and the need for business to be able to grow, prosper and employ.
...assess the performance of the workplace relations framework...
...the capacity for the ...framework to adapt over the longer term ...*

³⁰² The Hon Paul Keating, Prime Minister – Speech to the Australian Institute of Company Directors Luncheon, Melbourne, 21 April 1993, cited in: <https://abetz.com.au/speeches/address-to-the-sydney-institute-after-the-thirty-years-war> describing the future of the Australian IR system

³⁰³ Issues Paper 2, p.1

...fair and equitable pay and conditions for employees,
... the maintenance of a relevant safety net
... ability for employers to flexibly manage and engage with their employees
... barriers to bargaining
... red tape and the compliance burden for employers
...impact on jobs, incomes and the economy.
...maximise outcomes for Australian employers, employees and the economy,
bearing in mind the need to ensure workers are protected, the need for
business to be able to grow, prosper and employ, and the need to reduce
unnecessary and excessive regulation.
...a framework to serve the country in the long term.

1054. These matters invite fundamental, structural level consideration of the way the safety net should be structured and operate into the future, and in particular key considerations such as the roles and inter-relationships of the award and statutory (NES) safety nets, and how the safety net should support and interact with other parts of the WR system.
1055. The 'safety net' is exactly the right concept to frame the protection the fundamental rights and entitlements for Australian employees, and will remain so as our labour market and society evolves with changing workplaces and new generations of employees.
1056. Indeed, revitalising and moving towards better realising this concept, and making minimum standards in Australia a genuine safety net, should be one of the critical evolutions of the Australian WR framework emerging from this review.
1057. The idea of a safety net of minimum, fundamental and necessary standards which must be delivered in employment, and below which one cannot fall is a neat encapsulation of the fundamental shift in Australian workplace relations, and in particular the fundamental shift in the role of the award system, with the advent of enterprise bargaining in the early 1990s.
1058. No longer were awards to set actual, market or paid rates, but they were to provide a sub-market minimum of fundamental protective floors, directly relevant for setting actual terms and conditions for only the minimum possible proportion of employees. Also implicit in the safety net concept – although this is something Australia needs to recapture – the safety net should apply and have direct relevance to an ever declining proportion of employees, and be set at levels that will be overtaken by bargaining (the market) for as many employees as possible.
1059. As a country and WR policy community, we may have correctly understood where our safety net needed to go more than 20 years ago but we have never delivered a genuine safety net despite paying lip service to the concept. The Australian employment safety net is unduly complex, far more detailed than necessary and quite confusing to understand and apply. Compared to that of other OECD

economies such as New Zealand, the UK, the US, or Canada our safety net of universal minimum terms and conditions is positively byzantine and labyrinthine.

1060. The PC has the opportunity to properly consider how a genuine safety net should operate in future to support a truly modern Australian WR framework, and support a reformed system that will better deliver on the priorities outlined in the terms of reference.
1061. As we outline, the current mishmash and complication of awards, NES, preserved instruments etc. is a regulatory mess, and a mess which delivers no additional protections or advantages for employers, employees or our community or economy, and indeed detracts from critical safety net functions of enforceability, clarity and explicability.

WHY IS THE SAFETY NET PART OF AUSTRALIA'S WR SYSTEM?

1062. A legislated / regulated safety net is a recognition by the state that some contracts between employers and employees would be contrary to both the community interest and the interest of the employees concerned (e.g. employment at an unacceptably low level of wages or with no access to widely accepted standards regarding leave).
1063. In Australia, the safety net lies at the very heart and genesis of our regulation of work. This is the period between the 1890s and WWI, which is so fundamental to understanding the regulation of work in Australia and its OECD counterpart countries, as well as the ILO and its international conventions.
1064. Where some countries such as the UK concentrated on regulating trade union rights, and many OECD countries evolved collective bargaining largely outside of government regulation, early Australian work regulation under Commonwealth legislation was about setting minimum wages and arbitrating awards of terms and conditions which became enduring delegated legislation. The very lifeblood of Australian WR has been the "New Province of Law and Order" of Justice Higgins, and his decision to create a highly interventionist minimum wage framework, which in time became the award system.
1065. This is an important point to communicate. Australia has had difficulty moving to a genuine safety net in part due to deeply ingrained assumptions about the role of the state in setting near on market rates.
1066. As indicated, we understood conceptually what a genuine safety net would look like and how it should operate in the 1990s, but in practice notwithstanding tens of thousands of hours and many millions of dollars being spent on various exercises - award modernisation, award rationalisation etc. - our so-called safety net remains well short of an actual safety net.
1067. Returning to the contemporary, to be clear, resource employers unambiguously:
- a. Support Australia having an effective and enforced safety net of fundamental minimum terms and conditions, which accords with community expectations

and values, and which plays a genuine safety net role in a bargaining based WR system.

- b. Recognise the standards base which Australia has developed over time, and that there will not be, nor should there be, an aspiration to be a low minimum wage, or low safety net country. Employers acknowledge that the legacy of the award system creates an expectation of a comparatively fulsome set of minimum conditions as part of the safety net compared to some other countries.

1068. One key facet of any WR framework must be the protection of employees in the employment relationship, and ensuring that some appropriate body of community driven minima are observed in all (or an appropriately prescribed subset of) employment relationships – noting the principles set out below for the operation of an appropriate safety net for the contemporary and future operation of the safety net in Australia.

1069. In fact, as a general shift, the Australian WR system of the future could usefully be more focused on a much clearer, improved safety net; better able to support workplace and individual flexibility and determination, and start to move away from:

- a. Regulating terms and conditions above any level that could realistically be considered a safety net, or for employees that can in no way be considered vulnerable or at any inherent labour market disadvantage.
- b. The regulation of process and detail, and prescription of how agreement-making occurs, and superfluous detail and red tape in other areas of the system, which constitutes so much of the regulatory impost for employment in Australia, and which is not imposed for employment in comparable OECD countries.

1070. One of the key difficulties for the operation of any system, particularly for the Australian approach to date which might be characterised as “highly regulated decentralism resting on an unduly complex and overly extensive safety net” is the extent to which a safety net should be immutable or absolute, versus the extent to which parts of it may, to a prescribed extent, be subject to bargaining and trade-off. This is a critical question which to date has not been solved well in Australia, nor indeed has it been solved stably and sustainably, which are essential qualities of an effective safety net.

WHAT THE SYSTEM NEEDS TO DELIVER / GUIDING PRINCIPLES

1071. So, what would a genuine safety net look like, what characteristics would it have and what should the guiding principles be for the future development of the safety net in Australia?

1072. The principles that should underpin the creation of a genuine safety net in Australia, and which the system should start to move towards, should in essence be:

- a. **Springboard for bargaining:** A genuine safety net is set at a level which encourages bargaining by as large a proportion of the workforce as possible. Bargaining should not be crowded out or dis-incentivised by a safety net that exceeds its protective or minimum role and sits at or above market levels, or consciously tries to increase entitlements.
- b. **Genuine minima:** A genuine safety net of terms and conditions would be set at the level of genuine minima, there to ensure minimum community expectations are met in all employment and to protect the lowest-paid and most vulnerable. The safety net should not be treated as the vehicle to increase actual wages payable, or as an instrument of redistribution, or attempt to set actual terms and conditions for all but the lowest-paid employees in need of safety net protection.
- c. **Declining direct relevance:** It is entirely healthy that a safety net, particularly for wages, be of declining direct relevance to the rates actually payable in workplaces, which take into account market movements and hopefully rewards for productivity and output above minimum levels. There is nothing adverse in a gap between market and minimum rates, and indeed the WR framework of the future should aspire to fewer and fewer employees being employed on minimum wages.
- d. **Single, community standards:** A genuine safety net minimises or eliminates differences in regulated minimum outcomes between employees in different industries, or between different cohorts of employees. Put another way, a community standard should be a single community-wide, global standard, and should apply universally and without differentiation between industries to the extent possible³⁰⁴.
- e. **Brief, clear and simple:** A genuine safety net is simple, straightforward, easily expressed and easily understood.
- f. **Explicable and promotable:** Linked to the preceding point, a proper safety net is clear and able to be widely promoted and easily advised to employers and employees. Many other OECD countries can explain their minimum wages to employers and employees in a single simple table or notification. In contrast, in just the top six (6) awards covering AMMA members contain over 150 separate minimum wage rates, just for non-apprenticed adults³⁰⁵.
- g. **Enforceable:** Resource employers support the clear and certain enforcement of the safety net, which will best be achieved by a superiorly structured and targeted safety net as outlined in this section of the submission, and supported by reforms to what is currently the FW Ombudsman. This requires a simpler, clearer safety net of obligations as applies in other OECD countries.
- h. **Regularly fixed where appropriate, basically immutable where appropriate.** Minimum wages (the terms of employment) should be varied with appropriate

³⁰⁴ Note however that AMMA is not seeking to make submissions on the minimum wage per se, given other industries use it more, and in particular makes no submission on the concept of minimum wage differentiation between states or regions.

³⁰⁵ See Chapter 4.5.

regularity, but any wider safety net of minimum conditions should vary far less regularly and only when required. Standards of leave, for example, should be set and essentially not varied bar in exceptional circumstances.

RESOURCE INDUSTRY FOCUS

1073. The resource industry has one of the highest levels of average and median wages of all parts of the Australian economy, and these average wage levels exceed award minima by some margin.
1074. As an industry towards the top of the pay distribution, particularly at non-managerial occupational levels, the low-paid and minimum wage rates are not a direct concern for most employers in the industry, and are not as regularly used to determine wages and conditions for employees as they are in other industries e.g. retail or hospitality. AMMA does not, for example, directly participate in minimum wage reviews on behalf of the industry, nor does AMMA circulate generic award wages advice to its members. Very few investigations or underpayment claims are made through the FW Ombudsman.
1075. The safety net is, however, relevant to bargaining in the resources industry and will remain so into the future, including for employers providing remuneration and conditions well in excess of the safety net, and implementing sophisticated human resources strategies and resourcing at the enterprise level.
1076. This part of our submission is concentrated therefore on broader questions for the safety net and its operation, which is very relevant to all pursuing workplace bargaining. It is less focused on levels of minimum wages and, for example, penalty rates than some others taking part in this review.

INTERNATIONAL COMPARISONS

1077. Australia's OECD counterpart countries, such as New Zealand, the UK, US, Canada and others better deliver on "what the system needs to deliver / guiding principles" (above) than Australia's complicated system of the NES plus modern awards.
1078. Employers and employees in those systems have for example:
- a. Single or simply identified and applied minimum wages, where Australian employers and employees need to discern their coverage between 122 modern awards, and then work out which is often dozens of minimum wage rates apply. From there, they need to apply that minimum wage to particular hours of work, add in allowances and penalties to derive overall rates of pay, not to mention applying complex formulae to derive actual minimum rates in some industries.
 - i. For example, the FW Ombudsman's Pay Check Plus online tool offers 24 different choices of classification under the *Mining Industry Award 2010* alone, which is merely the first step in an at least four -step process once allowances and penalties are applied.

- b. Simpler and more clearly explained minimum standards on the matters covered in the Australian NES, without the complication of a dual safety net spread across statute (the NES) and awards.
- c. More standardised and widely applied minima that can be more widely understood and applied for all employment.

A SAFETY NET FOR EMPLOYERS?

1079. Further and to date, under-considered questions include: *What is the safety for employers? What should employers be protected from in their negotiations?*
1080. Just as our workplace laws intervene and prescribe (and indeed proscribe) various contractual arrangements with appropriate minima for employees, there are also things employers need to be protected from in their interests, and the interests of the community.
1081. Our system already makes these interventions in a number of areas, albeit not explicitly as a safety net for employers, including for example:
- a. Protection against unions striking for or seeking agreement terms on various prohibited matters / objectionable terms under *the FW Act*.
 - b. Prohibitions on the payment of strike pay³⁰⁶.
1082. The PC should give consideration to what the safety net is for employers, and the fundamental compact between the regulated and regulator. In this case we need to recognise the duty owed by the state to businesses in exchange for the state's regulation of employment and protection of employees.
1083. In particular, the system of the future needs to pay far more regard to safety net obligations owed to employers such as:
- a. Compliance being supported by clearer and simpler obligations. By any measure the Australian employment safety net is far more complicated than in OECD counterpart countries and far more complicated than it needs to be.
 - b. A genuine safety net needs to be not only clear, but stable. With the exception of dynamic entitlements such as minimum wages, we need to get the safety net right and not change it (or at very least vary it only rarely). This includes not exposing the safety net to continuous change through litigation; it should be set in the statute or award and not varied through litigation.
 - c. Employers need both incentives to bargain and scope to bargain. Too pervasive a safety net crowds out space to negotiate, and in doing so crowds out discussions on productivity and competitiveness.

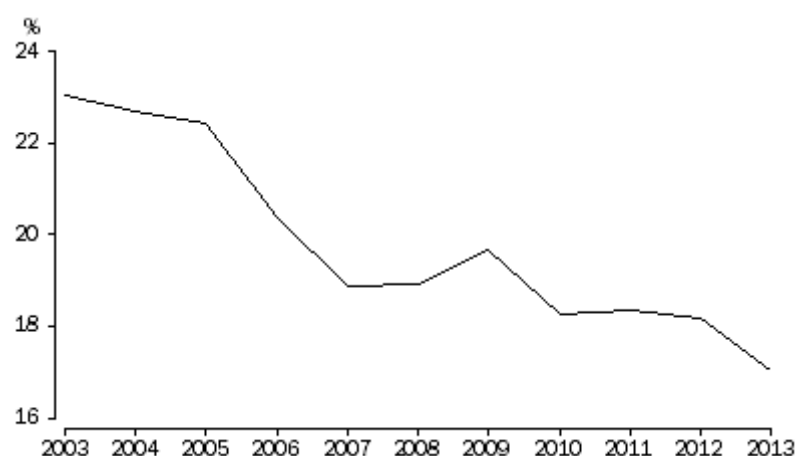
³⁰⁶ Division 9 of the Fair Work Act 2009.

1084. However, whilst these are useful considerations for the PC in this review, and it is useful conceptually for the PC to recognise the protective / safety net dimensions of the system for employers and non-union members:
- The explicit 'safety net' label in the future WR framework should be reserved for the minimum safety net of terms and conditions of employment for employees.
 - The WR framework should provide, promote and enforce a genuine safety net of minimum standards of employment for employees, which better delivers on the above guiding principles for a more effective and relevant safety net, better promoted and enforced, and playing a more appropriate and effective role in a system

A FURTHER DIMENSION TO THE SAFETY NET FOR EMPLOYEES

1085. Also relevant to consider is a 'safety net' for non-unionised member employees. The system already encompasses various such protections against, for example:
- Union attempts to have non-members pay a fee to the union for representation they do not choose to pursue (a "bargaining services fee").
 - Unlawful treatment on the basis of their decision not to join a trade union ("adverse action", noting our calls for reform in this area in Part 7 of this submission).
1086. The need for such protection can only increase in the future as fewer and fewer Australians, particularly emerging generations of Australians, choose not to join trade unions:

Proportion of employees with trade union membership in main job³⁰⁷



1087. Even were Australian unions to succeed in reversing their decline in support against decades-long global and domestic trends, in the majority of Australian workplaces

³⁰⁷ ABS, Cat. 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Summary of Findings, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6310.0>

union members will not be in the majority, and even in workplaces with some level of union membership, there will be non-members whose rights and interests need to be protected from the unacceptable excesses of collectivism, such as for example:

- a. Bullying in relation to decisions to not join a union or not participate in strike action.
- b. Pressure to join unions, including misuse of any legislated capacities for unions to enter workplaces.
- c. Bargaining fees, identified above.

WHAT TO MAKE OF THIS

- 1088. The following chapters in Part 6 of this submission address the current Australian system and how it needs to change to play its essential genuine safety net role in the current and foreseeable WR system and labour market.
- 1089. Resource employers consider the Australian safety net has lost its way, and has never been able to play the genuine safety net role in our evolving workplace relations system, that it was recognised as needing to play, in the early 1990s.
- 1090. Notwithstanding 20 years of the right rhetoric, Australia has a highly-pervasive, in parts excessive, highly-complicated and misguided safety net, which is a safety net in name only. It is not meeting fundamental principles or qualities for a genuine safety net, and thereby is not supporting fair, productive and effective workplaces in Australia.
- 1091. As set out in the guiding principles, we commend to the PC above, the Australian safety net needs to become:
 - a. A genuine springboard for bargaining, rather than setting actual rates paid or standards observed in workplaces.
 - b. Genuine minima rather than market instruments, particularly for wages and some conditions (noting others such as annual leave will stay at "standard" levels for most employees).
 - c. Of declining direct relevance as workplace level and agreed arrangements set actual terms and conditions for a greater proportion of employees.
 - d. More consistent and less variable as standardised, community standards are reflected in prescribed minima.
 - e. Briefer, clearer, simpler and more easily understood.
 - f. More easily explicable, promotable and enforceable.
 - g. Regularly fixed in some areas, but basically immutable or very rarely changed in others.

1092. The key priorities for the resource industry in this area are:

- a. Identifying and addressing the fundamental confusion and duplication in the Australian employment safety net between awards and the NES.
- b. Ensuring any regulation of transfer of business, and preservation of employee benefits between employers operates consistently with the goals in the terms of reference, and specifically the encouragement of persons remaining in work and operations being able to proceed sustainably and continuously, competitively and productively.
- c. Other issues relating to minimum wages, long service leave and stand down.

1093. Note: In Part 8 of this submission, AMMA also recommends the creation of an Employment Safety Net Act, and an Australian Employment Safety Net Commission.

6.2. EMPLOYMENT STANDARDS AND AWARDS

*"We do not have the legislative ability to provide binding advice (on the NES)."*³⁰⁸

- **Awards should be abolished in favour of a universal statutory safety net, building on the NES.**
- **Alternatively, further matters should be incorporated into the NES as community standards and removed from industry-specific awards.**
- **New NES, imported from awards, should only apply to those currently subject to awards.**
- **Awards should prescribe only matters that need to be set at an industry level, which may centre on wages, classifications and hours.**
- **The PC should identify an improved safety net for the future in its interim report and then invite further submissions on transitioning to such an approach.**

INTRODUCTION / KEY RECOMMENDATIONS

1094. Australia has a confused, repetitious and overlapping safety net under the FW Act, which falls well short of the qualities of an effective, modern safety net.
1095. Key questions the PC should engage with to identify and recommend the best and most effective employment safety net for the future include:
- a. *Should Australia continue to have a dual NES and award safety net?*
 - b. *Is this the best and most effective safety net structure for the future, which will best deliver on the goals identified in the terms of reference?*
 - c. *Should we rationalise the safety net into one or the other; either awards or the NES?*
 - d. *Alternatively, if we must retain a dual role for awards and the NES how do we ensure greater rationalisation, and that each component of the safety net is regulated using the best mechanism?*
1096. To cut through complexity in this area we can identify up-front the resource industry's key recommendations, along with what we argue should be included in awards and the NES to provide a more effective, modernised safety net.
1097. AMMA's vision is for a vastly simpler, clearer and more standard safety net in Australia, more comparable to those that apply in our OECD counterpart countries, and providing an improved foundation for workplace level determination in the future.

³⁰⁸ Fair Work Ombudsman, Nick Wilson, Education, Employment & Workplace Relations Legislation Committee Senate Estimates Hearings, May 30, 2011

Recommendation 6.2.1

Awards should be abolished in favour of a solely statutory safety net, based on the existing NES, expanded to include a number of matters currently in awards, plus Long Service Leave. This should be subject to not extending additional safety net obligations to currently non-award covered employment.

1098. Alternatively:

Recommendation 6.2.2

If this is not progressed and awards are to be retained:

- Existing award content should be rationalised into the NES where appropriate and in particular where there is replication and overlap, moving towards single community rather than industry-specific standards on a greater range of safety net issues,
- Awards should address only matters that it is determined require industry specific regulation. This may see awards (for example) address only wages, classifications, hours and some payments.

1099. This is a matter of regulatory structure, not content or level. This is not advanced to shrink or omit matters from the safety net, and without regard to debates about the level of particular standards or labour costs. This is not designed to cut the safety net, rather it is a recipe for a more effective safety net.

1100. Rather it asks whether there could be a better way to regulate a contemporary safety net in a bargaining-centred and driven system in Australia – a question that is answered pretty quickly when one looks to our OECD counterparts that do not have 122 modern awards, prescribing more than 2 million words of additional regulation, in addition to their statutory employment standards.

1101. If AMMA's primary recommendation to discontinue award regulation is not accepted, under our alternative recommendation, a revised safety might in summary be structured along the lines of the following:

Existing NES	Additional NES / Statutory provisions ³⁰⁹	Award matters
• Maximum weekly hours • Requests for flexible working arrangements • Parental leave • Annual leave • Personal carers leave • Compassionate leave • Community service leave	• Types of employment • Termination of employment • Redundancy • Leave • Public holidays • Long service leave • Interaction of NES and Awards	• Application and scope provisions • Minimum wages • Classifications • Annualised salaries • Hours • Overtime • Shift work

³⁰⁹ With comparable provisions removed from awards.

Existing NES	Additional NES / Statutory provisions ³⁰⁹	Award matters
• Long service leave • Public holidays • Notice of termination • Redundancy pay • Fair Work Information Statement³¹⁰	• Dispute resolution	• Penalty rates • Rostering • Breaks • Allowances³¹¹

NES AND AWARDS: A MESS

1102. Australia has a very complicated hybrid or dual safety under the FW Act comprised of both awards and the NES. An employer seeking to understand and comply with their employment obligations needs to discern their responsibilities and obligations from:
- A 16,490 word NES.
 - More than 2 million words in 122 awards³¹².
 - Even where the employer knows which award applies to them, the employer has to deal with perhaps a 17,000 word plus document in addition to the NES.
1103. This is not how the rest of the world regulates work. All competitor OECD countries have employment laws, all have employment specialists and all have employment lawyers to navigate complicated systems. However, the degree of complexity and the levels of detail, prescription, and sheer regulatory extent in Australia is unique.
1104. The rest of the developed world sets an employment safety net that is not only simpler, shorter and more straightforward, but in almost all cases there is one safety net for the community not a safety net that differs markedly from industry to industry. To our knowledge, no other industrialised economy attempts to have a dedicated industry safety net for each major industry (i.e. 122 modern awards) in addition to statutory minimum standards.
1105. As a nation, we need to consider why we have such a complicated, extensive, and wordy safety net, and more importantly:
- What if anything Australia gains from its uniquely prescriptive approach to employment laws.
 - To what extent our complicated, extensive, and wordy safety net delivers superior outcomes to those in comparable countries.

³¹⁰ This should be deleted.

³¹¹ Allowances should be abolished from a modern workplace relations system.

³¹² Mining Industry Award 2010 = 17,698 words. 17,698 words × 122 awards = 2,159,156 words (which is a conservative estimate some awards are longer, some shorter).

- c. What the benefits would be of moving to a simpler safety net, more equivalent to those in our OECD counterpart economies.

1106. There would theoretically be a number of ways forward, however:

- a. International practice clearly favours statutory minimum standards, set at a community level for all (or almost all) employment, rather than industry specific standards.
- b. The relevance and role of awards has fallen³¹³ as was intended with the introduction of enterprise bargaining, and can only fall further.
- c. It would be far harder to take matters out of the NES and back into awards, than to move the other way and consolidate minimum standards into legislation which is global best practice.

1107. We request the PC engage with some fundamental questions:

Why have awards at all at this point of Australia's development?

Why couldn't Australia have a system of bargaining underpinned by a common statutory standard, against which agreements are measured for approval according to prescribed tests? - i.e. NES only.

1108. The complication of the current dual or replicated system of awards and NES is sketched below, but as an introductory point, we urge the PC not to be misdirected by the efforts that have been put into award modernisation and award rationalisation across the past one to two decades.

1109. The Commonwealth, states, unions and employers have spent tens of millions of dollars, if not hundreds of millions – and the efforts of a generation of workplace relations professionals - to create a system in which there are still 122 awards, and more than 2 million words of delegated legislation through our award system. If one steps back and looks at the system afresh, award reform has been completely underwhelming despite 20 years of talking about it.

1110. 122 awards is a lot better than where we have come from, but these 122 instruments of delegated regulation still:

- a. Constitute a complex and complicated safety net which detracts from clear compliance and enforcement and in particular from capacity for information transfer and promotion.
- b. Represent a level of complication and prescription in the Australian employment safety net which is unknown in the safety nets of other developed countries. This level of complication and prescription in minimum employment standards makes enforcement and promotion harder than it

³¹³ Issues Paper 2, pp.10-11

needs to be, harming employees and detracting from compliance.

- c. Ultimately add nothing to the Australian system over its developed country / OECD economy counterparts. There is nothing better or more protective in the Australian safety net compared to our developed country counterparts which do this a very different way. Our over-detailed, replicated and over lengthy safety net is certainly doing nothing for compliance or job creation in this country.

1111. We also urge the PC not to be misguided by the successful efforts of the FW Ombudsman, the FWC, or any one of Australia's union and employer bodies in trying to make sense of this complexity. It is our collective job to try and make sense of the Australian safety net, and to present it as something which can be understood and complied with. However, these efforts do not mean we have got the safety net right or that we could not do significantly better in Australia in how we set, promote, enforce etc. minimum terms and conditions of employment (the safety net).
1112. We need a fair system that works for everyone, and that delivers on both the economic, and the enforcement and equity goals outlined in the terms of reference. This demands a re-examination of our complicated and overlapping safety net and consideration of how we could do better.

UNDERSTANDING THE SAFETY NET

1113. Issues Paper 2 starts with the following summary of the wages and conditions minimum standards in Australia.³¹⁴

Where there is a 'registered agreement' in place (Issues Paper 3), the minimum pay and conditions in the agreement apply. To create a registered agreement, the parties must obtain the agreement of the Fair Work Commission (FWC), which decides if the employees are each better off overall under the agreement than the award — indicating that the award safety net directly affects the terms that can be negotiated under enterprise agreements.

If there is no registered agreement, the minimum pay and conditions in the relevant award is likely to apply.

Some high income employees and managers are award free. Where no award or agreement applies, the NES and the federal minimum wage sets the floor on pay and conditions.

1114. Deconstructing this is a useful place to start in recognising key problems with the overlapping and replicated Australian employment safety net, and how they could be redressed in an improved WR framework.
1115. Firstly, the PC is technically correct that registered agreements are minima which can be exceeded. However, virtually all users of the WR system distinguish employment

³¹⁴ Issues Paper 2, p.1

under a registered agreement from employment under the safety net. This is as simple as someone is either employed on an agreement or on the safety net, as mutually exclusive concepts.

1116. Coverage by an award does not displace the application of the NES, as the following clause from the *Mining Industry Award 2010* makes clear:

6. The National Employment Standards and this award

The NES and this award contain the minimum conditions of employment for employees covered by this award.

1117. Thus award employment is correctly understood as employment which falls within the scope and classifications of the award, where there is no registered agreement, and to which both the award and the NES apply.

1118. We are concerned that the third dot point on page 1 of Issues Paper 2 regarding the NES and award free employment does not appear to correctly capture how the safety net applies.

1119. The NES applies to all employees³¹⁵, not just award free higher income earners, as explained on the Fair Work Ombudsman website:

The National Employment Standards (NES) are 10 minimum employment entitlements that have to be provided to all employees.

The national minimum wage and the NES make up the minimum entitlements for employees in Australia. An award, employment contract, enterprise agreement or other registered agreement can't provide for conditions that are less than the national minimum wage or the NES. They can't exclude the NES.³¹⁶

1120. From this we see that the vast majority of Australia's 11.6 million employed persons are covered by a multi-part safety net, and in particular the NES plus awards. This includes:

- a. All those covered by agreements, who are also covered by the NES.
- b. All those covered by awards, who are also covered by the NES.
- c. All those not covered by awards or agreements, who are covered by the NES.

THE NES

1121. Resource employers are focused on the role, structure, and operation of the NES, and in particular its contribution to an effective safety net in Australia. This is not the

³¹⁵ Putting to one side the rump of private sector employment retained in state systems.

³¹⁶ <http://www.fairwork.gov.au/employee-entitlements/national-employment-standards>

right forum to be running merit claims to extend the NES or dispute levels of entitlement under the NES.

1122. The resource industry does not ask the PC to undertake a root and branch examination of the level or adequacy of the specific NES (for example of numbers of days leave)³¹⁷ nor for this review to be used a vehicle for any interest to try to add additional matters to the NES (save for LSL which could usefully be added as canvassed by the PC in Issues Paper 5).
1123. In the 21st Century Australia is unique in attempting to provide its employment safety net through 122 modern awards plus the statutory NES. Australia seems to have the longest, most complicated, and multi-sourced expression of minimum employment entitlements of any developed country.
1124. This does not reflect international practice in other OECD countries. Most OECD countries have solely statutory minimum standards of employment, such as:
- a. New Zealand's *Holidays Act 2003*, which provides for annual leave and public holidays, and the various leave and hours of work matters in the *Employment Relations Act 2000*.
 - b. The UK's *Employment Rights Act 1996*.
 - c. The US *Fair Labor Standards Act*.³¹⁸
 - d. The Canadian province of Ontario's *Employment Standards Act 2000*.
1125. Australia's unique constitutional arrangements drove the evolution of the employment safety net into arbitrated awards rather than legislation. Australian trade unions also pursued in arbitration what their international counterparts pursued in legislation. This was in part due to the capacity of the former Conciliation and Arbitration Commission / AIRC, to make and expand the scope of delegated legislation (the awards). Added to this were unique complications from Australia having a federal system.
1126. Statutory minimum standards did exist in Australia, but often did so to provide a more peripheral safety net for those not on awards.
- a. Long Service Leave has always been a largely statutory entitlement, perhaps from its history as a colonial civil service leave entitlement.
 - b. An award-free employee covered by state legislation (prior to the creation of the national system) did enjoy rights to parental leave, sick leave, the taking of holidays etc. through statute, but this was less important in the system than the arbitrated awards which applied to far more employees. Such employees were also not generally members of trade unions, who in substantial part determined which employment was award covered and which was covered by statute and common law.

³¹⁷ Issues Paper 2, pp.9-10

³¹⁸ On US Labor legislation see: <http://www.dol.gov/compliance/guide/>

1127. At the national level, there are two important forces to understand behind the creation of the NES:
- a. If the national system was going to have universal coverage, or coverage of all those working for corporations, it needed to provide some safety net minimum standards for non-award covered employees (managers, professionals etc.) to replace those at the state level. Some form of NES was required to provide an appropriate safety net for professional, managerial and other non-award covered employees.
 - b. Various proposals to reform workplace relations from the early 1990s were predicated on a shift away from award minima towards statutory minima, and we saw in Victoria³¹⁹ and Western Australia³²⁰ the creation of vastly simplified statutory minima for bargaining. The logic of moving away from awards towards statutory minimum standards has been apparent in the Australian system for more than two decades.
1128. The NES were created by Work Choices, initially as the Australian Fair Pay and Conditions Standard, which later became the NES under the FW Act. There was a challenge to the constitutionality of the use of the corporations power which underpinned the Work Choices changes, which failed. After the High Court upheld the Commonwealth takeover of most of the coverage of state systems, scope for a codified set of statutory minimum standards was confirmed.

EXPAND THE NES

1129. There is scope to expand the NES to remove matters from awards, either entirely or to begin to move awards to address only what needs to be addressed at an industry specific level.
1130. This should see the NES expand cover current award matters such as:
- a. All paid and unpaid leave in all its forms.
 - b. Public holidays.
 - c. Terms of employment (full-time, part-time, casual etc.).
 - d. Long Service Leave, transforming existing Division 9 of Part 2-2 of the FW Act into an actual national long service leave standard.

Prescription, clarity and reliability

1131. Whilst the NES can be expanded in the range of matters it covers, something needs to be done about its expression, wordiness and accessibility.

³¹⁹ The former *Employee Relations Act 1992*.

³²⁰ The former *Minimum Conditions of Employment Act 1993*.

1132. The NES constitute 72 sections of the FW Act, and run to 16,490 words. This drafting is quite complex and prescriptive in a number of areas compared to approaches in other developed countries.
1133. There is clearly scope to further simplify and render into plainer English the NES in the legislation so it can be read and interpreted by employers and employees in workplaces.
1134. **There is a better way to regulate:** More than 20 years ago, Western Australia passed the *Minimum Conditions of Employment Act 1993*. Putting to one side that the legislation has subsequently been repealed for political reasons, and putting to one side which standards were codified and at which levels, purely as a matter of form, brevity, clarity and wording, this was a vastly superior and modern expression of the safety net than was achieved under either Work Choices or the FW Act.
1135. It could be read and applied by employers and employees in workplaces, largely without specialist knowledge, something which is far from the case under the current NES in the FW Act 2009. We commend this legislation³²¹ to you as a simplified model that the national system should aspire to in setting its safety net.

There was never a decent clean up behind the NES

1136. As we have argued through this section in particular, Australia's workplace relations legislation is very complex, and indeed:
- a. Australia's regulation of workplace rights and is far more complex than it needs to be, which detracts from the key qualities a safety net must deliver for its users such as clarity, and usability.
 - b. For unique historical and constitutional reasons going back to federation, the "clients" of Australia's workplace relations system learned to live with a level of complexity manifestly beyond that of other national systems in comparable countries. It was not until the late 1980s that anyone began to start to question that complexity, and this was itself isolated and heavily contested.
 - c. No one ever stepped back, and looked at the regulatory impost and approach of the system as a whole, nor was there any real engagement with whether there was a better way to regulate work.
 - d. This is the opportunity to step back and take a wider look. This review offers a unique and historic opportunity to step back and look fundamentally at how we regulate work in this country and whether we can do better in the future.
1137. As a function of this complexity of our workplace relations system, for more than 20 years each major tranche of change in our workplace relations legislation has needed to be followed up with subsequent remedial or clean up legislation after some period of months.

³²¹ http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/wa/num_act/mcoea199314o1993411.pdf

1138. A key problem with the NES was that there has never been a proper remedial follow up, there has never been the proper clean up behind the NES that such major changes to the legislation require.
1139. There was the FW Review Panel and its report in 2011 and 2012³²², and some further amendments were passed prior to the 2013 election, however fundamental problems have come to light with the NES which remain a challenge and detract from the role it is to play in our workplace relations system. These are pressing issues of significant concern to industry which need to be fixed with some urgency.

Paying out annual leave entitlement on termination

1140. Resource industry employers have long been confused in relation to what they are required to pay to employees on termination in respect of an annual leave entitlement. For example, if they should pay "leave loading" which otherwise would have been payable to an employee when he or she actually took annual leave.
1141. Section 90 of the FW Act provides as follows:

90 Payment for annual leave

- (1) *If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*
 - (2) *If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.*
1142. Effectively, section 90(1) provides the minimum entitlement to be paid to employees when they take annual leave. Section 90(2) goes one step further, and provides that employees should be paid not just the minimum entitlement but any monies they would have been paid under any relevant industrial instrument had they taken the leave. In effect, section 90(2) attempts to incorporate entitlements under enterprise agreements and awards into the NES safety net.
1143. It is worth noting that the origins of leave loading were that employees who normally received overtime and allowances would continue to receive the same rate of pay while on holidays and not suffer any disadvantage. The original awards bestowing that entitlement only provided leave loading if the leave was actually taken.
1144. The FWO issued advice in early 2011 saying the NES required leave loading to be paid on unused annual leave at the time of termination and also overrode anything to the contrary in awards or agreements that came into force on or after 1 January 2010³²³. Employment Minister at the time, Chris Evans, told the Senate Estimates committee it was not a problem if employer groups disagreed with the FWO's advice

³²² <https://employment.gov.au/fair-work-act-review>

³²³ FWO Fact Sheet, *Final Pay*, viewed on FWO website (www.fwo.gov.au) on 4 February 2012

and continued to advise their members otherwise, as long as their advice came from an informed perspective.

1145. A recent decision of the Federal Court of Australia has given judicial clarity on the issue confirming that:

*"s90(2) (unlike s 90(1)) is not confined to a statement of a minimum obligation, but is a statement to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if employment comes to an end while paid annual leave remains untaken."*³²⁴

1146. The court has interpreted the legislation to mean that when paying out annual leave entitlements on termination of employment, employees should be paid their base rate of pay **plus** any other amounts normally payable to that employee when taking annual leave (including annual leave loading) and that any industrial instrument that provides the contrary is in contravention of the NES.
1147. AMMA maintains that any interpretation of the FW Act that says the NES requires leave loading or other amounts on top of an employee's "base rate of pay" to be paid on termination where an award states something to the contrary or is silent on the issue is based on a narrow and isolated construction of s.90(2).
1148. That construction would not only be inconsistent with modern statutory interpretation but would provide a 'windfall gain' to employees that parliament did not intend, while exposing many resource industry employers to significant additional labour costs.
1149. This issue has been taken up in a Bill currently before the Parliament³²⁵. There needs to be urgent change to provide users of the system with clarity on these issues.

Recommendation 6.2.3

It should be made clear that the National Employment Standards provisions do not override modern awards in relation to leave loading to be paid upon termination if those awards are silent on the issue or state explicitly or implicitly that leave loading should not be paid on termination.

Cashing out high leave balances

1150. There is also confusion under the NES on the rate at which an employee can, by agreement, cash out excessive or extensive balances of personal and carers leave. Again the drafting of the NES has, some are arguing, created ambiguity on the rate at which agreed cashing out must be paid, and cutting across what employers and employees can agree.

³²⁴ Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining & Energy Union (No. 2) [2015] FCA 136

³²⁵ Fair Work Amendment Bill 2014, Schedule 1, Part 2

1151. Excessive balances of a range of forms of leave are a problem for longer-tenured employees throughout the Australian workforce, and employers and employees have successfully been able to agree to mutually beneficial arrangements where excess or higher entitlements are paid out to the employee, providing them with extra remuneration and reducing the liability the employer carries forward.
1152. Disputes have arisen on whether the NES³²⁶ allows an employer and employees to agree to cashing-out at base rates of pay, or whether some higher rate is required (such as what the employee would have earned had he or she worked on the days being cashed out).
1153. These disputes have arisen notwithstanding that employees have specifically entered into collective agreements, which the FWC has registered, expressly allowing for cashing out at base rates of pay.
1154. This has given rise to the referral of a question of law to the Federal Court, but more importantly has led to civil proceedings against employers for simply doing, by agreement with employees, what a properly registered collective agreement quite specifically and expressly allows them to do.
1155. There is currently ambiguity on whether it is open to employers and employees to agree, in a registered collective agreement, that leave (annual and personal) taken during employment would be paid at a rate above the base rate, but that payment of untaken leave at termination of employment should be made at the base rate.
1156. The FWO and some unions have sought to override mutual agreement between employer and employees based on a very technical, and employers argue, flawed interpretation of the NES. Employers maintain the NES is very clear in the limits it sets on cashing out, which are sensible (for example maintaining a minimum level than cannot be cashed out).
1157. There is an urgent need to provide users of the system with clarity on these issues.
1158. These are illustrative of wider problems which are inevitably created in seeking to codify a myriad of entitlements into a single NES, and then seeking to apply that NES prescriptively and technically.
1159. What the employer and employees have been able to agree to in these situations (both in the registered agreements, and in relation to the specific cashing out) should be able to be accommodated under an NES which accords greater respect and precedence to how employees want to use their accrued entitlements.

Recommendation 6.2.4

The NES be clarified on capacities to cash out leave entitlements, and revisited with a view to ensuring that what employers and employees are able to agree on as it relates to paying out employees' leave entitlements, is able to be translated into practice without breaching the NES.

³²⁶ Fair Work Act 2009, s.102

Personal leave entitlements on compressed rosters

1160. Another unresolved issue relating to the operation of the NES for resource industry employers involves the calculation of annual leave entitlements on 'compressed' rosters.
1161. AMMA wrote to the FWO in February 2011 seeking clarification about how to calculate personal leave entitlements for employees working 'compressed' rosters under the *Mining Industry Award 2010*.
1162. For example, given that some of those employees worked 12-hour shifts as the norm, did that mean their entitlement to 10 days' personal/carer's leave should be deducted according to the hours the employee normally worked (i.e. 12 hours) or at the rate of a standard working day (i.e. 7.6 hours) every time they took a leave day?
1163. The FWO said it was 'inclined to the view' that under s.99 of the FW Act, if an employee covered by the *Mining Industry Award 2010* worked 12 hours a day normally then they were entitled to 10 days of personal/carer's leave deducted at their ordinary daily rate of 12 hours per day rather than 7.6. Those workers would therefore be using 1.58 days of their 10 days' personal/carer's leave every time they took a leave day, the FWO said.
1164. For all intents and purposes, those employees' entitlements to personal/carer's leave would be 6.33 days rather than 10 days. The FWO advised AMMA that employers should treat the entitlement to 10 days of personal / carer's leave as an entitlement to 76 hours instead and calculate the deductions according to the employees' normal hours worked.
1165. Again, this advice is not legally binding but some employers are relying on it.

Recommendation 6.2.5

The Office of the FW Ombudsman's advice to parties about workplace relations matters must be legally binding and act as protection against prosecution when parties rely on it.

Recommendation 6.2.6

In the alternative, parties who rely on FWO advice that is later found to be in error should be immune from prosecution.

Information statement

1166. The current NES require an employer to give employees a "Fair Work Information Statement" as follows:

Employers have to give every new employee a copy of the Fair Work Information Statement (the Statement) before, or as soon as possible after, they start their new job.

The Statement provides new employees with information about their conditions of employment.

The Statement has information on:

- *the National Employment Standards*
- *right to request flexible working arrangements*
- *modern awards*
- *making agreements under the FW Act*
- *individual flexibility arrangements*
- *freedom of association and workplace rights (general protections)*
- *termination of employment*
- *right of entry*
- *the role of the Fair Work Ombudsman and the Fair Work Commission.*³²⁷

1167. Employers have never understood the rationale for this exercise in imposing additional paperwork obligations. Seven years after then Shadow Minister Gillard first canvassed this concept, it remains simply baseless and without benefit.
1168. This is also government attempting to somehow shift its responsibilities to support compliance to employers, which is very poor regulatory practice.
1169. The Commonwealth spends significant monies publicising the services of the Fair Work Ombudsman, employers know or should know they have employment obligations, and employees know or should know they have employment rights. The information statement is just unnecessary and misguided.
1170. 1.1 million people change jobs each year in Australia, which means hundreds of thousands of printed sheets or emails are changing hands which we reliably suggest are rarely ever looked at or thought about again.
1171. This is not an effective requirement, and it does nothing to assist compliance or capacity of businesses to do business. We know of no comparable obligation in other OECD countries.
1172. We also recall:
- a. The terms of reference which expressly ask the PC to consider "*the need to reduce unnecessary and excessive regulation*".
 - b. The PC's general policy guideline is "*to reduce regulation of industry...*"³²⁸

³²⁷ <http://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement>

³²⁸ Productivity Commission Act 1998, s.8(1)(b)

Recommendation 6.2.7

Any requirement for the Fair Work Information Statement to be provided to employees be removed from the NES.

Long service leave

Recommendation 6.2.8

As set out in Chapter 6.3, Long Service Leave should (subject to transitional considerations being resolved) provide suitable scope for flexibility and no widespread increase in labour costs. This should become part of the NES as a single national, uniform national standard.

Non-award employment

1173. There is one key difference between awards and the NES which needs to be recognised and navigated. Awards apply a more pervasive set of safety net conditions to more employees than the NES alone.
1174. As we set out elsewhere in this chapter, there is a substantial cohort of employment which has never been regulated by awards, and has been "award free". This includes managers and professionals, and some newer and emergent industries. This cohort of employees is picked up in the owner manager and (part of) the individual arrangement lines in Figure 2.3 in Issues Paper 2³²⁹.
1175. AMMA's key recommendation is that Australia should shift to a statutory employment safety net to replace the current hybrid statute (NES) and award employment safety net.
1176. However, to the extent that award entitlements were to move into the NES it is not intended that traditionally non-award employees become subject to them, which would increase costs and reduce flexibility for employees with no policy basis for doing so.
1177. Mechanisms to avoid such an outcome could include:
- Limiting the applicability of some of the NES (the newly expanded NES) to exclude those earning over a prescribed threshold, such as the High Income Threshold.
 - Limiting the applicability of some of the NES (the newly expanded NES) to exclude those who exercise genuine professional or managerial functions.
 - Limiting the applicability of some of the NES (the newly expanded NES) to exclude those who would not traditionally have been covered by an award.

³²⁹ Issues Paper 2, p.11

- d. If awards are retained, extending some of the expanded NES only to those covered by an award, so there could be a single common standard, on for example public holidays and additional pay for working public holidays, but it would only apply to an employee covered by an award.
1178. These are threshold level complications, determining which employees have access to which NES minima, but once determined there remains substantial scope for standardisation and the benefits of community level standards for particular cohorts (who will be the lower paid and those on award only contracts)³³⁰.
1179. It is acknowledged that this is more complex than it should ideally be and that it does reintroduce some level of the complication we are urging the PC to avoid. However:
- a. This is a navigable, threshold requirement to determine the application of parts of a significantly simplified safety net.
 - b. This is still better than the current complicated dual safety net of modern awards and the NES, and in no way is the status quo a superior approach.

Recommendation 6.2.9

If the NES is expanded to codify current award matters there needs to be a mechanism to ensure that traditionally award only entitlements only apply to those employees who traditionally enjoyed them.

AWARDS

1180. The PC specifically seeks feedback on the *"appropriate role of awards in a decentralised WR system that emphasises enterprise bargaining and allows for individual arrangements"*.

Recommendation 6.2.10

If awards are to remain part of the system, the scope and prescription of awards should be reduced considerably. Awards should be restricted to solely address those matters which must be set on an industry specific level and that cannot be subject to a community wide entitlement through an expanded NES.

1181. Awards should only come into play when there is a proven requirement for variation in the safety net between industries that arises from inherent differences in the nature of the work. This would see awards become exceptional in nature covering areas where there needs to be industry variation, and generic NES standards could not appropriately provide a genuine safety net. This would see far fewer matters covered in awards.

³³⁰ As identified in Issues Paper 2, at p.11 and Figure 2.3.

1182. Note however that the UK, New Zealand, Canada, and the US can encompass the levels of occupational and industry diversity of a developed economy (and indeed many more employees) without requiring industry specific awards or a differentiated safety net³³¹.
1183. If our developed economy, anglosphere peer economies can have an essentially uniform statutory safety net capable of covering the diverse range of employment across a modern economy, why shouldn't Australia pursue the same course?

What should be in any future awards?

1184. If awards do retain a role in the system, this would see them include in essence:
- a. Application and operation provisions, currently Part I of the standard award structure, including: a title, any commencement and transitional provisions, any definitions and interpretation and the coverage of the award.
 - i. NES notation: The introductory provisions of an award could also usefully note the existence of the NES and its application of minimum standards in separate areas to the award.
 - b. Minimum Wages: Encompassing: minimum wages for adults, supported wage employees etc. as required, and supporting classifications.
 - i. Annualised salaries should be included in all awards.
 - ii. Where it's possible to standardise proportionate wages as percentages, for example as standards percentages for juniors and apprentices, this should be pursued either in awards or the NES.
 - c. Hours of Work and Related Matters, including: ordinary hours, shift work, breaks, rostering, penalty rates and overtime (with time off in lieu of overtime to be available under all awards).

Minimum wages³³² and classifications

1185. There should be scope to move minimum wages and classifications into the NES and considerably reduce the number of minimum wages in Australia, which continue to number in the thousands compared to far more concise and straightforward wage safety nets in comparable OECD countries.
1186. If awards are to be retained, they should continue to set minimum wages for adults, and supporting classification structures.
1187. However, it may not be necessary to continue to set specific minimum wage rates for juniors, apprentices etc. Standard percentages of prescribed adult rates could

³³¹ With perhaps some exceptions in the US only for industries such as agriculture, construction and mining, which have additional safety net legislation.

³³² Current s.139 (1)(a) of the *Fair Work Act 2009*.

be codified into the statute for junior employees (up to the age of 20 as has traditionally been the case), employees with a disability, trainees and apprentices, including adult apprentices. These percentages could be standard across all industries, as is the case with the junior and apprentice rates in the UK.

1188. Incentive-based payments, and bonuses should no longer be regulated through minimum wages, deleting the equivalent of s.139(1)(ii) of the *FW Act*. These matters should be determined through bargaining.
1189. We make no submission on piece rates, and whether they should or should not form part of an award-specific minimum wage safety net.

Hours of work, rostering, rest breaks³³³

1190. In the absence of awards, a standard 38-hour week and genuine minima in these areas could be set in an expanded NES for an appropriate range of employees.
1191. If awards are to remain part of the system, hours, rosters and breaks are matters that could usefully be addressed in a more truncated award safety net.

Overtime and penalty rates

1192. Various interests are seeking to have the PC address the level and application of penalty rates, and the PC addresses this consideration in Issues Paper 2³³⁴.
1193. Penalty rates would in future no longer be part of a genuinely modern Australian workplace relations system. Like our OECD counterparts, Australia would set a minimum rate per hour or week for a prescribed number of hours whenever worked. Any higher rate for particular rates would be subject to negotiation and agreement making.
1194. Short of that, consideration needs to be given to how any penalties should be set. Were awards abolished they would need to appear in statute as all industry standards. If awards are retained, one of the few matters they could usefully contain and on which industries may arguably differ, is any penalty rates.
1195. Even in such a scenario, some penalty arrangements appear ripe for moving towards more standardised approaches and the PC should give consideration to a process for greater standardisation and simplicity in this area of the safety net, to the extent specific additional payments remain relevant.

Annualised wage/salary arrangements³³⁵

1196. Employers strongly support capacity to annualise wages where appropriate and move away from the assumptions and culturally ingrained limitations of waged

³³³ Current s.139(1)(c) of the *Fair Work Act 2009*.

³³⁴ Issues Paper 2, Section 2.5.

³³⁵ Current s.139(1)(f) of the *Fair Work Act 2009*.

employment, towards moving a greater proportion of employees into salaried, annual employment.

1197. With a simple enough wages safety net per hour or week, an annualised salary option would not be required. In the absence of this, however, if awards are going to continue to set minimum wages, each award should be required to set an annualised salary option or options for all classification under the award. The body responsible for setting minimum wages could also usefully be required to set and apply a single standard formula for calculating annualised salaries across the award system.

What should be removed from awards?

1198. As a general principle, where a particular employee entitlement is regulated by legislation, including but not restricted to the NES, this should be the sole source of the entitlement and awards should not further or additionally address these issues.
1199. As a matter of clarity, simplicity and enforceability, legislation, the NES and awards should occupy quite separate ground and it should not be necessary to look to multiple sources to understand obligations.

Recommendation 6.2.11

Safety net standards should be set in the NES or awards, not both.

Types of employment³³⁶

1200. Types of employment should be removed from awards and confined into legislation as standard options for full-time employment, casual employment, and part-time employment. This may be via a new NES or another new statutory provision.
1201. This should include codifying a single standard casual loading for all industries, along with clarity on the conditions which do and don't apply to casual work.

Flexible working arrangements³³⁷

1202. Flexible working arrangements should be secured through bargaining, or through a more useable form of the IFAs if they are to remain part of the system. In some cases, policy decisions may see scope for flexibility, particularly around work / family balance included in the drafting of the NES.
1203. However, this is not something which needs to be provided for in awards, and awards should in particular not have the effect of limiting what can and cannot be agreed in terms of flexibility between employers and individual employees.

³³⁶ Current s.139 (1)(b) of the *Fair Work Act 2009*.

³³⁷ Current s.139(1)(b) of the *Fair Work Act 2009*.

Leave, leave loadings and arrangements for taking leave³³⁸

1204. All provisions relating to leave:

- a. Should be set at a community level for all industries, rather than an industry specific level leave.
- b. Should be set in statute through the NES, and removed from awards.

Public holidays³³⁹

1205. Any employment standards on public holidays should be set through the NES.

Superannuation³⁴⁰

1206. Modern awards currently contain clauses on superannuation, notwithstanding the creation of universal statutory superannuation for all Australian employees more than two decades ago.
1207. The superannuation system in no way requires award superannuation provisions to operate, and were superannuation clauses to be removed from awards overnight, there would be a stable and reliable superannuation safety net in Australia and no loss of protection or regulation.
1208. The recent increase in superannuation to 9.5% was delivered through legislation, and most modern awards now contain neither a quanta of contributions, nor specific funds.
1209. In 2015, the primary “relevance” of award superannuation provisions is in situations in which employees do not exercise superannuation choice (which cannot be overridden by awards) and where default fund arrangements come into play.
1210. The FWC explains the role of award superannuation thus:

Under s.149A and s.155A of the FW Act, by 31 December 2013, the Commission must:

- *include a term in all modern awards permitting an employer from 1 January 2014 to make superannuation contributions for a default fund employee to a superannuation fund or scheme of which the employee is a defined benefit member, and*
- *remove from modern awards any superannuation funds that do not offer a MySuper product, or are not an exempt public sector superannuation scheme.*

³³⁸ Current s.139(1)(h) of the Fair Work Act 2009.

³³⁹ Current s.139 (1)(b) of the Fair Work Act 2009.

³⁴⁰ Current s.139(1)(i) of the Fair Work Act 2009.

1211. This is fundamentally unnecessary, and with the passage of the *My Super* changes award superannuation provisions have little or no work to do. Default fund arrangements for members of defined benefit funds should be addressed through the statutory superannuation system.

Recommendation 6.2.12

Superannuation should cease to be an award matter entirely and superannuation clauses should be excised from all modern awards.

Superannuation should be regulated solely by the established body of superannuation legislation and regulation centred on the Superannuation Guarantee Act.

1212. The PC will be aware of:

- a. The cleavage of interests between industry and retail funds, particularly in relation to default fund arrangements and which funds are named.
- b. The mess which has emerged in the scheduled four year review of award superannuation arrangements in modern awards, including problems with appointees to the Expert Panel of the FWC and litigation against the FWC in the Federal Court.

1213. Australia's superannuation system is comprehensively regulated in legislation. Additional award regulation is adding nothing to the safety net for employees and is serving only to confuse and complicate. The best way to deal with all of this, including division between industry and retail funds, is to remove superannuation from awards entirely.

Procedures for consultation, representation and dispute settlement³⁴¹

1214. Part 4 of this submission deals with dispute settlement, and sets out resource employers' vision for the future of this area which we commend to the PC. Future awards should not contain any provisions on consultation, representation and dispute settlement, which should instead be:
- a. Determined through bargaining and contained in agreements, subject to appropriate controls and limitations to preserve the integrity of statutory approaches to key issues such as union entry to workplaces and the enforcement of safety and other standards.
 - b. Subject to a single codified default standard where applicable, such as the Model Consultation Term set in the FW Regulations (which may need to be reviewed). There have at various junctures been legislated default models for

³⁴¹ Current s.139(1)(j) of the *Fair Work Act 2009*.

dispute settlement which could form a model for an appropriate statutory provision in this area in the future.

Allowances³⁴²

1215. Allowances should be removed from the Australian employment safety net, and in particular from awards. They are an anachronism and complication not required for contemporary employment, or a contemporary employment safety net.
- a. If a suitable transition is required this could be considered in minimum wage setting on a one off basis, based actual wages and prevalence of allowance payments, and with due consideration of not increasing labour costs.
 - b. An exception may be allowances paid in effective recompense for employees actually spending their own money on work related expenses, although again this would be capable of being codified into the legislation as a general rule on recompense rather than being included in awards as monetary allowances.

Stop the automatic award reviews

1216. If modern awards are to be retained, the system should get them right and they should then apply stably and in essence unchanged, save for periodic and scheduled uprating of minimum award wages. Specific changes in work should be pursued through bargaining, and awards should both allow and support through being set at genuine safety net levels and then not changed.
1217. The former government's FW legislation contained regular inbuilt processes for two and four yearly reviews of modern awards³⁴³. Whilst this may have been understandable where such major change was to be wrought to reduce award numbers, in practice and with the benefit of four years' experience of modern awards:
- a. A great deal was achieved in the initial award modernisation (albeit not answering fundamental existential questions about why awards exist and what roles they play).
 - b. Two and four years on there have been few pressing issues, and the workplace relations policy community of employers and unions have been forced into expensive and time consuming exercises with little or nothing to be gained.
 - c. It would be far better if award content was revisited, or any new matters considered, only on application of a specific interest for a specific award (an employer representative or union), and in a more streamlined award system, with its boundaries properly limited by statute, this would be less and less likely.

³⁴² Current s.139(1)(g) and 139(2) of the *Fair Work Act 2009*.

³⁴³ In accordance with s.156 of the *Fair Work Act 2009* the Fair Work Commission must review all modern awards every 4 years.

Recommendation 6.2.13

Remove any requirement for scheduled reviews of all modern awards from the FW Act or any successor legislation.

1218. The PC queries in Issues Paper 2 whether “*whether the four yearly review process is suitably nimble in addressing changing economic circumstances*”.³⁴⁴
- a. Awards should not be nimble, they should be stable foundations. It is through agreements and bargaining that enterprises and employees should seek to be nimble and to address their changing priorities.
 - b. Awards should become more stable. Minimum wages should vary with appropriate regularity, but any other conditions in awards should vary only rarely and exceptionally.
 - c. Nimbleness to changing circumstances should be achieved through either through flexible day to day working practices and dialogue at the workplace, or through bargaining.

If we are not pursuing zero awards, don't further consolidate

1219. AMMA's primary submission is that awards should be removed from the system, in favour of Australia having a safety net that genuinely supports bargaining.
1220. If awards are to remain in the system, the primary change to these awards should be in terms of content not coverage, and in particular removing matters from modern awards as set out in this chapter.
1221. 122 modern awards is a ridiculous proliferation of instruments for a modern safety net, in a system in which bargaining has long been recognised as the primary vehicle of workplace determination. However, experience indicates that parties to awards (those interested in awards) would be better directed to excise new NES or non-award matters from awards, without opening the complicated politics of scope and coverage. In the interim, if awards are to remain in the system, let's live with 122 of them and concentrate on moving them to pay and hours orders only.

Modern award objective

1222. The Commission queries the need to change the Modern Award Objective in the FW Act (s.134). Consistent with AMMA's primary recommendation, this objective would be removed from the Act either as awards are removed from the system entirely, or in favour of minimum wage focussed objectives for the new Australian Employment Safety Net Commission, which would set only minimum wages, classifications and other related matters in awards which addressed a vastly reduced set of matters.

³⁴⁴ Issues Paper 2, p.13

1223. "Problems posed by awards" will primarily be addressed by rethinking and repositioning the role of awards, and in particular by clearly delineating the roles of the awards and NES. Any objectives for awards should flow from the resolution of these fundamental matters.
1224. However, if this is not adopted or is moved to over time, it is important to understand the extent to which the objective provisions of the current Act are politicised, conflicting and provide little assistance to those charged with setting the safety net. The current Modern Award Objective is a confused mishmash.
1225. If award matters were listed accurately, and the overall objectives for the legislation were correct, does award making actually need a separate objective? It would seem quite possible to a separate object for awards system entirely, particularly given how confused and contradictory the existing objective is.

Recommendation 6.2.14

There should no longer be a specific modern awards objective, rather there should be clearer overall objectives for legislation as a whole, and a tighter prescription of the matters that can be included in awards (if awards are retained).

1226. If there is to be a separate objective for awards:
- a. A superior approach would be to simply list the matters should go in awards in one section of the legislation, and in another, prescribe a set of considerations for determining and varying the award component of the safety net (which should be a considerably reduced role for awards and see awards reduced in scope).
 - b. Any modern award objective should be focussed on a genuine safety net role for awards, should specifically recognise the existence of the NES, and clearly delimit the province of awards from the entirely separate province of the NES.
1227. It would also make much more sense to separate objectives for minimum wage setting, from those for other award matters. This would potentially remove much of the confusion and lack of utility from the current objective as wage based objectives are different to conditions based objectives.
1228. Turning to the specifics of the current Objective, s.134 of the FW Act is quite a mess, and there are a number of areas in which it could be improved if awards are considered to require a specific objective:
1229. Providing a genuine safety net of industry minima, that cannot be provided for in the NES:
- a. Explicit mention of the role of awards as a safety net is not sufficiently brought to the fore in the modern awards objective.

- b. Above all, the objective should be to deliver a targeted safety net of genuine minima above which bargaining occurs to determine the actual terms and conditions of most employees.
1230. Simplicity, clarity³⁴⁵, stability and sustainability³⁴⁶: Far greater precedence should be given to the importance of awards being simple, clear, comprehensible, enforceable, stable and sustainable.
1231. These concepts are already in the objectives for award setting, but insufficient regard has been paid to them in both:
- a. The detailed statutory rules for making modern awards that follow the objective, which fail to live up to the goals of simplicity, clarity, stability, sustainability, etc.
 - b. The exercise of tribunal discretion in making and varying awards.
1232. These concepts need to be more central in any future award making, and be accorded greater precedence in determining the scope and content of awards. If there is a new award objective, it needs to be clearer and tighter in ensuring these considerations guide award making.
1233. Encouraging collective bargaining³⁴⁷: It should be clear that the whole Act, and the whole system, should in future encourage a growing proportion of Australians to have their employment governed by agreed terms, and where appropriate, by registered agreements under the Act. This goal should be an objective of the Act as a whole, extending to, but not restricted to, parameters for award making. Furthermore, it should encourage agreement making generally, which should encompass both individual and collective options.
1234. Flexible modern work practices and the efficient and productive performance of work³⁴⁸: These are laudable aims strongly supported by employers, and they are one of the considerations relevant to setting minimum wages and employment conditions. However, neither awards nor the NES can deliver these outcomes, they can only be driven by employers and employees in workplaces. The relevance to minimum wage and condition setting is that it should do no harm in these areas and provide a foundation and scope for employers and employees to modernise work practices, and pursue more efficient and productive work.
1235. Impact on business³⁴⁹: This remains a relevant consideration for setting minimum wages, and conditions of employment.
1236. Fairness, relevance and relativity³⁵⁰: Fairness is generated by the system as a whole, and starts with more Australians having access to jobs and incomes. These are symbolic concepts which resonate with the Australian community. That does not,

³⁴⁵ Fair Work Act 2009, s.134(1)(g)

³⁴⁶ Fair Work Act 2009, s.134(1)(g)

³⁴⁷ Fair Work Act 2009, s.134(1)(b)

³⁴⁸ Fair Work Act 2009, s.134(1)(d)

³⁴⁹ Fair Work Act 2009, s.134(1)(f)

³⁵⁰ Fair Work Act 2009, s.134(1) and (1)(a)

however, make them relevant or useful to setting minimum wages. There is a difference between broad qualitative statements of what an area of regulation needs to deliver overall and useful guidance on how to get there in specific areas, and these concepts could be removed from guidance on award making were there a proper articulation of the safety net concept.

1237. Social inclusion³⁵¹: Social inclusion is a complex concept for which there is not a common understanding across the community. However:
- a. One of the best avenues to social inclusion is an opportunity to have a job, and one of few things the workplace relations legislation can do to support social inclusion is better support job creation in sustainable, viable enterprises.
 - b. This concept is of no assistance in setting an employment safety net. The safety net may assist social inclusion, as does the taxation and transfers system, but the concept of social inclusion is of no assistance in setting the safety net.
1238. Penalty rates³⁵²: Subsection 134(da) does not set a useful objective for those setting minimum standards. It was a last-minute, politicised attempt to set something of a time bomb or trap for any government seeking to amend the Act in future. Penalty rates are not a matter for an award setting objective, rather they are a matter for a list of topics that awards may address.
1239. Equal remuneration³⁵³: No tribunal is going to set different minimum wages for men and women; that's been excised from the system for more than 40 years. Notions of value or comparability are for other sections of the Act dealing with actual or market rates in excess of minima, and whilst equal pay is a principle strongly supported by employers, it doesn't do anything useful in the modern awards objective.

Awards and the FWC

1240. Not for some years have awards been at the forefront of the work of the FWC and its predecessor the AIRC, and putting to one side requirements for award modernisation and annual safety net wage increases, award variation matters have for many years been on the decline. This is entirely logical, and for more than 20 years our system has directed unions and employers to deal with workplace and industry specificities through agreement making rather than award arbitration.
1241. Consistent with the resource industry's call to resolve the tension and confusion between the roles of awards and the NES (which is really the creation of both the Coalition and Labor) the role of the FWC must change in relation to awards.
1242. This should centre on reducing the work done by awards and not using what are industry specific instruments to deliver what can be nationally consistent standards (and are nationally consistent standards in other OECD countries).

³⁵¹ Fair Work Act 2009, s.134(1)(c)

³⁵² Fair Work Act 2009, s.134(1)(da)

³⁵³ Fair Work Act 2009, s.134(1)(e)

1243. As awards become in essence minimum wage setting instruments, perhaps also addressing classifications, hours and some other industry specific matters, the role of the FWC needs to change:

Recommendation 6.2.15

Consistent with AMMA's wider recommendations for structural change to the institutions of the current FW system, the award functions of the current FWC should become the responsibility of a new Australian Employment Safety Net Commission.

TRANSITIONING TO NO AWARDS OR NEW AWARDS

1244. We encourage the Commission to focus on ends, and what an improved system for the future should look like. How Australia transitions to an improved system involves different considerations.
1245. The Commission seeks feedback on "*the implementation and transitional challenges of any significant changes*" – and presumably how such challenges can be navigated to change the system as it needs to be changed.
1246. We could replicate the length of this chapter again to comprehensively address this, and can certainly engage in detail with the Commission on transitioning to any new structures it is considering.

The toolkit of transitional options

1247. At this stage, it is most useful to recall some of the main tools which could be used to transition to a safety net based on the NES with a reduced role for awards.
1248. Previous tools for an effective safety net transition which could be built on include (noting these are not mutually exclusive and can be used in combination):
- Taking a policy decision that particular matters no longer form part of the safety net and are matters to be pursued in bargaining, if at all.
 - Preserving award entitlements at a certain point for existing employees, and making them enforceable until replaced or there is a change of employment, whilst removing them from the safety net for new employees.
 - Preserved and transitional instrument arrangements.
 - Take home pay orders as currently provided for under the FW Act³⁵⁴.
 - A no-detriment provision indicating that in any transition of coverage, an employee is not to lose entitlements or be worse off (a common approach under the traditional award system).

³⁵⁴ Fair Work Act 2009, s.768BS(1).

- f. Specifically prohibiting the dismissal or disengagement and reengagement of employees to deliberately avoid a formed entitlement and to secure reduced labour costs.

How to proceed

1249. The Commission should recognise that:

- a. Our workplace relations system has made significant transitions before, including:
 - i. The shift to statutory minimum standards and the national system under the Work Choices changes (maintained under the *FW Act*).
 - ii. The shift to modern awards under the *FW Act*.
 - iii. The shift to preserved pay scales with the creation of the Australian Fair Pay Commission.
 - iv. Major changes in the Victorian, Western Australian and New Zealand systems away from an award-based safety net in the early 1990s.
- b. A key part of this inquiry should be engaging with ends, not means, and considering what the future workplace relations system should look like without limiting options based on transitional difficulties from our rather confused status quo.
- c. Transitional challenges are not a valid basis to not start to move towards the safety net Australia needs for the future. Our government negotiates the complexity of transitions in a very wide range of policy areas, often with the expert assistance of the Commission, and there is no basis to think a sensible transition to a reformed workplace relations system is not possible.

Recommendation 6.2.16

In its interim report, the Commission should identify options or recommendations for an improved safety net which better delivers on the terms of reference and the role the safety net should play in a modernised workplace relations system.

The Commission should then, also in its interim report, invite further submissions not only on what it proposed, but also how to transition to the new safety net it is canvassing and to resolve any practical concerns it may identify.

6.3. OTHER ISSUES

There are at least 150 separate minimum wage rates for the resource industry in modern awards.³⁵⁵

If this were extrapolated to all modern awards, conservatively Australia would have well over 3,000 separate minimum wage rates for adult employees alone, not counting State awards.³⁵⁶

One major award, the Manufacturing and Associated Industries and Occupations Award 2010, contains at least 123 separate minimum wage rates.³⁵⁷

- **Minimum wages should be significantly simplified and the current proliferation of individual minimum wage rates significantly reduced towards international best practice levels.**
- **Australia should move towards a single, uniform national Long Service Leave (LSL) system, provided it is suitably flexible and open to individual level agreement on accrual and use.**
- **A taskforce/panel should consider options to transition to a uniform national LSL system.**
- **Stand down is an absolutely essential part of the framework and should be retained.**

1250. There are a number of other matters relevant to the future purpose, structure, levels and formulation of the employment safety net in Australia, and relevant to the role the safety net should play in a truly modern workplace relations system which better delivers on the parameters and goals for the system set out in the terms of reference.

MINIMUM WAGES AND PENALTY RATES

1251. There has been significant debate surrounding the Commission's work in this review, the Terms of Reference and the Issues Papers as they touch on minimum wages and penalty rates for weekend, public holiday and work outside the traditional working week or hours. Issues Paper 2 addresses these issues at Sections 2.2 and 2.5.

1252. For many, these would be the lead matters addressed in submissions. However, for the resource industry, minimum wages and penalty rates are less front-of-mind in the management of day-to-day workplace relations, and are less determinative of overall labour costs and/or employee incomes.

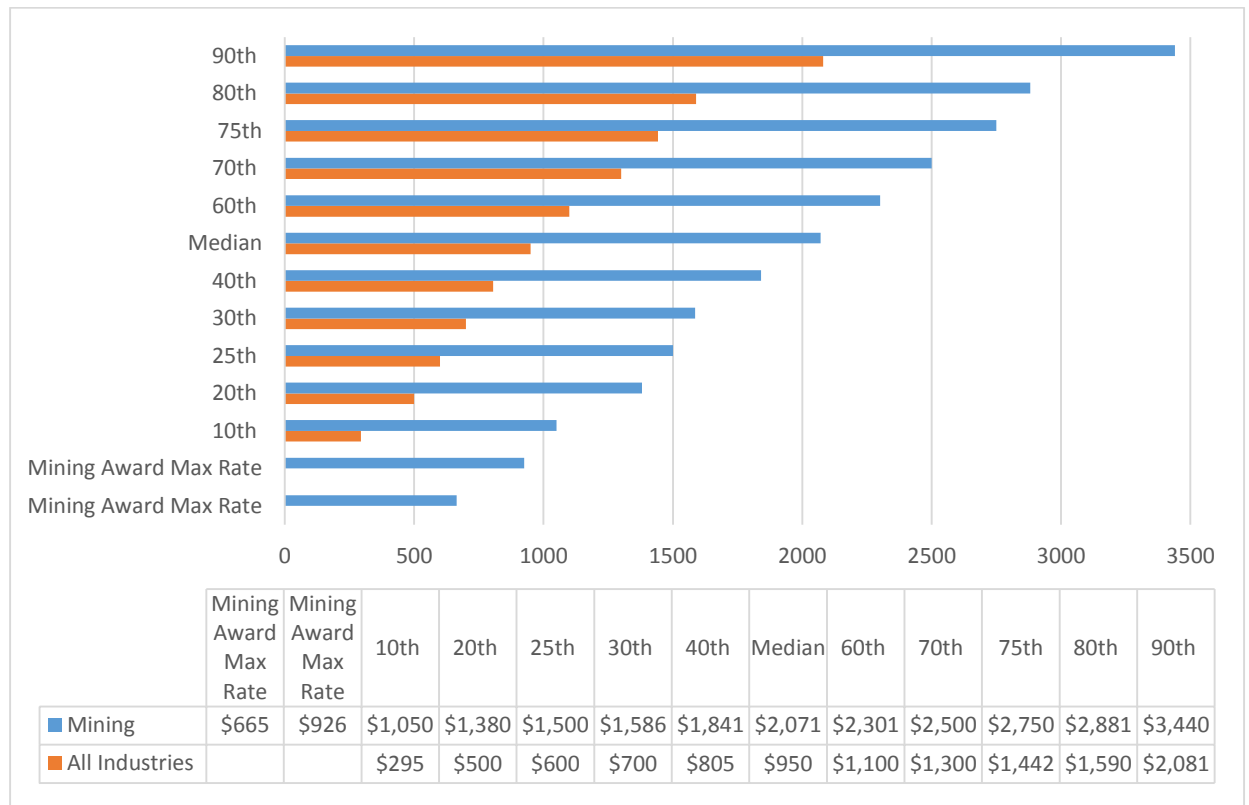
1253. The resource industry pays the highest wages distribution and median wages of any industry, and these wages well exceed the minima in awards covering the industry:

³⁵⁵ Maritime Offshore Oil and Gas Award 2010 = 97, Mining Industry Award 2010 = 8, Oil Refining and Manufacturing Award 2010 = 22, Quarrying Award 2010 = 6, and Black Coal Mining Industry Award 2010 = 19.

³⁵⁶ 122 modern awards × 30 wage rates per award = 3,660.

³⁵⁷ Cl.24 = 29 rates, cl.25 = 26 rates, cl.27 = 12 rates, and cl.28 = 46 rates.

Distribution of weekly earnings in main job³⁵⁸



1254. Over 90% of mining industry employees earn in excess of the minima in the industry award, and the federal minimum wage. In terms of setting actual rates of pay for most parts of the industry, minimum wages and their movement are not as directly relevant as they are in many other industries.
1255. We will on this basis, leave the prosecution of changes to minimum wage setting and penalty rate elements of the employment safety net to other submitting parties, including our peer employer representatives in the ACCI network.
1256. However, minimum wages and penalty rates are relevant to resource employers and employees in relation to (for example) securing the approval of proposed workplace agreements, and ensuring statutory minima and approval tests have been met.
1257. From the perspective of the resources industry key principles which should guide the PC in considering minimum wages and penalty rates include:
- The wages safety net should be straightforward and clear enough to simply and reliably:
 - Be “checked off” for the employment of persons throughout the industry at levels which in almost all cases significantly exceed the statutory safety net.

³⁵⁸ Source: ABS Cat. 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013

- ii. Be checked against, for the purposes of any statutory test for agreement approval such as the No Disadvantage Test (NDT) or the Better Off Overall Test (BOOT).
 - b. Where remuneration is well in excess of minimum safety net wage levels, the statutory test for agreement approval should be able to be quickly and easily applied for projected roster arrangements. Employers should be able to simply affirm or attest to the body approving agreements that on projected rosters, the agreement will clearly meet statutory minima.
 - c. Any penalty rate structures should be able to simply and clearly set aside into annualised salaries or other all up rates that provide equivalent or higher levels of entitlement.
1258. One area the Commission could give consideration to is the sheer number of minimum wages in Australia, and the differences in minimum wage numbers in awards covering different industries and occupations. Key questions include:
- d. *Does Australia need thousands of separate minimum wages under federal state awards in a workforce of 11.6 million persons, where our OECD counterpart countries have single minimum wages or at worst well fewer than 100 (counting provincial and state minimum wages in the US and Canada)?*
 - e. *What additional benefit does Australia's labour market, economy, and society get from our clearly complex and relatively high minimum wage structures compared to other developed countries?*
 - f. *What could be gained in terms of improved enforcement, promotion and community understanding of minimum wage entitlements if the number and structure of Australian minimum wages were considerably simplified?*
1259. The Commission describes minimum wages as a “persistently controversial issue”.³⁵⁹ This is quite correct, and the Commission could have added “inherently”. These are not areas in which all interests can ever be made happy or in which wage setting arrangements can ever enjoy the support of both employer and employee representatives.
1260. Australia's industrial relations history is in large part one of one side or the other, unions or employers, being persistently unhappy with minimum wage arrangements imposed by the state, via the agency of the national industrial tribunal.
1261. Sound policy for the future in this area will not lie in popularity or consensus building but in setting in place improved structures and safety net entitlements that can endure and deliver on the criteria set in the terms of reference for this review.

Recommendation 6.3.1

Australia should move towards a far simpler structure of minimum wages, significantly reducing the overall numbers of minimum wage rates by moving towards removing

³⁵⁹ Issues Paper 2, p.1

minimum wage differentials between industries (horizontal proliferation) and setting only genuine minimum rates for the lower paid and lower skilled in need of a minimum wage safety net (reducing vertical proliferation).

Apprentices, trainees, juniors and other minimum rates

1262. Minimum wages are more directly relevant to sections of the resource industry in relation to apprentices and trainees. Again, the critical concern is not so much the rate or level for the resources industry, but instead the need for simpler and clearer arrangements.
1263. There are separate minimum wages for apprentices, trainees, and juniors in almost all modern awards in the national system, and in equal or greater numbers of state awards. This is again the proliferation of hundreds of minimum wages for employees undertaking relatively comparable trades, other qualifications or junior work.
1264. This is far more complex than it needs to be, and there would appear to be scope to vastly simplify and standardise these rates across industries.
1265. The UK minimum wage can be shown on a simple table for adults, juniors and apprentices³⁶⁰:

Year	21 and over	18 to 20	Under 18	Apprentice*
2014	£6.50	£5.13	£3.79	£2.73
2013	£6.31	£5.03	£3.72	£2.68
2012	£6.19	£4.98	£3.68	£2.65
2011	£6.08	£4.98	£3.68	£2.60
2010	£5.93	£4.92	£3.64	£2.50

1266. New Zealand has an adult minimum wage, a training wage and three starting out minimum wage rates for juniors³⁶¹.
1267. In Australia, an employer, apprentice, junior, parent etc. would need to find the right award, and determine the right rate for the circumstances concerned.
1268. In just one of the "Modern Awards" applying to the Australian resource industry, there are 21 separate minimum wage rates for apprentices, differing by their age and the date on which their apprenticeship commenced³⁶².
1269. The Australian minimum wage system should be capable of the levels of simplicity, clarity and, above all, comprehensibility and enforceability which applies in our OECD counterpart economies on minimum wages.

³⁶⁰ <https://www.gov.uk/national-minimum-wage-rates>

³⁶¹ <http://www.dol.govt.nz/er/pay/minimumwage/>

³⁶² Mining Industry Award 2010, cl.13.4 - https://www.fwc.gov.au/documents/modern_awards/award/MA000011/default.htm

1270. A genuinely simple minimum wage structure for juniors and apprentices could be promoted in newspaper ads, appear in simple websites etc. and be more easily communicated to employers and employees, particularly younger employees. In fact, the UK and New Zealand rates would be capable of being tweeted and retweeted, with far greater and more rapid promotion than could ever be achieved under the agency of government alone.

Recommendation 6.3.2

Consideration should be given to setting a single national set of ratios of apprentice, trainee and junior minimum wage rates to adult rates (expressed as percentages), which would be applied to a designated trade rate of pay or adult rate to derive standardised minimum wages for apprentices, trainees and juniors working in all industries.

Process for setting the minimum wage

1271. As part of AMMA's wider recommendations on Institutions to support the operation of a reformed and modernised system which will deliver on the goals in the terms of reference (Chapter 8 of this submission), we recommend the safety net functions of the existing FWC being transferred into a new Employment Safety Net Commission (ESNC).

Recommendation 6.3.3

The minimum wage functions currently exercised by the Expert Panel of the FWC should be transferred to a new body specialising in minimum wage setting / making recommendations to government on other parts of the safety net. Under AMMA's model for revised institutions (Chapter 8) this would become the Australian Employment Safety Net Tribunal.

LONG SERVICE LEAVE

1272. The Commission addresses Long Service Leave (LSL) in Issues Paper 5, at p.16. In AMMA's view, LSL is properly considered a safety net matter, just as other forms of leave are, and the same principles and overall goals for regulation of the safety net should apply. This includes the importance of a safety net being:
- g. Simple, clear, and standardised across workplaces to the broadest extent possible and set at a stable, genuine safety net minimum level.
 - h. Appropriately flexible and as open as possible to usage as agreed between employers and employees.
1273. A great deal could be written on LSL, going back to its origins as home leave for English civil servants posted to the colonies in the 19th Century, and the lengthy sea travel to and from the "old country".

1274. The matters raised in Issues Paper 5 are not new, and various existing papers and reports have considered the issues raised, including consideration of transitioning towards a single national standard. See for example the work of federal and state labour ministers in the late 1990s³⁶³.

Understanding LSL in the current and foreseeable Australian labour market

1275. **Job tenure will decrease for most employees:** LSL is a contingent benefit triggered by extended job tenure with a single employer (or in exceptional cases in a single industry or sector). It rests on assumptions about employment and job tenure that are decreasingly relevant in the contemporary and foreseeable labour market.
1276. One of the most discussed futurist trends of recent years is the purported difference in job aspirations, orientations etc. of those entering the workforce compared to established employees. Whilst much of the fascination with Generation Y is exaggerated and facile, a few clear points of substance do stand out for the future:
- i. Fewer and fewer employees are likely to complete extended job tenure with any single employer in the labour markets of the future. An employee entering the workforce now is likely to have more employers across their career, and shorter job tenure with any single employer, than today's mid-career employees and the baby boomers.
 - j. Shorter periods of job tenure with any single employer will become the norm, and will not disadvantage or tar any employee in the labour market of the future. Indeed, too long a period with any single employer may unfortunately become a poor reflection on an employee in the eyes of some, and a point of labour market disadvantage.
 - k. Australians will increasingly pursue multiple careers across their working lives.
 - l. Skills portability and transferability between employers should facilitate inter-company movement, and even inter-industry movement, for an increasingly diverse range of employees, including in those occupations which typified "job for life" employment in the past.
 - m. Periods in and out of the workforce - for study, for career change, for self-employment, to raise families, and for sabbaticals and holidays - will become more common and not disadvantage employees in their longer term job or career prospects. Periods out of work, or out of work in a particular area, will become more common in the labour markets of the future.
1277. The ABS tracks job tenure in its labour mobility series³⁶⁴. Whilst the data is relatively stable at the headline level in terms of the proportion of employees being with one employer for ten years or more changes very slowly, it can be forecast that long tenure employment will be decreasingly prevalent in coming years, particularly outside the public and funded sectors.

³⁶³ "Flexibility in Long Service Leave". Labour Ministers Council Research Papers. www.deewr.gov.au. May 1999.

³⁶⁴ ABS Cat. 6209.0 - Labour Mobility, Australia

1278. **Employee priorities will become ever more diverse:** Employees themselves will increasingly drive when they leave jobs, change careers, choose to study, take time with families, etc. This will be diverse and employee-driven and will not be based on the imposed assumptions that underpin existing LSL models.
1279. **Employees will fund their choices:** Contemporary employees are funding their own career shifts, using HECS and other schemes to move into study; choosing part-time work to facilitate study and child caring; and organising periods of holiday or career break based on their own expenditures. This is not to exaggerate the disposable incomes of today's employees, but to note that where people are pursuing flexibility in their work and careers, it is often self-funded rather than relying on LSL. Note that where families wish to take career breaks together, the probability that both partners will have LSL at the same time is quite low.
1280. **LSL is unknown outside Australia:** LSL is a uniquely Antipodean³⁶⁵ entitlement, and does not form part of the employment safety net in almost any other country, developed or developing (bar perhaps a tenuously arguable comparator in Finland³⁶⁶). It is an anachronism, but, like so many parts of the Australian employment system, one that has become ingrained and accepted in the wider community.
1281. In the late 1990s, then Minister for Workplace Relations Peter Reith extensively canvassed issues relating to the contemporary regulation and usage of LSL³⁶⁷, including the matters discussed in Issues Paper 5³⁶⁸. We commend this work to the Commission in engaging with this area.
1282. From this work, and the experiences of employers and employees who were innovating in this area during the 1990s and 2000s, various priorities stand out for what the LSL system should provide (recommendations below). These recommendations are made on the basis that:
- n. LSL should be retained, notwithstanding that it is an internationally unknown and anachronistic arrangement which adds little or nothing to the Australian labour market, economy or community.
 - o. LSL should be made more flexible, and a great deal more choice should be available to employers and employees about how LSL is accrued, used, paid etc.

1283. NES:

Recommendation 6.3.4

³⁶⁵ Some other countries may have something comparable, however in comparable OECD economies other than New Zealand longer service does not trigger an entitlement to such extended leave and pay.

³⁶⁶

www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_legislation/legislative_developments/prm/109/v_detail/id_322/category_11/index.html

³⁶⁷ "Flexibility in Long Service Leave". Labour Ministers Council Research Papers. www.deewr.gov.au. May 1999.

³⁶⁸ ABS Cat. 6209.0 - Labour Mobility, Australia

³⁶⁸ Issues Paper 5, p.16

There should be a national standard for LSL, and it should in time become part of the NES, provided there should be greater flexibility in the application of an NES on LSL than there are on other existing NES standards.

1284. Non-LSL Employment:Recommendation 6.3.5

It should be possible to employ in future on a specifically non-LSL contract, provided that:

- The employee and employer specifically agree to employment on such terms.
- The employee receives appropriate additional consideration (i.e. proportionately higher wages) from the commencement of their employment to compensate for LSL not being payable or leave being available should the employee reach the accrual threshold (e.g. 7 or 10 years).

1285. Flexible accrual, payment, cashing out and taking of LSL:Recommendation 6.3.6

There should be greater scope for employers and employees to agree on an individual or collective basis how LSL will be accrued, paid, cashed out and taken.

A wide range of options should be available to employees to use this entitlement flexibly, provided the employee freely enters into such an arrangement and receives pay or leave no less favourable than their accrued or accruing LSL entitlement.

1286. Individual choices paramount:Recommendation 6.3.7

The right of an employee to determine what they would like to do with their accrual of LSL, or how they would like to take their accrued LSL, or indeed whether they would like to cash it out in whole or part, should at all times be an individual one, as agreed between the individual employee and his or her employer.

No collective agreement should override or remove scope for an employee to agree with their employer how they would like accrue, take or cash out LSL.

A uniform national standard?

1287. The Commission asks in Issues Paper 5³⁶⁹:

³⁶⁹ At page.16

Do (the costs associated with existing differences in long service leave entitlements across states) costs justify the adoption of a uniform national standard?

1288. States and territories are responsible for the regulation of LSL. The Workplace Ombudsman explains this as follows:

Most employees' entitlement to long service leave comes from long service leave laws in each state or territory. These laws set out:

- *how long an employee has to be working to get long service leave (e.g. after 7 years)*
- *how much long service leave the employee receives.*

1289. This creates a situation which is very complex for employers to manage, including managing the complexity of employees completing different periods of service in different state and territory jurisdictions, which is a particularly prevalent concern for some major resource employers.

Recommendation 6.3.8

Whilst LSL does not rank amongst the highest priorities of resource employers for workplace reform, on balance Australia should start to move towards a single, uniform national standard for LSL, noting AMMA's other recommendations for this to be a flexible and customisable employment benefit.

1290. AMMA understands there are some difficulties with the existing terms of the referrals of powers from the states and territories to the Commonwealth, but as a principle or sign post for the framework of the future, given AMMA's wider submission on the need for clarity and simplicity in a single national system, there is no reason why LSL should not be part of this.

Considerations and transitions

1291. The Commission then asks how to get there:

"If a uniform national standard for long service leave was to be adopted, how should the existing disparities between state and territory laws be resolved?"

1292. This does not need to be resolved by the Commission in this review. Rather, the Commission should recommend a process to resolve what should be properly understood as an issue of detail and transition.

Recommendation 6.3.9

The Commission should recommend the creation of a panel or taskforce to take submissions and recommend options to transition to a single, uniform LSL standard.

The taskforce's recommendations should then be considered by the National Workplace Relations Consultative Council (NWRCC) and Workplace Relations Ministers Council (WRMC) with a view to cooperatively approach to this transition.

If this does not deliver arrangements for a national standard rapidly, the Commonwealth should legislate for a uniform LSL standard for national system employees, covered by the federal workplace relations statute (currently the FW Act).

1293. However:

Recommendation 6..3.10

Any uniform national standard on LSL cannot simply be achieved by imposing the highest common denominator, swings and roundabouts may need to apply, and standardisation should be about an appropriate standard for the future, and making full use of transitional periods in and out of any increased entitlements.

1294. One potentially interesting issue for resource employers is the treatment of periods of service outside Australia under the terms and conditions of employment of another country. This is the type of challenge that a taskforce or panel could work with industry to understand and appropriately take into account.

Portability and transferability

1295. Some industries (building and construction, stevedoring, coal mining, cleaning and parts of the health and aged care sectors) have "portable" LSL in some states and territories. These are contributory schemes administered by government/statutory authorities³⁷⁰ and created by legislation³⁷¹. They are exceptional in nature and apply only in very limited areas and with very rare extension over time into new areas of work.
1296. Periodically trade unions and others call for portability or transferability of LSL between employers generally, and moving to some model in which there is a general right to take LSL after any person had been in the Australian workforce for 7 or 10 years.
1297. Effectively, these are calls for a general right to a "sabbatical" after a given number of years in work, regardless of how long the employee has been with their "final" employer at the point of becoming entitled to the leave.
1298. The Commission may hear these calls again in this review, and this is something of a perennial ambit claim from some quarters. At no point, however, have the fundamental flaws of such an idea been addressed (nor can they be). These include:

³⁷⁰ For example, the Queensland <http://www.gleave.qld.gov.au>

³⁷¹ For example, the Queensland [Contract Cleaning Industry \(Portable Long Service Leave\) Act 2005](#).

- p. The competitive disadvantage such additional labour costs would impose on Australia compared to competing countries.
- q. How this could be funded, and why a currently contingent liability (in which the employer can recoup monies set aside for LSL if the employee leaves prior to the qualifying period) should become an absolute liability, and what the impacts of this would be.
- r. The consequences of, or any justification for, employers paying into any statutory scheme administering mass portable LSL, and the impact of this on employee incomes and spending priorities.
- s. The signal this sends to employers about hiring people reaching the 7 or 10 year period of career tenure, at which they would have a right to an extended period of absence. *Why would any employer hire someone who some months into their employment is going to exercise a right to an extended period of absence?* (Noting there is a normative or values-based difference between someone's right to become a parent and take parental leave, and someone simply wanting a career break or a holiday).

Recommendation 6.3.11

There should be no extension of portability or continuity of LSL between employers, beyond the limited and exceptional areas in which it has currently and historically been applied in particular industries, including current statutory schemes administered at the state and level.

Recommendation 6.3.12

There should be no impediment to employers and employees, on either a collective or individual basis, agreeing to employment in any industry without portable LSL, provided alternative generic LSL is provided or an equivalent alternative benefit provided. This would mean that existing portable LSL schemes or entitlements would no longer be compulsory and could be excluded by express agreement/alternative LSL arrangements.

STAND DOWN

- 1299. Part 3-5 of the *FW Act*³⁷² provides for the standing down of employees (without pay) for periods in which they cannot usefully be employed, essentially due to circumstances beyond the control of the employer (such as, for example, natural disasters, fires at premises, industrial action against other employers, etc.).
- 1300. This is a key part of the safety net for employers and protects employers against having to pay labour costs for periods in which work cannot be undertaken and when it would be unreasonable to be obliged to pay the employees.

³⁷² *Fair Work Act 2009*, ss.522-527

1301. Resource employers strongly support this remaining part of the system as a national safety net clarifying when payment is and is not liable in the interests of both employers and employees. The concept of stand down is an accepted and non-controversial one, notwithstanding that debates can emerge in particular circumstances about whether a stand down should be made.
1302. It should be noted that the employer is not obliged to stand employees down without pay (and does not for example have the prohibition on payment which attaches to strike pay) and can continue work or payment where it chooses to. As stated, this is a safety net which can be exceeded.
1303. There are four concerns with the operation of stand down in its current form which could usefully be addressed arising from the Commission's review:

Information and other technologies

1304. One of the circumstances in which employees can currently be stood down under the legislation is "*a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown*".
1305. This remains one of the key situations in which stand down without pay needs to apply, and AMMA understands this is being interpreted dynamically enough to accommodate changing technological circumstances in most cases.
1306. However, the wording in the legislation is somewhat 20th Century, industrial and factory-based in nature. It could better keep pace with modern work and work practices and the shift to a service and IT-based economy.

Recommendation 6.3.13

Breakdowns or service outages of ICT (Information and Communications Technologies) and specifically network and internet breakdowns should be expressly added to the circumstances that give rise to stand down, provided this would remain subject to the test of stand down only being applicable in situations in which the employer cannot reasonably be held responsible.

Agreement stand down clauses

1307. Stand down should be a code in the legislation which provides a safety net for employers, and just as the safety net for employees should not be able to be undercut or varied by agreement unless specifically allowed, so, too, should the safety net for employers not be capable of being undercut by agreement provisions.
1308. Some employers and unions have worked out consent mechanisms to successfully deal with stand downs in their regular dealings at the workplace level, and this can be reflected in agreements.

1309. However, in other cases, dispute mechanisms and the involvement of the union in discussions on alternative employment serve only to delay stand down, create complications for all concerned, and complicate what should be an employer's right to stand down in particular circumstances.

Recommendation 6.3.14

Agreements should not be able to be used to place conditions and processes around the standing down of employees which have the effect of denying employers what should be a safety net right to not incur labour costs in circumstances beyond their control.

Union representation

1310. The *FW Act* regulates who can and cannot take a dispute to the tribunal regarding the standing down of employees³⁷³.
1311. This currently includes an employee organisation (trade union) that *"is entitled to represent the industrial interests of an employee (to be stood down or wanting to take leave to avoid being stood down)"*³⁷⁴.
1312. Consistent with the industry's wider calls on the operation of trade union rights and capacities throughout this submission:

Recommendation 6.3.15

A union should only be able to dispute a stand down where:

- It has members being stood down/wanting leave to avoid being stood down; and
- Those members have requested the union represent them in relation to the specific stand down being disputed; and
- The union is party to an agreement covering the employment of the employees to be stood down and there is not an extant or prior agreement with another trade union or directly with employees on an individual or collective basis.

³⁷³ *Fair Work Act 2009*, s.526(3)

³⁷⁴ *Fair Work Act 2009*, s.526(3)(c)

7. EMPLOYEE PROTECTIONS

7.1. INTRODUCTION

"We have felt the need to pay this money to circumvent the time and money involved in defending the claim in court."³⁷⁵

"We have had claims but defended our decisions. Although we did not pay any 'go away' money, we still had legal fees associated with this activity. Therefore, there was still an unnecessary cost for the employer."³⁷⁶

"The employee advised he hadn't wanted to make a case of it – the union pushed him into it."³⁷⁷

- **The best employee protection is working for a productive, competitive, sustainable enterprise that is supported in its capacity to do business by national employment regulation.**
- **Where employment protection measures (such as in relation to unfair dismissal, adverse action, workplace bullying) are imposed they need to be balanced, proportional and practical to accord with what a workplace relations system needs to deliver for the economy and labour market in which it operates.**
- **There needs to be greater capacity to retain jobs by revisiting agreed entitlements where businesses and jobs are under genuine threat.**

FUNDAMENTALS

1313. Issues Paper 4 addresses employee protections, including unfair dismissal, anti-bullying, the general protections / adverse action provisions and the transfer of business provisions of the FW Act.

1314. Going back to fundamentals, the best employee protections, and the best employment protections, are:

- a. Having a job in a productive, competitive enterprise that can sustainably and rewardingly employ them over time.
- b. To the extent possible, jobs that grow and change and that keep employees competitive in changing labour markets through growing skills and experience.
- c. A labour market that is generating new jobs and in which it is possible for employees to change jobs, and indeed careers, to meet their preferences

³⁷⁵ AMMA Workplace Relations Research Project [Survey 3](#) Report, April 2011, Dr Steven Kates, RMIT University

³⁷⁶ Ibid.

³⁷⁷ Ibid.

etc. Sometimes people need a change, don't like their workmates, just don't fit, or the job is wrong for them. At the moment, too many of these situations end up in litigation, where in a stronger labour market employees would have more choices to change enterprises.

1315. So the best recommendations the PC can make on employment protection are those which make employment easier and more economic, and which support greater productivity, competitiveness and capacity to do business in Australia.
1316. Beyond that, however, there is considerable scope for remediation and adjustment to our existing regulation of:
- a. Unfair dismissal (Chapter 7.2)
 - b. Anti-bullying (Chapter 7.3)
 - c. General protections / adverse action (Chapter 7.4)
 - d. Transfer of Business (Chapter 7.5).
1317. AMMA notes in relation to the above areas that the workload of the FWC is now firmly stacked in favour of individual rights applications rather than dealing with collective disputes which was historically the case.
1318. Any employee can now take a matter to the tribunal, such as a grievance under a modern award or enterprise agreement or an unfair dismissal claim, but more recently have been able to bring an anti-bullying claim or an adverse action claim.
1319. The transfer of business provisions of the FW Act are also included in this chapter, along with some other issues to do with employee rights under agreements, given that these are generally seen as "protections" for employees.
1320. A KPMG [analysis](#) commissioned by AMMA on behalf of resource industry employers assesses the cost savings that could be made in the above areas if some of AMMA's reform options were taken up by the PC and recommended to the Federal Government.

PRINCIPLES FOR EMPLOYEE PROTECTIONS

1321. This is a review of all parts of the WR system impacting on employers, employees, our economy and community as set out in the terms of reference. Employers accept that a number of employee protection measures and avenues to litigate have been added to our system and are likely to remain part of the system (save for the anti-bullying jurisdiction which remains wrongly located in the workplace relations system).
1322. However, if unfair dismissal and protection from unlawful dismissal are to remain part of the system, they need to be reviewed and in key areas reformed to deliver on the qualities and characteristics of a WR system we need now and into the future.

1323. Each element of employee protection in Australia needs to deliver on certain key principles and meet key quality standards for all users of the system. These should include:
- a. **Balance:** Any employment protection legislation (EPL) must be genuinely balanced and based on genuine merited cases warranting redress, and must not overly favour either claimants or respondents.
 - b. **Targeted:** Access to litigation or remedies should apply only in a minority of situations that are exceptional in nature. Neither claims nor determinations should be made in relation to any substantial proportion of terminations of employment and where this does occur, this is an indication of flaws in the employment protection system.
 - c. **Systemic learning and declining relevance:** After more than 20 years in operation, our system should be yielding an ever-declining number of termination claims. If it is not doing so, this is indicative of the system failing to send clear and consistent signals to employers in making dismissals which can be relied upon to not trigger litigation.
 - d. **Predictability / consistency / transparency:** Linked to the preceding, the system needs to support compliance by sending proper signal effects to employers on what to do and not do. This is a function of transparent, predictable and consistent approaches to decision-making and to applying the law to factual circumstances.
 - e. **Proportionality:** Litigation cannot be asynchronous, in which one party assumes all the risk and the other party none, and indeed employment cannot be viewed in this way either.
 - f. **Seriousness and gravity:** Taking someone to court should be a serious rather than speculative matter, and whilst justice should be accessible, gravity should attach to contesting dismissal. Any termination of employment / EPL system must require things of employees which discourage speculative or calculated claims.
 - g. **Practicality and navigability:** And above all the system needs to be practical and navigable. Employers need to be able to know what to do and not do to keep themselves out of litigation, and to then be able to keep themselves out of litigation.
 - h. **Directed and discrete:** There are separate species of employment protection, targeted to different considerations under state and federal laws. They should be separated in practice, and there should not be scope for strategic litigation or forum shopping in which lawyers or advisers pursue multiple actions complaining of the same termination or situation.
 - i. **Assisting compliance with other laws:** Employers must be empowered to direct their staff to work safely and legally, and to work in compliance with the employer's legal obligations. Employers must have the tools, including

warnings and dismissal, to ensure employees work as directed, work safely and meet the employer's legal obligations.

- j. **Meeting community expectations:** Litigation on dismissals and terminations should meet community expectations, in particular where the community would have expectations as to safety, non-impairment, and what constitutes and does not constitute a fair go all round.

1324. Since its creation, unfair dismissal has caused significant angst for employers not simply because it created new rights to litigate dismissal, cost money, saw dismissed employees reinstated, nor simply because it was new. As outlined in Chapter 7.2, the system has failed over more than two decades to be balanced and deliver sufficient clarity for employers to assist compliance.
1325. The general protections have been even more controversial, disturbing well understood and complied-with protections of fundamental rights and replacing them with a system that invites creative and strategic litigation and which is unduly costly and unpredictable to operate under (see Chapter 7.4 for more details about employer concerns in relation to the adverse action jurisdiction).

INTERNATIONAL EXPERIENCES

1326. The PC reports that *“Workplace relations (WR) systems throughout the world legislate some protections for employees, employee representatives and, in some circumstances, employers. Central to these are various arrangements that address the unfair dismissal of employees and that allow employees to organise collectively”*.³⁷⁸
1327. It is correct that many countries have some form of employment protection, however, it is worth noting in regard to unfair dismissal that:
- a. Only 36 ILO member countries out of more than 180 have ratified ILO Convention 158, which is the foundation for our unfair dismissal laws.³⁷⁹
 - b. Of the 36 ratifying countries, only Australia, Finland, France, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden are OECD economies.
 - i. Only nine of 34 OECD economies have ratified the ILO Convention which gives rise to unfair dismissal systems.
 - ii. Australia is the only country in the Anglosphere (major industrialised English speaking countries in the Commonwealth plus the USA) to have ratified ILO Convention 158.
 - iii. New Zealand, Canada, the UK and the USA in particular have not ratified ILO Convention 158.

³⁷⁸ Issues Paper 4, p.1

³⁷⁹ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303:NO

- iv. Employers did not support the adoption of ILO Convention 158 in 1982, and globally do not support the ratification of this convention.
- v. A number of countries quite successfully operate without unfair dismissal protection, including those that successfully protect employees from discriminatory termination of employment. What they don't do is provide an avenue to litigate on the fairness of dismissal or to argue it is harsh, unjust or unfair.

GENUINE JOB SECURITY

1328. At a fundamental level, all interests and groups support secure employment. From a purely cynical economic point of view, business needs its customers to have secure incomes, constant demand for goods and services, and confidence to take on debt and build and repair houses for example. Australia's economy also relies on investment through employee superannuation.
1329. **Job security:** This does not mean a job for life, or that jobs cannot be lost. It does not mean no-one ever leaves a job, nor that uneconomic businesses do not ever close or lose staff. However, we would hope that all with an interest in jobs in Australia would support a system in which jobs are sustainable, resting on a foundation of sustainable enterprises that are able to do business, trade, employ and make a profit.
1330. However, insufficient regard has been paid in our workplace relations system to what actually makes jobs more or less secure.
1331. **Secure jobs rely on competitive, productive enterprises:** An employee's job is only ever secure to the extent that his or her enterprise has some existential security and sustainability by virtue of its confidence and capacity to trade competitively and productively. We have seen in recent years that long-standing and substantial enterprises, often with a global reputation and presence, can rapidly find themselves fighting for their very existence if markets change rapidly. Enterprises and their employees need new tools and new options to be able to adjust and be competitive and retain jobs to the extent possible.
1332. **Secure jobs rely on managers managing:** As enterprises are exposed to more and more rapid change, they need to be able to make smart, strategic decisions and implement them rapidly to best navigate changing circumstances. Unduly imposed bureaucracy or delay around essential commercial decision making, including workforce structures and employee numbers, reduces the capacity of those leading businesses to keep them in business. Job security and protection measures cannot be so onerous or bureaucratic that they preclude workforce adjustments that are necessary to actually keep jobs secure.
1333. **Regulation or inflated entitlements cannot make jobs more secure:** Governments need to recognise that they cannot regulate for job security, and that job security is a function of enterprise security, confidence and capacity.
1334. **Risk for employers makes jobs less secure:** Furthermore, and crucially, measures that governments take in the name of job security can actually reduce job opportunities

and make jobs less secure if they are excessive, unbalanced or add to the legal risks and liabilities of employment.

1335. **Inflated costs make jobs less secure:** In addition to litigious risks, through unbalanced and excessive rights to contest, delay, or complicate termination, the costs of employment and of doing business can make jobs either more secure or less secure. If an agreement-making system, for example, forces employers into inflated labour cost structures, then ultimately that company will not win business, or indeed opportunities for whole industries will go overseas. Inflated costs in offshore construction during the resources boom are an example of this, and at this point this very costly employment has scaled down considerably.
1336. **EPL regulation must not discourage hiring:** EPL impacts on jobs, and it can impact on employer capacity to take on risk and to have confidence to hire. EPL should not tip over the threshold to become so strict that it negatively impacts on employers' capacity to hire, which is ultimately in no-one's interests in any part of our community.
1337. **Employers and employees need tools to retain jobs when times get tough:** When times are tough, employers and employees need new tools and options to work together to keep enterprises going and retain jobs.

TOOLS TO RETAIN JOBS

1338. A deal is a deal when it comes to agreement-making, and no extra claims provisions have an essential role to play in delivering industrial peace, trading certainty, and forecastable and projectable costs. Employers strongly support no extra claims being able to be made when collective or individual agreements are entered into.
1339. However, at some point where ongoing employment or trading under the terms of an agreement will threaten a substantial proportion of jobs or the very existence of an enterprise, there should be exceptional scope to review previously agreed labour costs, employment arrangements, and even employee numbers and hours.
1340. This is based on the premise that employers and / or employees should have the capacity to revisit what has previously been agreed in an attempt to keep a business in business and to maintain jobs.

Allow reopening of agreements where jobs are under threat

1341. Issues Paper 3 contains the following:

There has been some uncertainty about whether and to what extent no extra claims clauses are effective in preventing parties from changing enterprise agreements. This issue came to a head when Toyota Australia was seeking, with the support of its employees, to recast its enterprise agreement so that it could become more internationally competitive... An initial Federal Court judgment meant that the combined consent of employees and the employer was not sufficient to overturn the 'no extra claims' provision in Toyota's enterprise agreement, thus precluding the desired flexibility. In mid-July 2014,

Toyota won on appeal to the full Federal Court , so it now appears that the 'no extra claims' provision is not an ironclad condition that prevents proposed variations to enterprise agreements that would otherwise be allowed by the FWA.

Given the clarification provided by the Toyota decision, what if any concerns persist about no extra claims provisions, and what should be done about this?

1342. Reviewing the Toyota decisions and the events surrounding that case, we saw a systemic failure of the WR framework to be able to assist in job retention, and an inflexibility to even allow an employer to have a dialogue with its employees on retaining their jobs.
1343. Separating this from the unique tariff and industry assistance debates surrounding the car industry, tens of thousands of employers are parties to agreements containing no extra claims provisions.
1344. The costs and time spent litigating to reach an outcome in the Toyota case do not reflect well on the current system, and point to an inadequacy to be redressed. Notwithstanding the final legal outcome, this chain of events highlighted something that should be possible in our WR system and something which could be more clearly, identified and understood.
1345. It should not be simple or common to reopen an agreement and start a dialogue with employees about reducing entitlements, delaying pay increases, or securing additional changes in work practices.
1346. However, equally, it should be possible for an employer facing an existential threat or the prospect of making widespread redundancies, to have an open dialogue with employees on the state of the business and its capacity to continue to operate under previously agreed terms and conditions, and how they may go forward together to minimise job losses.

Recommendation 7.1.1

A specific provision of the FW Act³⁸⁰ should allow an employer party to an agreement to make proposals to its workforce under prescribed circumstances (relating to incapacity to pay and the threat of redundancies), to revise previously-agreed agreement terms. Where agreed, this should become a variation to the agreement, according to its terms, which is simply recorded by the FWC with no scope to undo or contest the agreed outcome, particularly from a union which has not represented the employees in relation to the most recent discussions.

Where employer and employees seek the assistance of the FWC it should be made available, but should not be mandatory.

Relief from safety net increases / incapacity to pay

³⁸⁰ Or its successor.

1347. In the early 1990s employees at SPC and their employer recognised that the very existence of the employer was under threat, and that the enterprise could not afford a scheduled award wage increase. Employer and employees were able to agree that to pass on the increase would place jobs under threat.
1348. The-then system had a great deal of trouble coping with this situation, and supporting the employees concerned. This was a failure of employment protection, which is not restricted to unfair dismissal and capacity to litigate against the employer.
1349. The system needs to again recognise some employers have an incapacity to pay increased wages and labour costs and to provide some avenue for relief for them.

Recommendation 7.1.2

There should be some additional safety net mechanism to protect jobs by foregoing scheduled safety net increases or cost changes where this would threaten jobs or business viability. An employer should be able to apply to one of the institutions in a revised framework for temporary or ongoing relief from safety net wage increases where they can meet appropriate prescribed tests / requirements.

Reducing or capping redundancy entitlements

1350. Employment protection should also extend to capacity to revisit previously agreed redundancy benefits where they far exceed safety net levels and the employer is unable to pay them.
1351. The NES on redundancy is able to be reduced where an employer applies on the basis of their incapacity to pay³⁸¹. This is a capacity to apply for relief from requirements to pay up to 16 weeks' pay at the employee's base rate of pay.
1352. When it comes to agreed redundancy benefits an incapacity to make payments can be even more acute as the redundancy entitlements can be many times higher, can be uncapped, and can be based on higher rates of pay than are required under the NES.
1353. Whilst agreements should stand and employees should receive their agreed benefits, this should not necessarily come at the expense of more redundancies or business closure where this is a probability. Equally, redundancy payments deliberately set at levels which discourage businesses from making essential workplace changes are very damaging and create a very real risk of wider job losses.
1354. In appropriately limited and exceptional circumstances, there should be scope to reopen or limit inflated or over generous redundancy entitlements where the payment of benefits at these levels will threaten other jobs.

Recommendation 7.1.3

³⁸¹ See *Fair Work Act 2009*, s.120(1)(b)(ii)

There be scope to apply to the FWC³⁸² for relief from redundancy payments under agreements where the employer is unable or incapable of paying the rates previously agreed. This could be by way of a reduction or capping in payment levels which is not provided for in an agreement. This should be subject to suitable tests and evidentiary requirements.

³⁸² Or its successor with the new title under a reformed institutional structure.

7.2. UNFAIR DISMISSAL

*"In most unfair dismissal applications, there has been an expectation that the employer will pay 'go away' money in order to resolve the matter. The legal fees involved in going to arbitration are extremely high so we tend to agree to settle at conciliation in order to avoid arbitration."*³⁸³

- **The FW Act's unfair dismissal rules have had the effect of encouraging speculative claims and have in many instances seen the FWC encroach on what should be left to managerial decisions as to what is best for the enterprise.**
- **The jurisdiction is a growing one, with twice as many claims being brought now as under the previous WR system.**
- **In many cases employees who have engaged in serious misconduct undermining trust in the employment relationship have been able to seek reinstatement, some of them successfully.**
- **Employee protections are well taken care of in this area, it is employer protections that are lacking.**

INTRODUCTION

1355. In Issues Paper 4, the PC puts forward a range of questions related to the effectiveness of Australia's unfair dismissal laws, with a key question being:

"Do Australia's unfair dismissal processes achieve their purpose, and if not, what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions?"

1356. This part of AMMA's submission highlights the serious commercial issues resource industry employers face when defending unfair dismissal claim before the FWC, and also proposes some solutions to bring rigour back into the process and fairness for all concerned.

The Fair Work Act's unfair dismissal framework

1357. The existing provisions relating to unfair dismissal appear in Part 3-2 of the FW Act at sections 379 to 404, with [s.394](#) the main section dealing with bringing unfair dismissal applications.

1358. When assessing whether a dismissal is unfair, i.e. "harsh, unjust or unreasonable", the FWC must have regard to a number of factors, all of which are given weight, with no single factor given more weight than any other (this is a problem which AMMA discusses later).

³⁸³ AMMA member company responding to AMMA Workplace Relations Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University

1359. The factors under the FW Act the FWC must consider in deciding whether a dismissal was unfair are:
- a. whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
 - b. whether the person was notified of that reason; and
 - c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
 - d. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussion relating to dismissal; and
 - e. if the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal; and
 - f. the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - g. the degree to which the absence of dedicated HR management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - h. any other matters the FWC considers relevant.
1360. Whether the employee was dismissed for a "valid reason" is but one of many factors to be equally considered by the FWC.

Why is this part of Australia's WR system?

1361. The object of unfair dismissal laws is to balance the needs of businesses and employees while trying to establish procedures that are quick, flexible and informal.
1362. Unfair dismissal provisions are created so that if a dismissal is found to be unfair, then the appropriate remedy can be applied.
1363. Under the FW Act, the primary remedy is reinstatement although AMMA maintains that this is not appropriate in all cases and there should be exclusions from the potential for reinstatement even if the FWC for some reason finds the decision unfair.

What the system needs to deliver

1364. AMMA members need a fair and balanced unfair dismissal system that recognises managerial decision-making is paramount unless there are exceptional circumstance that warrant the tribunal's intervention.

1365. In the resource industry, employers have a particular heavy duty of care to ensure worker safety in often high-risk workplaces. This means that decisions to reinstate particular workers in that industry will have more potentially serious repercussions for workplace safety than in many other industries where employees are desk-bound, for instance.
1366. Resource industry employers must be able to set an example such that if safety protocols are breached, physical violence is involved, or serious misconduct occurs, there is no prospect of reinstatement.
1367. Reinstating such workers, such as when there are some procedural errors in the employer's handling of the termination of employment, sends a very unfortunate message to the rest of the workforce. If someone is reinstated after breaching safety protocols, being found to be under the influence of drugs at work, or having engaged in physical violence, the risk is that this sort of behaviour will start to proliferate on safety critical worksites.
1368. An AMMA member recently told of an example where a male worker was violent towards his girlfriend on a campsite and was dismissed. He later sought reinstatement.
1369. Such conduct not only breaks down the trust in the employment relationship but jeopardises the safety of others at the worksite or the accommodation villages associated with them in the case of the resource industry.
1370. There should be no prospect of reinstatement in such circumstances, even if the FWC finds the dismissal was unfair, which according to AMMA should not happen as long as there is a valid reason for termination.
1371. The types of behaviours listed above would provide more than valid reasons for dismissal on any reasonable view of such conduct in the workplace.

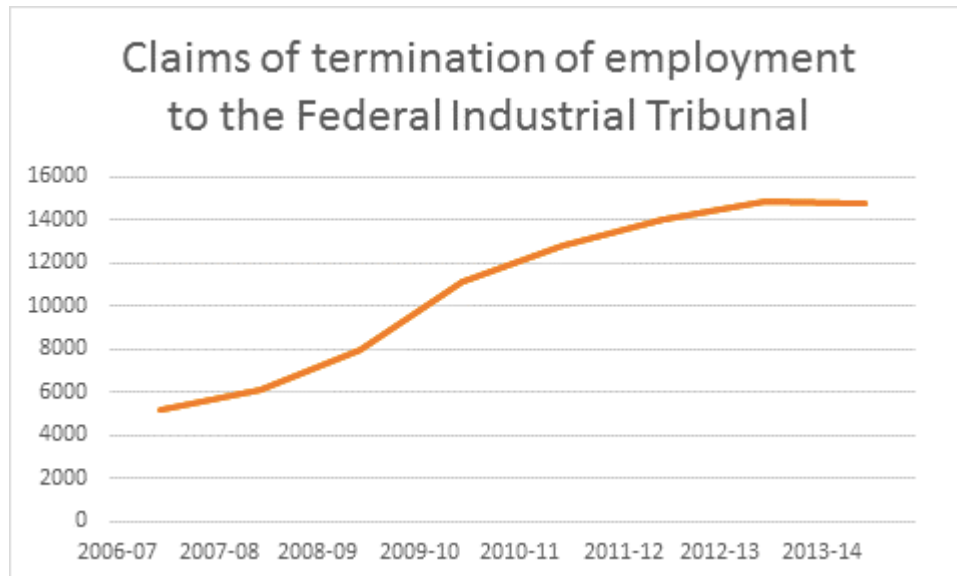
HOW THE SYSTEM IS PERFORMING

Problems with the current system

Increased number of claims

1372. The number of unfair dismissal claims the FWC is seeing each quarter has more than doubled and nearly tripled since under the proceeding system. This is due to the removal of some thresholds that were placed on the jurisdiction prior to the FW Act taking effect.
1373. This increase in claims is having an economic impact on every employer that has to defend them, and so the costs of a system that is accompanied by high numbers of termination of employment claims involve higher economic costs all round.

1374. As the graph below shows, the number of unfair dismissal claims per year prior to the FW Act taking effect were around 4,000 or 6,000 which has now risen to around 15,000 a year.



Valid reason for dismissal

1375. The existence of a valid reason for dismissal should be pivotal to the FWC's assessment of whether a dismissal was unfair. The absence of a valid reason will almost invariably render the dismissal unfair in any case. In the reverse, the existence of a valid reason should weigh heavily in favour of a determination that a dismissal was not unfair.
1376. Under the current system, that is not always the case. The determination of whether a dismissal is unfair or otherwise is highly discretionary which poses significant difficulties for employers in being able to effectively manage their workforce and, by extension, their operations. This in turn has the potential to impact on productivity.
1377. The legislation should be revised to focus the FWC's discretion in relation to the factors it considers when determining whether a dismissal is unfair so that all the factors are not equally weighted. The question of whether an employer had a valid reason to dismiss someone should be the primary consideration for the FWC. If the FWC finds an employer had a valid reason for dismissal, it should only be in rare circumstances that the dismissal should be found to be unfair and the FWC intervenes.
1378. But in all such cases where a valid reason exists, the FWC should be prevented from ordering the reinstatement of the employee.
1379. And at the very least, the FWC should not be empowered under the legislation to reinstate employees who were dismissed for breaches of work health and safety procedures; sexual harassment; bullying conduct; serious misconduct; or acts of violence.

1380. It is a contradiction for the FWC to confirm that an employer had cause to dismiss someone but as a result of an error in the termination process, or because of the harsh impact on that person, they should be entitled to return to the business, effectively denying the employer the ability to manage its business safely and effectively.
1381. Leading case law coming out of the FWC provides that its role is not to “stand in the shoes of the employer” when exercising its discretion in this jurisdiction. Yet so often it does exactly that. In many cases a commissioner will form a subjective view about an employer’s decision without a proper examination of the context in which the decision was made and without due consideration of the operational considerations involved.
1382. If an employer had a valid reason to dismiss an employee but erred in the way the termination took place (for example, if the employee was not afforded procedural fairness in some way) the employee should have other recourse available to him or her but this should not impact on whether a dismissal was unfair.
1383. The best practice process for employers when handling a termination of employment is clearly set out in the Small Business Fair Dismissal [Code](#). The Fair Dismissal Code, or a suitably modified form of it, should apply to all national system employers, not just those with fewer than 15 employees.
1384. This system would assist the FWC with the exercise of its discretion by delineating between issues directly related to the employment relationship (i.e. the dismissal) and any deficient conduct of the employer which occurs outside of that specific employment relationship and relates for to inefficient processes and procedures (for example, disciplinary processes, workplace investigation processes).
1385. There may be circumstances in which, on a technical point, the employer had a valid reason to terminate but the consideration of other factors should have led to the employer enforcing alternative disciplinary measures on the employee as opposed to a dismissal.
1386. In such circumstances, FWC orders should be limited to those that have a direct connection to the reason for the dismissal, not the manner in which the dismissal was effected or traits held by the employee that mean he or she is impacted more heavily by the dismissal (age, financial circumstances, employment prospects, etc.).
1387. For example, if an employee negligently breached a safety regulation on account of his or her mind not being “on the job” because of a death in the family, that is a factor that could be taken into consideration by the employer when determining appropriate disciplinary action for the employee’s actions.
1388. If the matter comes before the FWC as an unfair dismissal application, the tribunal can make a finding that objectively the employer had a valid reason for dismissal but that in the context of the subjective impact of the dismissal (taking into account the personal situation of the employee), the employee was dismissed unfairly.

1389. Unfortunately, decisions coming out of the tribunal of late place a great deal of weight on the FWC's discretion to take into account other "relevant" factors that may relate to the potential "harshness" of a decision to terminate.
1390. This is a misuse of the discretion and leads to inconsistent decisions by employers, encourages discrimination on the part of employers when managing their workforces and can lead to productivity losses.
1391. It is also most likely the case that employers are not aware of the personal circumstances of employees at the time of the dismissal, nor should they be, and as such it is unfair to take them into account in deciding on the harshness or otherwise of the employer's decision.

Employers must be able to enforce high standards

1392. Employers involved in providing services to the greater public must be able to uphold high standards of health and safety on their worksites to ensure the efficient and effective provision of those services and to ensure they discharge their duty of care to employees and visitors to the site.
1393. Any constraints placed on employers' ability to do this risks leading to loss of reputation, loss of contracts, loss of revenue and potentially loss of life.
1394. In a recent decision at first instance³⁸⁴, the commissioner found the employer had a valid reason for dismissal due to the fact that the employee, while in the role of master on a vessel, crashed into a pylon while under the influence of drugs. However, the tribunal reinstated the employee to his role because he found that despite the valid reason, the dismissal was harsh.
1395. In making this finding, the tribunal had regard to factors that included the employee's length of service and his poor prospects of obtaining other employment.
1396. AMMA would argue those factors were not relevant in relation to the dismissal and should not have led to the overturning of the employer's decision.
1397. In another recent example³⁸⁵, the commissioner at first instance found the employer had a valid reason for dismissal, i.e. the employee forwarding an "inappropriate and offensive" anti-Muslim email on his employer's IT system, but found the dismissal was "harsh" and "unreasonable" given his age and lack of likelihood he would find another job. The man was not reinstated but was awarded compensation. The employee appealed the decision not to reinstate him. On appeal, the decision not to reinstate was upheld as was the order for compensation.
1398. Effectively, the employer was punished to the tune of a \$29,000 compensation order for dismissing an employee for a valid reason (serious breach of policy) because he was aged 65 and had poor prospects of securing other employment.

³⁸⁴ *Christopher Toms v Harbour City Ferries Pty Ltd* [2014] FWC 2327

³⁸⁵ *Ronald Anderson v Thiess Pty Ltd* [2015] FWCFB 478 (30 January 2015)

1399. Finally, in another recent decision³⁸⁶, the tribunal found an employee's dismissal was harsh despite the employer having a valid reason, i.e. serious workplace violence. Again, the employee's age was a factor influencing the FWC's decision that the termination was unfair.
1400. The message these decisions sends is that if you seriously breach company policy or engage in serious misconduct such as workplace violence, if you are older or your employment prospects are limited, you will still retain your job. This line of jurisprudence is discriminatory in nature and places greater pressure on the younger workforce while shielding the ageing workforce from taking any responsibility for their actions.
1401. Issues relating to the impact of the dismissal on the applicant and their family in deciding whether it was harsh, unjust or unreasonable should have no bearing on the tribunal's decision and each application should rest on its merits.
1402. The fact is there is always going to be an element of hardship associated with termination of employment but where safety and other issues of serious misconduct are concerned, given employers' strict liability obligations under work health and safety laws, the courts and tribunals should be extremely cautious about overturning the legitimate decisions of the employer.

Case study – drug-fuelled reinstatement

1403. In another recent FWC decision³⁸⁷, an applicant, represented by the CFMEU, sought reinstatement despite having returned a "non-negative" drug test result that was four times the cut-off figure for methamphetamines.
1404. The woman had been required to take a random drug and alcohol test on returning to a mine site after her rostered days off.
1405. She protested her innocence, alleging her drink had been "spiked" on her time off, without her knowledge. The union on her behalf also pointed out that other employees had failed a single drug test but had not been dismissed.
1406. Particular mention was made of the financial hardship the woman would suffer if she lost her high-paying job in the mining industry.
1407. The CFMEU in representing her said that the woman did not "feel" like she was under the influence of drugs when she returned to work and felt perfectly able to perform her duties.
1408. The employer successfully argued there was a clear and valid reason for her employment to be terminated as she had breached one of the company's "cardinal rules" in respect of attending work under the influence of drugs. This, the company highlighted, had critical safety implications for the welfare of all those who worked at the mine.

³⁸⁶ *Lambley v DP World Sydney Limited* [2012] FWA 1250

³⁸⁷ *Cunningham v Downer EDI Mining Pty Ltd* [2015] FWC 318, 14 January 2015

1409. While there had been an error in the company's letter of dismissal to the woman that had the incorrect date on it, there was nothing that should cause the FWC to overturn the company's valid reason to dismiss the woman, the company argued.
1410. The FWC concluded there was strong evidentiary support for the company's stance that she had not involuntarily consumed the drugs and it declined to reinstate her.
1411. While this decision was a sensible one, it underscores the fact that even in cases where drugs at the workplace are involved, reinstatement is still very much on the table and employers are still put to the time and expense of defending such unmeritorious claims. In AMMA's view, dismissals for serious misconduct should not have reinstatement as a possible remedy even if there are procedural deficiencies.

Genuine redundancies

1412. Under the FW Act, if an employer dismisses a person for reasons of 'genuine redundancy', that dismissal can be found to be unfair if it would have been 'reasonable' for the employer to redeploy that person elsewhere in the employer's enterprise or within an 'associated entity'.
1413. While the extent of what is 'reasonable' in terms of employers' redeployment obligations has not been fully tested under the FW Act, the requirement arguably means an employer could be expected to canvass redeployment options with a myriad of 'associated' companies over which it has no control and with which it has no direct interaction and may even be in direct competition.
1414. The definition of 'associated entity' used by the FW Act is adopted from the Corporations Act 2001 and is so broad that it potentially ropes in other entities that would owe no obligation to that other enterprise to redeploy one of its former employees. Failing that, the former employer could face a successful unfair dismissal claim.
1415. As one AMMA member company said in answer to a survey question about their most serious IR concerns with the FW Act³⁸⁸:

"Unfair dismissals and genuine redundancies. In particular, the uncertainty in relation to the extent that an employer must consult with employees and consider redeployment opportunities."

1416. This situation is particularly unworkable in the building and construction industry where large conglomerates of companies operate, and companies within that conglomerate would meet the definition of 'associated entities' while having nothing really to do with each other.
1417. The only redeployment options an employer should be required to canvas as part of a genuine redundancy are options within its own direct enterprise, not with associated entities.

³⁸⁸ AMMA WR Research Project, Survey 6, October 2012, reported by Dr Steven Kates of RMIT University

True high-income threshold

- 1418. While the current high-income threshold for unfair dismissal under the FW Act, above which people are said to be excluded from the jurisdiction, is set at a salary of \$133,000 a year.
- 1419. However, this threshold does not apply if an employee is covered by an industrial award. In such cases, they are still entitled to bring an unfair dismissal claim no matter how much their salary exceeds the nominal cap.
- 1420. This has led to a raft of senior executives seeking to argue they are in fact covered by awards in order to access the jurisdiction, often successfully.
- 1421. This is unfair and inconsistent and the high-income threshold should apply irrespective of whether someone is covered by an award.
- 1422. There must also be a "true" high-income threshold, above which there are absolutely no unfair dismissal rights for those earning higher than, at present, \$133,000 a year.

The unfair dismissal process in the FWC

Application fees

- 1423. Currently, an application for an unfair dismissal remedy is \$67.20. The current application fee for a comparable application in the United Kingdom is £250. Based on current exchange rates, this equates to approximately \$494 AUD.
- 1424. The low application fee in the Australian system encourages employees who have not been unfairly dismissed but perhaps bear a grudge against their former employer or are in need of additional funds resulting from unemployment, to make frivolous (or even in their mind genuine) claims as a means of obtaining "go away" money.
- 1425. The legal costs involved in defending unfair dismissal claims are high. The internal costs of defending proceedings internally within a business are similarly high. Employee applicants pay little for an unfair dismissal application, and do not bear the cost of an expensive court proceeding so have little to lose and much to gain.
- 1426. This is particularly the case in matters relating to employees whose salaries are at the higher end of the jurisdictional threshold. For a nominal fee, those employees can make a claim for unfair dismissal and ultimately be rewarded with a large sum of money at conciliation, without any admission as to liability on the part of the employer who is encouraged to settle simply to dispose of the matter.
- 1427. Conciliators encourage employers to talk about settlement in terms of weekly pay. Obviously, the worth of a week's pay varies across the jurisdictional spectrum. Those at the higher end of the spectrum can pay less to make an application but stand to gain a greater windfall.

1428. Applicants should have to pay an unfair dismissal application fee that is commensurate with their salary. Salary levels could be broken up into bands with application fees applicable to each band.

Hearing fees

1429. Under the current system, if the parties are unable to resolve a matter at conciliation, the matter is transferred to a commissioner who then issues directions and a listing for hearing. On some occasions, the commissioner will list the matter for a directions hearing to involve the parties in the process of setting hearing dates and dates for directions. The process is inconsistent and varies between chambers.
1430. In AMMA's view, if an unfair dismissal matter proceeds to a hearing, the applicant should be required to pay a hearing fee to the FWC in order for the matter to be listed for hearing.
1431. This hearing fee could be reimbursable from the employer if the applicant is successful and the dismissal is found to be unfair. This would discourage employees from pursuing unmeritorious claims and encourage employers to make genuine efforts to settle those claims that do have merit without the need for a hearing.

The claims process

1432. According to the Explanatory Memorandum for the FW Bill 2008, the unfair dismissal system introduced with the FW Act was to be "simpler and easier for all parties to use". The EM stated:

"Under the current system, an unfair dismissal claim must go through an initial conciliation stage, which goes on to arbitration if not able to be conciliated. In the new system, Fair Work Australia will be able to respond to claims in a flexible and informal manner. This includes through initial inquisitorial inquiries, and where there are contested facts, an informal conference or hearing. Fair Work Australia will be able to make binding decisions following a conference, without the need for a formal, public hearing. Where conferences are held, they will be able to be conducted at alternative venues, such as the employer's place of business, which will minimise the cost in time and lost earnings an employer may face in defending a claim".

1433. It is clear to all, employees and employers alike, that the current unfair dismissal jurisdiction is not operating as suggested above. Rather, it continues to operate in much the same way as the "previous" system described above in that claims go through an initial conciliation stage and then onto arbitration if not able to be conciliated.
1434. Conciliation conferences take place over the telephone and are facilitated by a conciliator, not a commissioner. Conferences are rostered for two hours and conciliators often comment on the need to keep to that timeframe. The conferences give the parties an opportunity to present their respective cases. The conciliators generally do not take much of an active mediator role in the conference but rather, act as an intermediary between the parties when the two are separated into private

conference. A great deal of pressure is placed on both parties to resolve the matter, yet little time is spent on the merits of the claim / defence.

1435. The FWC places an emphasis on monitoring the number of cases that conciliators settle / resolve through key performance indicators (KPIs) related to finalising unfair dismissal conciliation conferences. The FWC's 2014 Annual Report states that one of the KPIs for that year was to finalise conciliations in a median time of 34 days (the median time actually ended up being 46 days). The report went on to say that in 2014:

"Conciliation remained a highly effective resolution process for unfair dismissal applications, with a settlement rate of 79 per cent. The conciliation process is a major success. Its high resolution rate meant only 3,716 matters were required to proceed past conciliation, with only 8 per cent of matters requiring to be resolved by a decision or order at a conference or hearing."

1436. As well as its annual reports, the FWC also publishes quarterly statistical data on settlement rates. It would seem that conciliators are under pressure to maintain a high settlement rate and therefore have an interest in attempting to persuade employers to pay "go away" money.
1437. In AMMA's experience, conciliation conferences are more often than not run as "horse trading" exercises, whereby following a brief exchange of facts and submissions by the parties, the employer is quickly asked by the conciliator to name its price in terms of a "commercial settlement" to appease the applicant and avoid a costly hearing. The parties pitch high and low respectively, and work towards a median settlement sum.
1438. To bring more rigour into the process, conciliations should either be facilitated by members of the FWC, or at the very least, facilitated in person to enable the parties to have frank and open discussions with each other (there would, of course be able to be exceptions to this). Telephone conciliations allow employees and management representatives of employers to hide behind the telephone and not engage with the conciliation process effectively. If the conciliations are to be facilitated by FWC staff rather than members of the tribunal, those staff should be directed to refer certain matters to a member of the tribunal at which point the member can elect to exercise his or her power under the FW Act to make binding orders following the conciliation, either on the papers or by way of further conference.
1439. Under the current system, if a matter does not resolve at conciliation, it goes into a pool of applications awaiting allocation to a member of the tribunal. Once allocated to a commissioner, depending on the practice of the member, it is either listed for a directions hearing or directions are issued and the matter is listed for hearing. There is rarely scope for *"initial inquisitorial inquiries... informal conference or hearing... or binding decisions following a conference"* as suggested in the explanatory memorandum to the FW Bill 2008.

COSTS OF THE CURRENT SYSTEM

AMMA members' experiences

1440. The costs of responding to unfair dismissal claims, whether using inhouse staff or external legal teams, are high.
1441. One AMMA member company in metalliferous mining recently said the costs of obtaining external legal and professional advice in relation to unfair dismissal and other employee protections claims was \$1,000 an hour for a law firm partner, senior associate or associate, with an average cost of \$20,000 per case.
1442. Anecdotal evidence suggests settlement figures or "go away" money paid at the conciliation stage average around \$20,000 a case, with decisions often made to settle because not all cases fought, even with legal support, will be won.
1443. Another AMMA member company reported that 33% of their terminations of employment wound up as unfair dismissal claims before the FWC. While that member tries to deal with most of the claims through inhouse legal staff, it would cost an extra \$50,000 to \$80,000 per matter if they sent a brief out to external legal.
1444. Since December 2014, that member has dealt with five or six unfair dismissal matters that have cost the company in excess of \$250,000 in one form or another.
1445. The general rule for some companies is they will only let matters go to arbitration if there is a question of having to set a strong precedent. Otherwise, it is often better to settle in terms of financial outlay.
1446. It is also important to remember that there are costs every step of the way for employers that go beyond the conciliation and / or arbitration stage of the FWC process. One AMMA member said they recently raised a jurisdictional objection to a person even having an entitlement to make an unfair dismissal claim (i.e. the company argued they were above the high-income threshold and not covered by an award).
1447. In response, the applicant lodged an "extension of time" application to which the company also had to respond. All of these are business costs associated with claims that are probably not even within jurisdiction in the first place.
1448. Even where employers successfully defend unfair dismissal claims, the financial costs are huge. One AMMA member recently reported paying \$100,000 to successfully defend a claim.

RECOMMENDATIONS

Recommendation 7.2.1

The question of whether an employer had a valid reason to dismiss someone should be the primary consideration for the FWC.

Recommendation 7.2.2

In all such cases where a valid reason for termination exists, the FWC should be prevented from ordering the reinstatement of the employee.

Recommendation 7.2.3

At the very least, the FWC should not be empowered under the legislation to reinstate employees who were dismissed for breaches of work health and safety procedures; sexual harassment; bullying conduct; serious misconduct; or acts of violence.

Recommendation 7.2.4

The Small Business Fair Dismissal Code, or a suitably modified form of it, should apply to all national system employers, not just those with fewer than 15 employees, and should provide a valid exemption from unfair dismissal claims.

Recommendation 7.2.5

Issues related to the impact of the dismissal on the applicant and their family in deciding whether it was harsh, unjust or unreasonable should have no bearing on the tribunal's decision and each application should rest on its merits.

Recommendation 7.2.6

The only redeployment options an employer should be required to canvas as part of a genuine redundancy are options within its own direct enterprise, not with associated entities.

Recommendation 7.2.7

There must be a "true" high-income threshold, above which there are absolutely no unfair dismissal rights for those earning higher than, at present, \$133,000 a year, regardless of whether they are covered by an award or not.

Recommendation 7.2.8

Applicants should have to pay an unfair dismissal application fee that is commensurate with their salary. Salary levels could be broken up into bands with application fees applicable to each band.

Recommendation 7.2.9

If an unfair dismissal matter proceeds to a hearing, the applicant should be required to pay a hearing fee to the FWC in order for the matter to be listed for hearing.

7.3. ANTI-BULLYING LAWS

“Allegations of bullying can be used as an industrial weapon by individual employees or by groups of employees, against other employees or the employer. I believe current services assist people making such fabricated or exaggerated claims but there is little to assist an employer in handling such claims – indeed it is perceived as inappropriate that an employer would even question the legitimacy of such claims.”³⁸⁹

- **Employers are concerned about bullying and agree there is a need for protections against genuine workplace bullying, which can be a threat to the health and safety of employees and to workplace productivity.**
- **However, anti-bullying redress which is duplicative, poorly-designed and ineffective is counter-productive and potentially damaging for both employers and employees.**
- **The current FWC jurisdiction was rushed and speculative and should be repealed in favour of a return to focusing on bullying as a work health and safety matter.**
- **Applicants should also be required to take their complaints through internal company processes first before accessing FWC redress.**
- **There should also be a greater focus on mediation and non-adversarial dispute resolution.**
- **Urgent action is also needed to address union-related bullying which in many ways is protected under the FW Act.**

INTRODUCTION

1449. The PC is interested in hearing from stakeholders on the following questions in relation to the FW Act's anti-bullying provisions³⁹⁰:

- a. What are the likely utilisation rates of the anti-bullying provisions, and what factors are most likely to affect these rates?
- b. What are the impacts, disadvantages and advantages of the anti-bullying provisions of the FW Act for employers and workers?
- c. Are there any unintended consequences of the anti-bullying provisions?
- d. To what extent are the anti-bullying provisions of the FW Act substitutes for, or complements to, state and federal WHS laws and other provisions of the FW Act? What implications do overlaps have for the current arrangements?
- e. How effective has the FWC been in assessing applications for orders to stop workplace bullying?

³⁸⁹ Respondent to AMMA member survey on workplace bullying, June 2012.

³⁹⁰ Issues Paper 4

- f. What, if any, changes should occur to the anti-bullying provisions of the FW Act or in the processes used to address claims and to communicate with businesses and employees about the measures?
1450. AMMA addresses these questions in this chapter but would like to note from the outset that, notwithstanding the lower than expected number of applications and orders in the first 12 months of the FWC's anti-bullying jurisdiction, it remains an unnecessary extra mode of third-party interference for employers which has added little or nothing to the protection of employees in comparison with what was already in place.
1451. Although there is no monetary compensation available, the new jurisdiction requires more time and resources to address concerns through FWC processes than it does to address them internally under company procedures. A key part of AMMA's recommendations in this area is therefore that applicants should have had to follow internal processes first before taking an application to the FWC.

Guiding principles and priorities for employers

1452. AMMA and its members recognise that workplace bullying is a serious issue – for individuals, their peers, for workplaces and employers. AMMA members identify the following negative impacts of workplace bullying when it occurs:
- a. The loss of personnel and intellectual capital if someone leaves the organisation due to workplace bullying.
 - b. The costs of an investigation and appropriate management of a complaint given the very real risk of future legal action.
 - c. Disruptions to work, and distractions, due to poor interactions between employees (including employees directly involved in a bullying matter but also their co-workers who may feel they need to take sides).
 - d. A diversion of line management and senior management time to deal with any allegations that arise.
1453. There are genuine and serious cases of workplace bullying that can cause significant harm although:
- a. In other cases it is equally true to say that what feels like bullying to one person does not meet the official definition at all.
 - b. There is conceptually, and must be in practice, a difference between legitimate performance management and actual bullying:
 - i. AMMA members have particular concerns about the implications of this jurisdiction for managerial prerogative and believe while the number of applications is currently lower than expected, it is set to grow as employee awareness grows.

- ii. There is an inherent tension in the anti-bullying jurisdiction between what is bullying and what is legitimate managerial action and this tension is far from reconciled despite a series of decisions on this issue. Because each case is by nature very unique to its specific circumstances, the case law is not able to provide general guidance that would deter further out-of-jurisdiction applications.

- 1454. In a 2012 submission³⁹¹, AMMA acknowledged that when workplace bullying occurs it is often detrimental to productivity.
- 1455. However, employers have for some years now had duties of care to ensure workplaces are safe for employees and free of bullying, well before the FWC's anti-bullying jurisdiction took effect on 1 January 2014.
- 1456. The onus is already well and truly on businesses to manage bullying at work given not only the disruptions to workplace morale and productivity but the potential for litigation under a plethora of jurisdictions. Employers have a very clear duty of care in this area that was not assisted by the creation of a new jurisdiction.

The FWC's anti-bullying provisions

- 1457. The FW Amendment Act 2013, which came into force on 1 January 2014, amended the FW Act to confer a new function on the FWC in relation to "workers bullied at work" under Part 6-4B of the FW Act (ss.789FA to 789FL).
- 1458. This was a brand new function for the FWC and another arc of regulation not recommended by the FW Act review panel, which handed down its recommendations to the then-Labor government 18 months beforehand. This also cut across decades of work to address bullying through the safety jurisdictions.
- 1459. The new [s.789FC](#) states that a worker who "reasonably believes that he or she has been bullied at work may apply to the FWC for an order under [s.789FF](#)".
- 1460. "Bullying" at work is defined as:

*A person or a group of people **repeatedly** behaving unreasonably towards a worker or a group of workers at work **AND** the behaviour creates a risk to health and safety. Bullying does not include reasonable management action carried out in a reasonable manner.*

- 1461. In response to an application, the FWC can make orders to stop the bullying if it believes there is a risk the bullying will continue.
- 1462. The term "worker" under the FW Act is the same as that applying under the model Work Health & Safety Act 2011. Workers are individuals who perform work in any capacity, including employees, contractors, sub-contractors, outworkers, apprentices, trainees, students gaining work experience and volunteers. A very broad cohort of individuals has the ability to bring a claim, and against individuals

³⁹¹ AMMA submission to the House of Representatives Standing Committee Inquiry into Workplace Bullying, July 2012

not necessarily even employed by the same company, adding another layer of complexity and risk for employers trying to manage such interactions.

1463. The orders the FWC can make are not limited to the employer but can also apply to co-workers and visitors to the workplace.
1464. While orders do not include financial compensation and are aimed only at “stopping the bullying”, most will require employers to take some form of action and will be disruptive to businesses in some way. The jurisdiction gives the FWC wide discretion to make “any orders” it considers appropriate to stop the bullying.
1465. Orders can also be made in response to behaviour such as threats made outside the workplace if those threats relate to work. This led to around 200 employers in July 2013 saying they were afraid this would force them to monitor the Twitter and Facebook use of their employees to ensure they were not engaged in bullying, ironically exposing the companies to bullying claims for doing so (i.e. harassment and victimisation)³⁹².

Why is this part of Australia’s WR system?

1466. This new jurisdiction for the FWC was not recommended by the FW Act review panel but represented a policy intervention by the former Labor government following a House of Representatives inquiry into workplace bullying in late 2012.
1467. Critically, the 2012 House of Representatives Committee report did not explicitly recommend the creation of an anti-bullying jurisdiction through the FWC, but recommended:

Recommendation 21

The Committee recommends that the Commonwealth government seek agreement from the work health and safety regulators of each jurisdiction through the Safe Work Australia process, for the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.

Recommendation 23

The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.

1468. The House of Representatives did consider what scope the FWC could offer in this area, but on a fair reading of the report, thought more work needed to be done and declined to explicitly recommend a FWC process.

³⁹² Bullying code puts firms in a bind, [published](#) in The Australian on 17 July 2013

1469. Introducing a FWC process was really a decision of the previous government and, notwithstanding the importance and urgency of addressing bullying, the process was clearly rushed and not sufficiently thought out, which sowed the seeds of the problems the jurisdiction currently suffers from.
1470. Employers and employer groups have consistently maintained that a greater degree of consultation and policy development should have preceded the introduction of the jurisdiction, which was also disappointingly not opposed by the then-Coalition Opposition when the laws were before the Senate. Bullying is a genuine challenge, and our regulatory system clearly could better address it. However, the course we have taken in Australia is rushed, ill-thought out, and pays insufficient regard to what was being pursued in other regulatory spheres, principally in work health and safety.
1471. The pre-existing legislative and regulatory framework that imposed a duty of care on employers in relation to workplace bullying was sufficient and no further regulation is warranted.

Interactions with other parts of the system

1472. A key interaction of the FW Act's anti-bullying provisions is with the Act's adverse action / general protections provisions, which in comparison allow unlimited compensation and risk very substantial financial penalties being granted against the employer.
1473. The general protections "exemptions" from disciplinary action for "industrial activities" often makes disciplining union members or delegates for bullying behaviour a fraught area.
1474. Recent case law has confirmed that as long as the employer's decision-maker did not take the adverse action **because** of the industrial activities but for a reason related to the bullying behaviour itself, then there is a defence.
1475. However, this is a complex and expensive defence to run. AMMA members repeatedly report fearing the repercussions for their business in terms of industrial vendettas for taking disciplinary action against union delegates, regardless of the basis for such action. They also report that many line managers are now afraid to performance manage their subordinates, despite the exemption from bullying claims for reasonable management action.
1476. A major issue is the vexed nature of the interaction between combatting bullying and the adverse action provisions of the FW Act which protect "industrial activities".

Coalition policy / proposed legislation

1477. The Coalition when in Opposition did not oppose Labor's anti-bullying measure and has not since proposed any amendments to the anti-bullying system within the WR framework.

1478. The Coalition's pre-election *Policy to improve the FW laws* did refer to requiring applicants to take their complaints to health and safety authorities before taking them to the FWC, however, this has not been progressed.

PRE-EXISTING JURISDICTIONS

1479. There already existed prior to the FW Act's anti-bullying measure coming into effect a plethora of legislative obligations on employers in respect to workplace bullying at federal, state and territory levels.
1480. Depending on the circumstances, there were a number of legislative avenues that a "victim" of workplace bullying could pursue. An applicant, whether a target of bullying themselves, a witness to bullying against a co-worker, or accused of being the bully, could potentially:
- a. Bring an action under state work health and safety laws which require employers as a primary duty of care to provide a safe work environment free of hazards.
 - b. Make a complaint to a state WorkSafe or WorkCover authority.
 - c. Have a course of action against an employer under Part 3-1 of the FW Act (i.e. the general protections) if it is alleged the bullying occurred because of an unlawful ground under Part 3-2 of the FW Act (i.e. if they believe they have been unfairly dismissed as a result of bringing bullying claims to light).
 - d. Pursue a "constructive dismissal" case under the FW Act.
 - e. Pursue a compensation claim through the workers' compensation scheme in various state jurisdictions. An employee may make a claim regarding a compensable injury if it arises out of, or in the course of, their employment. For instance, in South Australia, psychiatric disabilities caused by bullying at work are compensable if the person's employment was a substantial cause of the disability under s.30 of the *SA Workers Rehabilitation and Compensation Act 1986*.
 - f. Cite a breach of a relevant industrial instrument.
 - g. Pursue a tortious or equitable course of action through the courts.
 - h. Make a claim under state or federal anti-discrimination laws (including for unlawful harassment) if it is alleged the bullying occurred because the person possessed a protected attribute.
1481. In the Commonwealth jurisdiction, victims of bullying prior to 1 January 2014 had the following legislative avenues open to them if the bullying was based on a protected attribute:
- a. The Racial Discrimination Act 1975.

- b. The Sex Discrimination Act 1984.
- c. The Disability Discrimination Act 1992.
- d. The Age Discrimination Act 2004.

1482. In the state jurisdictions, potential remedies for victims of bullying exist under:

- a. The ACT Discrimination Act 1991.
- b. The NSW Anti-Discrimination Act 1977.
- c. The NT Anti-Discrimination Act 1996.
- d. The Qld Anti-Discrimination Act 1991.
- e. The SA Equal Opportunity Act 1984.
- f. The Tas Anti-Discrimination Act 1998.
- g. The Vic Equal Opportunity Act 1995.
- h. The WA Equal Opportunity Act 1984.

1483. A range of legislative avenues are also available to the alleged bully if they feel they have been mistreated or an investigation into complaints about them has not been handled fairly. In such cases, the alleged bully may have a course of action against an employer under:

- a. Part 3-1 of the FW Act (the general protections).
- b. Part 3-2 of the FW Act (if they believe they have been unfairly dismissed because of the allegations against them).
- c. A tortious or equitable course of action that can be pursued through the courts.

1484. In Victoria, June 2012 amendments to the Victorian Crimes Act 1958³⁹³ have expanded existing stalking offences to include:

- a. Making threats to the victim.
- b. Using abusive or offensive words to, or in the presence of, the victim.
- c. Performing abusive or offensive acts in the presence of the victim.
- d. Directing abusive or offensive acts towards the victim.
- e. Acting in any other way that could reasonably be expected to cause a victim to engage in self-harm.

³⁹³ Crimes Amendment (Bullying) Act 2011 (Victoria)

1485. The offence of stalking in this context incorporates but is not limited to workplace bullying.
1486. This explicit new criminal offence in Victoria sends a clear signal to the community that anyone who commits such offences will face imprisonment.
1487. It remains AMMA's view that the pre-existing raft of options available to both victims and alleged perpetrators are sufficient if not excessive avenues to pursue courses of action. Opening up yet another avenue for workplace bullying under the FW Act was unnecessary and duplicative.

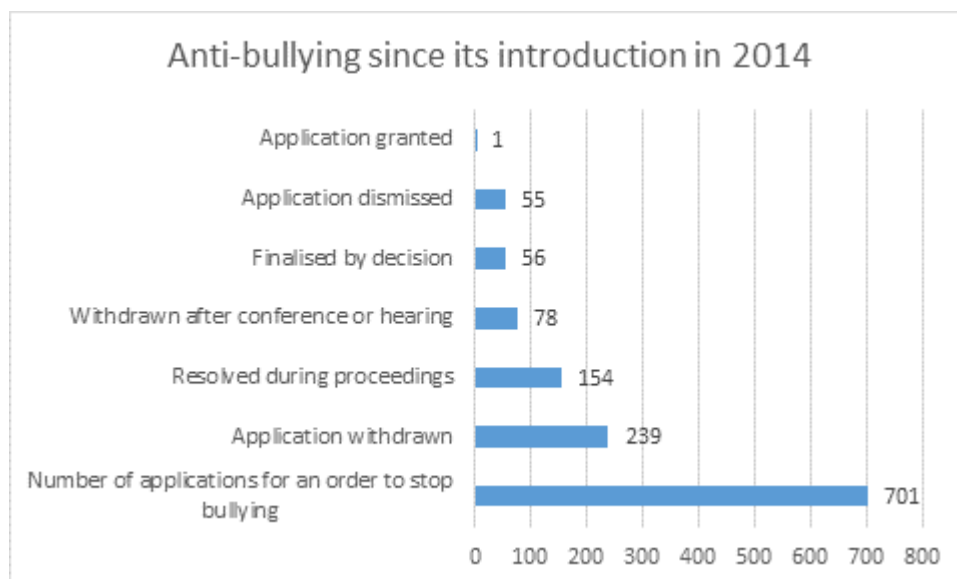
ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

Applications and decisions to date

1488. Prior to 1 January 2014 when the jurisdiction took effect, it was expected to lead to a significant number of tribunal applications.
1489. FWC representatives told a Senate Estimates hearing in February 2013³⁹⁴ that the FWC would not be able to absorb the costs of dealing with the extra complaints expected, and would need additional funding.
1490. General Manager of the FWC, Bernadette O'Neill, told a later Senate estimates hearing in June 2013 the FWC's "working hypothesis" was that in the order of 3,500 claims would be lodged per year.
1491. Numbers of applications have not been as high as expected but have still amounted to a significant additional workload for the FWC, despite published outcomes to date not in the main showing serious bullying behaviour in the claims coming before it.
1492. In the first quarter of the anti-bullying jurisdiction's operation (1 January 2014 to 31 March 2014), 151 applications were received. Of those applications:
- a. 133 were from employees;
 - b. Three were from labour hire employees;
 - c. Four were from sub-contractors;
 - d. One was from an apprentice / trainee; and
 - e. One was from a volunteer.
1493. Of these 151 applications in the first quarter, just one order was made, a consent order.

³⁹⁴ Senate Education, Employment & Workplace Relations Committee, Additional Estimates Hansard, 13 February 2013

1494. Unsurprisingly, most applications in the first quarter (109 out of 151) alleged bullying by a manager, notwithstanding the fact that “reasonable management action carried out in a reasonable manner” is exempt from claims.
1495. Whilst this exemption meant a large proportion of such applications did not proceed, this has been a consistent employer concern since a new FWC jurisdiction was proposed. And whilst applications based on ordinary management of employees were overwhelmingly dismissed, employers still incurred the costs of dealing with such bullying claims in 109 of 150 cases (73%).
1496. The graph below shows the number of applications (701) and how they were dealt with in the first 12 months of the jurisdiction, ending on 31 December 2014.



1497. While the 701 claims received (and two consent orders made – one later withdrawn) was not quite the 3,500 claims per year predicted by the FWC prior to commencement of the new avenue for litigation, it is still a significant number of applications, which can only be expected to increase in time.
1498. Notwithstanding the low number of orders to date, and the fact that no financial compensation can be awarded, this jurisdiction remains an extra level of regulation on employers on top of already comprehensive regulation that existed in a raft of other state and federal jurisdictions prior to 1 January 2014.

Snapshot of published decisions in first 12 months

1499. Cases decided in the first 12 months of the jurisdiction included:
- An IT application developer who claimed he was bullied because he was assigned a task not in his job description (the FWC found this did not constitute bullying)³⁹⁵.

³⁹⁵ Mr Tao Sun [2014] FWC 3839. 16 June 2014

- b. A training manager who alleged she had been bullied by her general manager when he failed to inform her and involve her in meetings and was overly-intrusive and “micro managing” (the FWC found she was an extremely difficult worker and the GM’s actions were “reasonable management action”) ³⁹⁶.
 - c. A delivery support manager who alleged a coordinated campaign against her by subordinates together with a lack of support from the company (the FWC found no evidence of a coordinated campaign and the company’s investigation into complaints against her was the only “prudent” course) ³⁹⁷.
 - d. A lawyer who alleged that being put on a performance improvement plan was bullying (the FWC disagreed, dismissing the application) ³⁹⁸.
 - e. A restaurant worker who alleged bullying by two employees (but the applicant had left the business so there was no risk of further bullying) ³⁹⁹.
 - f. A man who alleged he was bullied by the president of the company along with five board members and the book-keeper of a club (he was also no longer working there so his application was dismissed) ⁴⁰⁰.
 - g. A teacher employed by a WA state public school who alleged she was bullied in the course of her duties (but the employer was not a constitutional corporation and therefore not covered by the FW Act) ⁴⁰¹.
1500. In each case, this cost the employer money to investigate and defend. Furthermore, the human and workplace consequences after making such claims is unexplored.
1501. We don’t know, for example, how peer relations fare after someone complains against a workmate, and whether on balance scope to go to the FWC has ultimately been good or bad for all concerned.
1502. Of the **very** few applications that did result in published orders, the following were among them:
- a. A “consent” order that said the alleged bully was not to arrive before 8am; was to have no contact with the applicant alone; was to make no comment about the applicant’s appearance; and was not to send any texts or emails to the applicant except in emergency situations. That order was revoked several months later when the applicant felt more comfortable in the workplace and cited no further conflict⁴⁰².
 - b. Another “consent” order in which two brothers employed by companies associated with their family trust were ordered to be “civil” to one another; to avoid making abusive or offensive statements; and to only email each other

³⁹⁶ *The Applicant v GM and Company C* [2014] FWC 3940. 17 June 2014

³⁹⁷ *Ms SB* [2014] FWC 2104. 12 May 2014

³⁹⁸ *Willis v Gibson; Capital Radiology; Carroll* [2015] FWC 1131. 17 February 2015

³⁹⁹ *P.K.* [2015] FWC 562. 11 February 2015

⁴⁰⁰ *Jackson* [2015] FWC 402

⁴⁰¹ *Ms SW* [2014] FWC 3288, 2 June 2014

⁴⁰² *Applicant* [2015] FWC 9184, December 2014

between 9am and 5pm with a maximum of three emails per day (aside from emergencies), with all emails required to be about the business. The orders were to operate for a three-month trial period⁴⁰³.

1503. In the two consent order cases above, it can hardly be said they justify an entire new jurisdiction, for which FWC members had to undergo specialist training, and upon which the government and employers have spent millions. This is not to detract from the seriousness of genuine bullying but it does question whether Australia embarked on the right course in bestowing the FWC with its new jurisdiction and powers.
1504. AMMA members maintain that dealing with bullying allegations in the workplace should be left up to companies, along with the responsibility to educate their workforces in appropriate and respectful conduct, and to manage bullying claims as they arise. The involvement of ever-greater numbers of third parties in this area serves only to further undermine direct employment relationships and weaken managerial control.
1505. If company processes fail to satisfactorily deal with the complaint, only then should individuals be able to pursue claims.
1506. It is worth noting, however, that intra-company processes will often be curtailed in their ability to address union-related bullying given the lack of control employers have over union officials' and delegates' conduct in the workplace coupled with protections of that behaviour under the FW Act itself.

Case study – union bullying

1507. If Australia genuinely rejects and seeks to stamp out bullying as a matter of community values and ensuring people are safe at work, this must extend to bullying by unionists and their supporters.
1508. In a series of letters to former PM Kevin Rudd in July and August 2013, AMMA asked the then-Labor government to clarify what plans it had to hold unions to account for their unacceptable conduct following some serious examples coming to light.
1509. In particular, AMMA asked how clearly intimidatory and threatening behaviour, such as that seen in April 2013 by an official of the MUA against one of his union's own delegates, would be actionable under the soon-to-be-legislated anti-bullying provisions of the FW Act.
1510. While bullying by union officials was supposed to be just as actionable as bullying by any other party in a workplace setting, there were countervailing provisions in the legislation that meant that was not necessarily the case (namely the adverse action provisions).
1511. The below case study shows a particularly nasty example of union bullying that to AMMA's knowledge has gone un-actioned.

⁴⁰³ *Blenkinsop v Blenkinsop Nominees Pty Ltd; and Blenkinsop* [2014] PR555521, 15 September 2014

Union official bullies own union's delegate

An (at that time unnamed) MUA delegate had emailed officials and staff of the union highlighting some scheduling confusion and what was in his view a lack of clarity around the classifications of some specialist maritime vessels. He also queried why new mattresses were needed on one vessel when almost all the existing mattresses had never been slept in. The email did not name anyone nor point the finger at anyone in relation to the issues raised.

Nevertheless, an MUA official responded with an offensive and aggressive email tirade, later published far and wide by the union. That official's email referred to the delegate as "gutless" and called him a "maggot":

"We spend all day, every day, bluing with bosses. I enjoy that part of the job. What I can't cop is ill-informed bullsh-t by a gutless individual who won't put a name to a document."

The MUA official's email went on to say:

"This snivelling grub sits back and makes pot shots at officials without making any contribution to the collective outcomes of MUA members in the offshore sector."

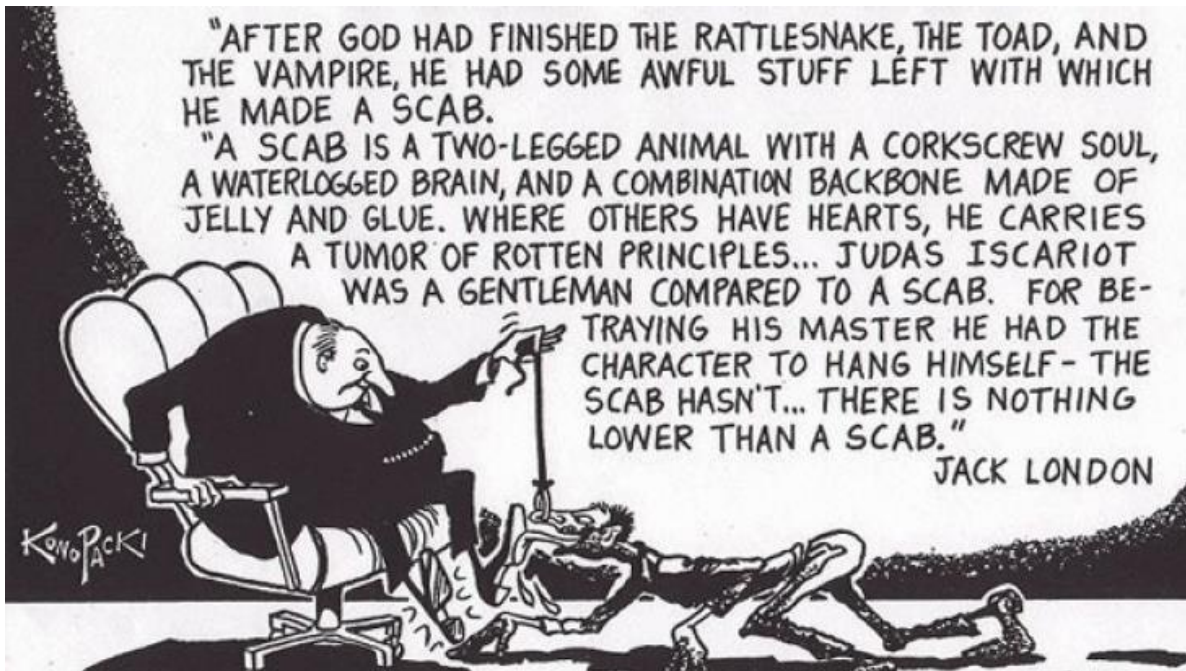
This email attack was from an official of the MUA to a delegate of that same union, who by that time had publicly identified himself and felt incredibly threatened by the official's email:

"I am deeply concerned by the tone of his attack. To denigrate, harass, intimidate anyone, let alone a member of our union in this way is nothing short of thuggery."

The delegate's email went on to say:

"If [the MUA official] had sent such a vitriolic attack to a person he describes as the '1%' of members, I have no doubt that such a person as he describes in his diatribe would be seeking legal redress and a settlement at great expense to union coffers ... What next? Am I up for a bashing? It certainly sounds that way."

1512. When weighing the FW Act's anti-bullying provisions against existing protections for conduct engaged in around "industrial activities", it appears there are massive grey areas about whether certain conduct would be actionable, or who would be held to account if it was.
1513. In the case of union-related bullying, it is the bullies and the unions they represent that should be held liable for the behaviour, not employers.
1514. "Scab", "dog" and "mongrel" are hate words, deliberately used to bully people in relation to their work. These hate speech relics of 19th century macho collectivism still do the rounds and are perpetuated by some trade unions.
1515. A nasty little piece of 19th century antiquity by Jack London called "The scab" still does the rounds, is still posted on the net, and is still directed in workplaces to those who do not support the position of their trade union colleagues:



1516. This typifies the abuse which lurks not far beneath the surface for many Australian officials and union members. This is actually an exhortation to suicide, which unions otherwise (quite rightly) treat very seriously.

1517. The following song apparently appears on an MUA commemorative CD⁴⁰⁴:

*There's vampire bats and sewer rats, there's pubic lice and crabs,
 But the lowest form of life on Earth is the slimy Patrick's scab.
 There's vampire bats and sewer rats, there's pubic lice and crabs,
 But the lowest form of life on Earth is the slimy Patrick's scab.*

*An hour before the sun comes up, he crawls out of his pit,
 You wouldn't get too close to him for the smell of slime and ... other little bits,
 Beneath the cloak of darkness he sets off, all clad in black,
 To serve his wretched masters goes the slimy Patrick's scab.*

*And when his treachery is done, on his knees he crawls back home,
 His kids don't want to know him, so he eats his tea alone,
 They haven't been to school for days, they're ashamed that he's their dad,
 "Tell me, what's your father do?". "He's a slimy Patrick's scab."*

There's vampire bats...

*He's not dared step inside a pub or an RSL for days,
 'Cos when you're a slimy Patrick's scab the world don't seem too safe.
 He sits at home and counts his hoard to find out what he's worth,
 But what value would you put upon the lowest slime on Earth?*

⁴⁰⁴ <http://unionsong.com/u044.html>

*Alas, accidents do happen, in the wharves and on the shore -
A crash, a smash, a flash, a splash - and our scab's a scab no more,
Nobody mourns his passing, no-one's even slightly sad,
Upon his grave these words inscribed - "Here lies a Patrick's scab."*

There's vampire bats...

*So he walks up to the pearly gates where the heavenly bell he rings,
Says he, "I've worked hard all my life, you'll surely let me in.
"I've always done the boss's will, to have served him makes me proud,
"So please give me my halo now, and my little fluffy cloud."*

*Saint Peter slowly shakes his head and looks him in the face,
"What makes you think that I've got room for scabs inside this place?
"You've robbed your neighbour of his job and his children of their food,
"You've stabbed your brothers in the back and betrayed your sisters too.
"My angels would lay down their harps, do you think that I'm that mad?"
And to burn in hell forever he despatched the Patrick's scab.*

There's vampire bats...

1518. This threatens those disagreeing with the union with a deliberate industrial fatality.

1519. According to Crikey⁴⁰⁵, during the past decade the following were available for sale to CFMEU members in Western Australia:



1520. That's a double barrellled shotgun, and this is a pistol from commemorative red union braces:

⁴⁰⁵ <http://www.crikey.com.au/2007/06/21/shopping-with-the-cfmeu/>



1521. To our knowledge, no one has been shot for being a “scab”.
1522. However, this is a visible manifestation of quite unacceptable attitudes that translate into specific abuse and vilification when individuals fail to tow the union line or even the collective line of their fellow workers.
1523. Without question this is bullying, and a level of personal abuse which would never be accepted if it were based on anyone's race or religion, as opposed to their IR choices.
1524. Such abuse should not be considered acceptable simply because it is seeking to intimidate employees to toe a union line, or by unionists or strikers to their peers in retaliation for not joining the union or not choosing to join a strike. There is nothing special about trade unions and their activities that would warrant privileging them or allowing them to bully with no repercussions.
1525. This type of abuse is no more acceptable, and potentially no less harmful, than the personal abuse that gave rise to our anti-bullying laws, and it is no less hurtful. It should have no more a place in modern Australia than racial, sexual or religious slurs.
1526. AMMA has consistently maintained that if the new federal anti-bullying system is to stamp out bullying, it must extend to the conduct of union officials, members and supporters. However, the current system's protection of industrial activities acts as a barrier to that.

Protection of industrial activities

“I am aware of reports by employees of my company and competitors that they were bullied by union members and officials during EBA negotiations. I suspect but do not know that such action would be unlawful in some way already, however, those affected will be unlikely to speak out for fear of persecution by the unions and co-workers and likely follow them to any future employment in the industry.”⁴⁰⁶

⁴⁰⁶ Respondent to AMMA member survey on workplace bullying, 2012

1527. The FW Act places significant protections around behaviour engaged in by individuals while participating in “industrial activities”. Engaging in industrial activities is protected as a workplace right under [s.346](#) of the FW Act, which says a person must not take “adverse action” (i.e. disciplinary action or termination of employment) because a person has engaged in industrial activities.
1528. While the word “because” is key, this has been interpreted as a *fait accompli* on the part of employers if industrial activities played any part in the offending conduct and the subsequent “adverse action”. That is, it is assumed from the outset that if a union activity was involved, then the employer is taking the adverse action because of the union activity, and the burden of proof lies with the employer to prove otherwise.
1529. The meaning of “engages in industrial activity” under [s.347\(v\)](#) includes to “represent or advance the views, claims or interests of an industrial association”.
1530. This provides unions, union officials, union delegates and unionised workers with a defence against alleged bullying conduct if it occurs in the context of their industrial activities, which of course it nearly always does. In other words, the FW Act seems to encourage and protect union-related bullying that would be prohibited or actionable if the conduct was engaged in by an employer or any other party.

Offensive conduct on union picket line

A 2012 Federal Court decision involving the CFMEU and BHP Coal Pty Ltd⁴⁰⁷ found that an active unionist's conduct, which on any reasonable view of it constituted bullying and harassment of fellow workers who crossed a union picket line during industrial action, was protected under the FW Act.

The judge found the conduct was protected under the adverse action provisions because the worker was advancing the views of his union, which was a lawful industrial activity over which he could not be disciplined. The judge found the man's actions in hurling abuse at workers who crossed the picket line and calling them “scabs” were within the scope of protections in the FW Act.

The judge found that the actions fell within the scope of:

- Sections 346(b) and 347(b)(ii) which covered participation in a lawful activity organised by an industrial association; and
- Section 347(b)(v) which covered representing or advancing the views, claims or interests of an industrial association.

The judge found the CFMEU delegate had been stood down and later terminated for a prohibited reason, namely because he had participated in a union picket line. He ordered the machinery operator be reinstated after rejecting the company's claim that he was stood down for breaching its workplace conduct policy and transgressing “expected workplace behaviours”.

The judge found the picket line (i.e. the industrial activity), not the man's conduct within it, was the relevant activity over which the worker was terminated and the worker's behaviour during that activity was part and parcel of his participation in it and could not be separated from it.

On the issue of the man calling those that crossed the picket line “scabs”, the judge noted the whole point of calling someone a “scab” was to humiliate them for not participating in industrial action.

He found that strong criticism of workers who did not participate in a strike could be seen as a “view” or “interest” of a union and therefore acting in support of those views or interests was a protected activity. By calling co-workers a scab and displaying signs with “scab” written on them, the worker was representing the views and furthering the interests of the union in its negotiations for a new enterprise agreement with the employer, the judge found.

⁴⁰⁷ CFMEU v BHP Coal Pty Ltd (No 3) [2012] FCA 1218, 7 November 2012

That finding was overturned by a Full Court of the Federal Court and again by the High Court⁴⁰⁸ which found that as long as there was evidence that the employer was taking the adverse action not because of the person's industrial activities but because of their lack of adherence to workplace rules such as a code of conduct, then that was the deciding factor in adverse action claims and the employer's decision-maker had discharged the burden of proof.

1531. While the High Court's finding in the above case is a welcome one for employers, IR commentators maintain this is not the last case we will see that challenges employers' ability to make workers toe the company line rather than the union line.
1532. Adelaide University's Professor Andrew Stewart said⁴⁰⁹ another example would be a company adopting a code of conduct that required employees to behave at all times in a way that showed loyalty to the employer. If an employer then terminated someone's employment for acting contrary to that and furthering the views of the union instead, would that decision be upheld? He doubted it:

"It's not difficult to imagine another High Court case on the issue."

1533. This underscores the need for the legislation to confirm that involvement in industrial activities does not condone bullying conduct within those activities.
1534. If union-related bullying conduct is meant to be actionable under the FWC's anti-bullying jurisdiction, it needs to have more teeth than it currently does given that businesses are dealing with often aggressive behaviour that is backed by union coffers.

RECOMMENDATIONS

Recommendation 7.3.1

Repeal the FW Act's anti-bullying provisions that took effect on 1 January 2014 on the understanding there were already numerous other avenues in place, including under work health and safety laws.

Recommendation 7.3.2

In the event the jurisdiction remains, require anti-bullying applications to be dealt with by AMMA's proposed Australian Employment Conciliation and Advice Service (AECAS) but only after applicants have raised their bullying allegations internally with their employers and followed internal company processes first.

⁴⁰⁸ *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41 (16 October 2014)

⁴⁰⁹ High Court "scab" ruling not the end: Stewart, published in Workplace Express on 16 October 2014

Recommendation 7.3.3

Any changes to the FWC's anti-bullying jurisdiction to hold union-related bullying more to account will require supporting changes to the FW Act's general protections provisions. It should be made explicitly clear that bullying in relation to individuals' participation or non-participation in the union and its businesses, support or non-support for a proposed workplace agreement and participation and non-participation in protected industrial action is not protected. This should include a statutory note or clarification that this expressly extends to verbal, written or online abuse.

Recommendation 7.3.4

At a minimum, it should be clarified in the legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected from any adverse action. It remains actionable against the perpetrator. Following on from that, unions should be held accountable for the bullying actions of their officials, delegates and members taken on the union's behalf.

7.4. GENERAL PROTECTIONS / ADVERSE ACTION

"[There is] scope for abuse and the growth in creative litigation once it is entrenched and people hear of 'success' stories."⁴¹⁰

- **Adverse action claims are posing a serious and escalating challenge to resource industry employers.**
- **There need to be clearer laws around exactly the type of claims that can be brought under this jurisdiction which currently functions in an 'open slather' way.**
- **There must be a way to weed out unmeritorious claims from the outset which do not have the necessary nexus between a workplace right and adverse action being taken by an employer because of that right.**
- **There should be no automatic protections of unacceptable conduct that occurs as part of someone's industrial activities as is currently the case.**
- **Reforms in this area should look at containing the number of unmeritorious claims, defining clearly the required nexus between a workplace right and the alleged adverse action, and capping the currently unlimited compensation that can be awarded for successful claims.**

INTRODUCTION

1535. The existing provisions relating to general protections and adverse action appear in Part 3-1 of the FW Act.
1536. Part 3-1 consists of new features of the system introduced on 1 July 2009 with the FW Act, with the creation of concepts such as "adverse action" being completely new creations. The general protections provisions generally, of which the adverse action provisions are a subset, consolidate a number of longstanding protections.
1537. The adverse action area of the general protections, which is what this part of AMMA's submission focuses on, are a massive issue for AMMA members and fertile ground for the payment of "go away" money to applicants given the unlimited orders employers face if such matters reach the courts.

What the system needs to deliver

1538. The FW Act system should provide a balance between protections for employees and the ability for employers to take legitimate action.
1539. The system needs to be much clearer in terms of what "prohibitions" are placed on employers in relation to taking legitimate disciplinary action against employees, and

⁴¹⁰ AMMA member respondent to AMMA Workplace Relations Research Project Report 2, October 2010, reported by Dr Steven Kates

in AMMA's view those prohibitions on employers' legitimate decision-making should be minimised or removed.

- 1540. Protections for discriminatory treatment based on a wide range of attributes, including industrial affiliations or activities is one thing, but placing a reverse onus of proof on employers in relation to proving there was a genuine reason for their adverse action is unacceptable.
- 1541. A number of recent cases have demonstrated that legitimate actions by employers are being challenged before the courts and that motives are being automatically ascribed to employers' behaviour that are not necessarily there.
- 1542. Even where claims of adverse action against employers have ultimately failed, they have still come at a significant cost to employers.
- 1543. While the evidence confirms that adverse action claims are on the rise, it is not only unions that are driving the increase, as employee awareness of their ability to bring claims and receive pay-outs grows.

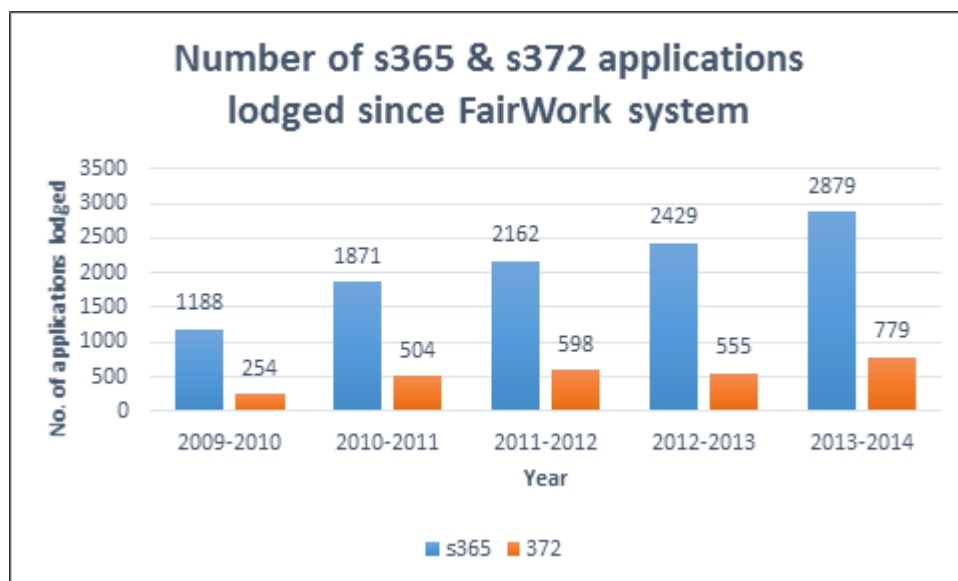
Interactions with other parts of the system

- 1544. The adverse action provisions have a key interaction with the workplace bullying provisions of the FW Act which took effect on 1 January 2014.
- 1545. While bullying conduct is now actionable under the FW Act via a claim to the FWC to "stop the bullying", the adverse action provisions muddy the water in this regard as they provide protections for many different types of conduct, arguably including bullying conduct, as long as it occurs as part of the "industrial activities" of the employee concerned.
- 1546. This has led to employers fearing reprisals if they try to action bullying conduct by union delegates or unionised workers, even if such conduct is deserving of disciplinary action (see Chapter 7.3 on Bullying in this submission for a further exploration of these issues).
- 1547. There are also interactions between the adverse action provisions and the unfair dismissal provisions given that if someone is barred from bringing an unfair dismissal claim, or would prefer to "forum shop" in the hopes of a larger payout, they can attempt to bring a claim under the adverse action rules.
- 1548. Anecdotally, there is strong evidence to suggest that staff on the FW Ombudsman hotline are actively highlighting the jurisdiction to those making enquiries about their workplace rights, which has arguably led to a further increase in claims, many of them speculative.

ANALYSIS: HOW THE CURRENT SYSTEM IS PERFORMING

Matters going before the courts

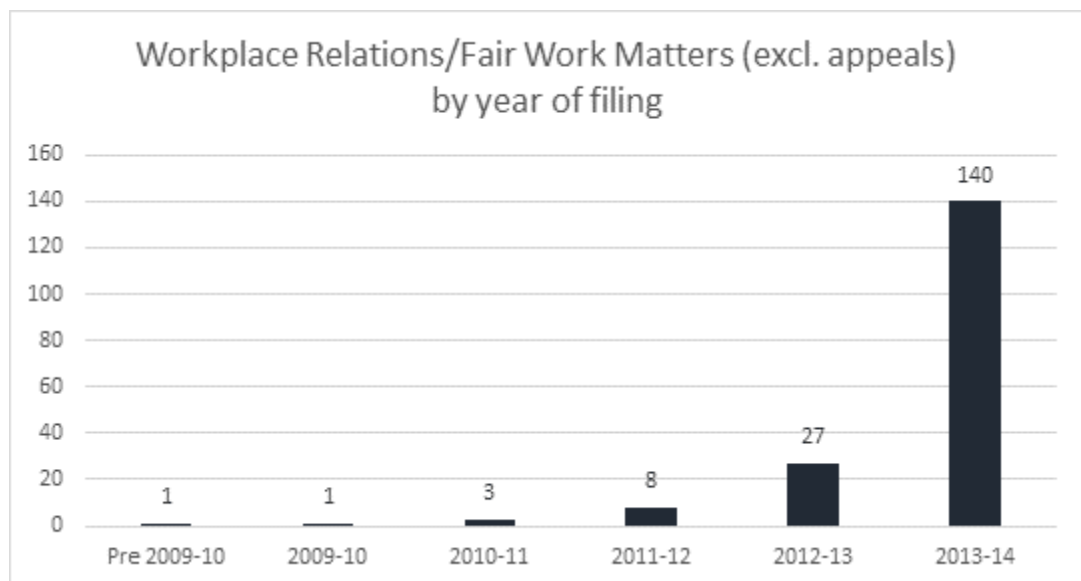
1549. According to the available data, the majority of cases initiated before the FWC do not end up before the federal courts and subject to formal litigation. This is to do with a high onus on conciliators to settle claims as per their KPIs. It is important to remember that the FWC does not hear adverse action claims, merely conciliates them and issues a certificate if they think the matter should go further.
1550. Where matters are litigated before the FWC because it involves a dismissal under s.365 (or under s.372 for matters not involving a dismissal), the overwhelming majority appear not to proceed to the courts.
1551. The data below shows how applications under the two "adverse action" jurisdictions have increased since the FW Act began on 1 July 2009⁴¹¹.



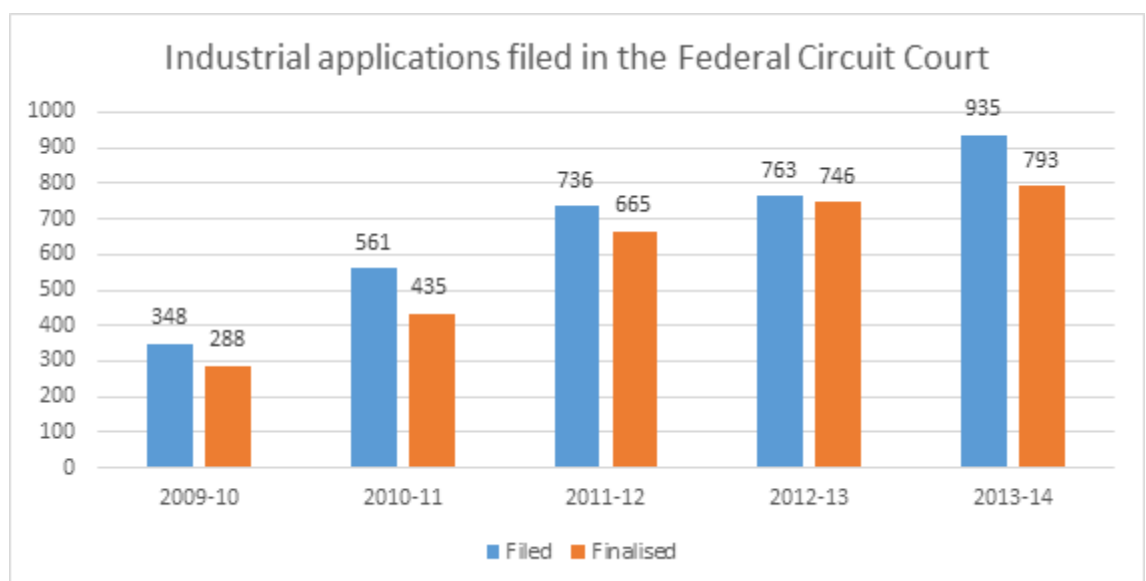
1552. It also appears from the data published by the Federal Circuit Court and the Federal Courts (who actually hear any claims that may eventually proceed to arbitration), that the overwhelming majority of claims in those courts are either withdrawn or settled.
1553. While only 27 applications were filed in the Federal Court in 2012/2013, there were 2,429 applications made to the FWC under s.365 of the FW Act that same year⁴¹².

⁴¹¹ Annual Reports of the AIRC, FWC and FWC: <https://www.fwc.gov.au/annual-report-2013-14/3-performance-reporting/resolving-disputes>;
http://www.fwc.gov.au/documents/documents/annual_reports/ar2010/AIRC_AIR_annual_reports_2009-10.pdf

⁴¹² Reproduced from Federal Court, Annual Report 2013-2014, Figure A5.12.1 – Current Workplace Relations/Fair Work matters (excl. appeals) by year of filing, p.151: http://www.fedcourt.gov.au/data/assets/pdf_file/0004/25726/Annual-Report-2013-14.pdf



1554. Whilst higher than the number of applications seen in the Federal Court, there were between 736 and 746 filed or finalised applications in the Federal Circuit Court in 2012/2013⁴¹³.



1555. Whilst the vast majority of adverse action matters do not end up in proceedings in the Federal Circuit Court or Federal Court, the numbers coming through the FWC are cause for concern, and often involve a large financial settlement in the absence of any formal finding of wrongdoing on the part of the employer in the courts.

AMMA's own research

⁴¹³ Federal Circuit Court Annual Report 2013/2014, p.56: <http://www.federalcircuitcourt.gov.au/pubs/docs/1314.pdf>
<http://www.federalcircuitcourt.gov.au/pubs/docs/1314.pdf>

1556. AMMA previously commissioned research to ascertain the experiences of resource industry employers in relation to this jurisdiction. As part of the AMMA Workplace Relations Research Project that spanned from 2010 to 2012, AMMA sought to harness resource industry employers' views about the brand new jurisdiction.
1557. A number of salient findings from that research appears below but suffice to say that the new jurisdiction was met with a sense of alarm by resource industry businesses, an alarm that has not lessened as they gain experience with the system.
1558. Some comments from respondents to the surveys that formed part of the research are as follows⁴¹⁴:

"[The WR environment is] in danger of deterioration due to the ease in which employees/ex-employees can access unfair dismissal, adverse action and workers' compensation claims."

"First and foremost is the ease with which the unions and/or anyone for that matter can apply for adverse action for dismissal matters. The fact that a person/union/law firm can make unsubstantiated accusations claiming adverse action is a very significant concern. In addition, the cost of defending such actions is prohibitive regardless of the merits of the claim."

1559. Below are some examples of claims of "adverse action" being made by employees at AMMA members' workplaces with the advent of the FW Act. Note it is very difficult to see what "workplace right" is apparently being transgressed in these claims:

"Termination allegedly due to making a workers' comp claim. Following clear evidence this was not the case, the claim was amended to being non-provision of suitable duties due to making a workers' comp claim. Allegation of workplace bullying and alteration of duties and benefits following making a complaint."

"We have only had one, and that was from a former payroll officer onsite. The ex-employee claimed that she resigned her post because of unfair treatment by her line manager, specifically favouritism shown to another employee. The claim was not successful. It was essentially a baseless claim, and the ex-employee was seeking a 'payout'."

"We were accused of not rostering on a diver because of his union involvement, when it was in fact due to poor performance. Decision was in our favour."

"An employee was terminated for safety issues, but this was not explained in the termination so the employee claimed that we terminated due to a temporary illness. We settled after conciliation."

"Allegation of bullying and harassment culminating in constructive dismissal. Allegation that due to a workers' compensation claim an employee was denied suitable duties, had personal leave requests declined and was

⁴¹⁴ AMMA Workplace Relations Research Project Survey 6, reported by Dr Steven Kates of RMIT University, October 2012

terminated. I believe that the claims we are seeing are not the sort of disputes intended to be dealt with by the general protections legislation, but rather lawyers are trying to fit grievances into a general protections claim due to the better financial outcomes that are possible with this avenue."

1560. More than half of the firms surveyed as part of that research (57.1%) reported that adverse action claims were a major area of concern, with specific concerns cited as follows:

"It has almost come to the situation whereby if an employee puts in a claim it is automatically assumed that the employer needs to get their cheque book out because the costs of defending some of the pitiful complaints outweigh the costs of settling in mediation."

"The reverse onus of proof, potential for significant financial penalties and the almost impossibility of having legal defence costs reimbursed even for claims that approach being vexatious, mean these are a major risk."

"It seems to be a wide area for lawyers to pursue cases which are likely without merit, but the reverse onus to defend the matter makes them likely to result in settlement via go away money."

"Expense of defending claims with little or no merit."

"... it is a constant consideration in our disciplinary processes and decision making."

"There are areas which are untested and some scenarios which could give rise to potential claims are very broad. An offence could occur by accident without intention with situations possibly being an individual's subjective perception."

"Although none currently received, the emphasis is on the employer to disprove the claim rather than the claimant having to substantiate a possible legitimate claim first."

Familiarity breeds contempt

1561. The FWC recently reported that in the second quarter of 2014-15, it received a total of 1,151 general protections (adverse action) claims, compared with 1,109 in the preceding quarter, and 1,000 in the quarter before that.
1562. Until the June quarter of 2011, applications had always been below 600 per quarter – just under half of the applications filed in the most recent quarter.
1563. A major reason for the increase in claims is undoubtedly a growing familiarity with the general protections regime under the FW Act. Why is it that employees, unions and employee agents are becoming more and more familiar with the jurisdiction and the wide ranging protections it affords employees?

1564. In AMMA's view, a critical factor is the extraordinary breadth of the definition of 'workplace right' under the FW Act. The world of workplace rights is the employee's oyster. In effect, any action taken by an employer towards an employee can fit within a general protections claim. This means an employer's risk profile is large and ambiguous when it comes to dealing with employees in the workplace and dismissing employees.

1565. As an example, because the right to "make a complaint" is protected against adverse action as a workplace right, i.e. an employer cannot discipline someone because they have complained, this means that every single worker covered by the federal WR system in Australia has fertile grounds to bring a claim, or at least give it a go.

Performance management stymied

1566. Employees can use the concept of 'workplace rights' under the FW Act to stymie any attempt at performance management and to prevent their individual accountability for behaviour and performance.

1567. As a result of the broad definition of 'workplace right' under the FW Act, employees can claim that any attempt to manage performance must be because the employee has at some stage exercised a 'workplace right' (for example, asked for flexible working arrangements, whether or not the request is granted; or complained about an error with his or pay one week).

1568. For example, a worker may request to start and finish early each Thursday in order to attend to his parental responsibilities on that particular day. The request is granted.

1569. Some months later, the worker's manager decides that the poor performance of the worker cannot be ignored any longer and it is time to address their lack of productivity. Upon arranging the first performance management meeting the manager is met with the worker's email notifying the manager that the worker refuses to attend on the basis that being required to attend the meeting is 'adverse action', and one of the reasons the adverse action is being taken is because the line manager resented the worker's flexible Thursday working arrangement.

1570. The onus of proof then falls upon the manager to show, should the matter proceed, that whatever the manager's reasons, they did not include the fact that the worker had exercised their right to request flexible working arrangements. Of course, if the manager had unfortunately emailed (for example) the human resources department in terms that disclosed a level of frustration at having to accommodate the employee's new Thursday roster, that onus of proof would be almost impossible to discharge.

1571. By making the threat, the worker avoids accountability for performance because HR then conclude that given the time, costs and distraction that dealing with a general protections claim involves, the difficulty of discharging the reverse onus of proof plus the fact that compensation is (unlike unfair dismissal claims) unlimited means it is easier to 'work around' the unproductive employee.

Complaint or inquiry?

1572. Under the FW Act, a workplace right includes an employee's ability to "make a complaint or inquiry... in relation to his or her employment". All employees have an ability to make a complaint or inquiry about their employment and many exercise that ability in relation to a variety of matters pertaining to their employment. The scope of this definition is far too broad and the subsequent legal exposure for employers far too great.
1573. Since the provisions came into operation, the courts have tried to focus the definition by either taking a broad or narrow view. It is clear from the ambiguity of the authorities that the legislation needs to be more targeted in order to direct the judiciary's approach to these matters.
1574. Under the narrow view, courts have determined:
- the complaint must originate from or be an incident of the contractual arrangements or statutory framework surrounding the employment (*Harrison v In Control Pty Ltd* (2013) 273 FLR 190); and
 - a complaint made by an employee must be based on a genuine objection or grievance and should not be made for any ulterior purposes (*Shea v TRUenergy Services Pty Ltd* (No. 6) [2014] FCA 271).
1575. Under the broad view, courts have determined:
- a complaint by an employee will be enough to attract the protection against adverse action in the FW Act, even where there are no formal complaint mechanisms or processes for the complaint or inquiry (*Devonshire v Magellan Powertronics Pty Ltd* (2013) 275 FLR 273); and
 - section 341(1)(c)(ii) was not confined to complaints, or inquiries directed to, the employer, but could cover inquiries directed to lawyers (*Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307); and
 - section 341(1)(c)(ii) was not confined to complaints about the employee's own employment relationship, but also encompasses complaints made about other employees' relationship with the employer (*CFMEU v Pilbara Iron Company* (No 3) [2012] FCA 697 and *Walsh v Greater Metropolitan Cemeteries Trust* (No. 2) [2014] FCA 456).
1576. It seems quite clear that the expansion of the law in this area has gone too far and has resulted in an unnecessary spike in complaints which rely on the breadth of the language, particularly around the definition of "workplace right" as involving a "complaint or inquiry in relation to his or her employment" in s.341(1).
1577. Section 341(1) should be amended to make clear that an individual can only make a complaint about "the terms and conditions of his or her employment" to clarify that it is not just any complaint that is covered by those protections. The aim is to be clear that generalised complaints about employment do not fall within the definition of a workplace right that must be protected from any subsequent action.

Company investigations can be adverse action

1578. The breadth and depth of what can constitute adverse action makes it very difficult to ensure that an employer (or their agents and employees) do not offend the adverse action provisions. Whilst many particular actions in a workplace may be clearly adverse action (i.e. termination or disciplinary action), there remains an unclear line as to whether a course of conduct may actually be deemed to be adverse action.
1579. Recently, it was held *Bartolo v Doutta Galla Aged Services Ltd (No.2)* [2015] FCCA 345 (19 February 2015) that a company-initiated investigation itself and any report produced from it could be categorised as adverse action. In other words, employers are damned if they do, damned if they don't when it comes to workplace investigations.
1580. In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41 (16 October 2014), the case concerned the actions of the company against an employee who used a sign to threaten other staff members. The sign was displayed with the words "No principles, SCABS, No guts" and was used by the employee to intimidate workers in the context of industrial action and a union picket line. However, the decision of the company to terminate the employment of the employee concerned resulted in three separate rounds of litigation and ended up before the High Court, fortunately by that stage upholding the company's legitimate decision to take disciplinary action against the man.
1581. Employee protection laws should be much clearer for both employers and employees. The system should ensure that matters such as those described above can be resolved through alternative dispute resolution, and not be unclear or ambiguous as to what the legislature intended that it needs to be resolved by the High Court. There should also be serious consideration given to the FWC's KPIs that encourage conciliators to encourage employers to settle claims with little regard for the merits of those claims.
1582. The absence of few specified exemptions or defences for employers means there is a degree of uncertainty for both an individual and an employer in terms of predicting whether a claim will be upheld by a court. There should be greater certainty built into the system to guide duty holders. AMMA recommends consideration of a defence which would allow adverse action claims to be made in most circumstances as is currently available, but creating a clear defence for employers that can be discharged easily with limited expense and no "go away" money.
1583. One option would be to consider the creation of a new defence based on "reasonable grounds" which would apply in circumstances such as the *Bartolo* case. The overall benefit of an available defence is that it has the potential to filter out unmeritorious claims before time and cost is expended by both parties through complex and litigious action through the tribunal and court system.
1584. The reasonable grounds defence could also apply where the employer took action, which may be adverse action under the current definition, but did so in circumstances where it was not for a prohibited reason i.e. it was not motivated by

the person's exercise of a workplace right. This would cover situations where the employer took legitimate disciplinary action.

1585. It should be a complete defence to a claim of adverse action where:

- a. An employer had genuine reasons / grounds to take the action it took quite apart from the workplace rights that may have been exercised (even if the action the employer took is "adverse"); and
- b. The dominant purpose of the action was not related to a workplace right but for a legitimate reason (i.e. significant safety breach, physical violence against co-workers, theft, poor performance, etc.).

Negative impact on productivity

1586. In AMMA's experience dealing with companies that have managed adverse action claims, it is important to note the experience of dealing with an aggrieved person in the workplace can have an impact on existing and ongoing employment relationships.

1587. The use of the provisions as both a sword and a shield by staff members against HR decisions can ultimately impact the productivity and harmony of the workplace in the following manner:

- a. First, engaged and motivated co-workers find themselves dispirited as they observe their colleague triumphantly avoiding accountability for his or her under-performance, the consequences of which are left to be carried by the rest of the workforce.
- b. Second, the unproductive worker is left as a cost to the organisation, unable to be held to account or disciplined in any way by fearful and paralysed management.

Legal and transactional costs

1588. Employers generally expend resources on investigating and engaging in legal services to defend an application from an individual worker. These costs are generally high when considered that it can involve multiple actions for a company to properly respond and deal with a claim. For example, an adverse action claim often involves:

- a. Devoting internal resources to properly and thoroughly investigate the claim. Many companies as part of their internal risk management practices engage an independent third party to investigate allegations and provide a report to the company as to the veracity and substance of the claim;
- b. Engagement of forensic investigation services. The type of expert assistance will depend on the nature of the allegations or claim, but this can involve obtaining IT, medical, scientific, engineering, OHS or other independent expertise to assist in the factual investigation;

- c. As a matter of course, engaging internal and/or external legal advice;
- d. Engaging separately with insurers as per relevant insurance policies that apply to a company;
- e. Preparing to defend a formal complaint before the FWC or the courts. This often involves not only key management personnel but other staff members such as relevant witnesses;
- f. Advocacy and representation in proceedings which often involves both legal advisers and counsel where it is before the federal courts.

1589. Resource industry companies have reported to AMMA that the costs for defending adverse action claims by former or existing staff members are significant.
1590. One AMMA member company indicated that the average cost to the company in defending adverse action claims is approximately \$60,000 to \$70,000 and that is before it is litigated in the court system.
1591. This appears not too dissimilar to costs expended by other employers. For example, Australia Post disclosed during Senate Estimates in 2011 that since 1 July 2009 (when the new adverse action provisions commenced under the FW Act), Australia Post dealt with 20 adverse action cases⁴¹⁵. 18 cases had been settled at a cost of \$12,500. However, the total legal cost for the cases was \$253,765.
1592. Often a settlement reached prior to any litigation will involve both parties paying their own costs. With many matters involving monetary components, the costs that the employer is unable to recover can be significant.

High income earners / compensation

1593. AMMA members have indicated that the cause of action for adverse action claims involving termination and protection from unfair dismissal are similar. However, there is no similar high income threshold which applies to adverse action, nor is there any compensation limit. This effectively sends signals to aggrieved individuals that there may be a significant amount of compensation if they pursue an adverse action cause of action.
1594. The unlimited nature of the jurisdiction should be re-examined as should the fact that high income employees who are not able to access unfair dismissal are able to pursue an adverse action remedy that will potentially net them much greater sums than they could receive under the unfair dismissal laws.

RECOMMENDATIONS

Defence for genuine reasons

⁴¹⁵ Senate Standing Committee on Environment and Communications Answers to Senate Estimates Questions on Notice Budget Estimates Hearings May 2011 Broadband, Communications and the Digital Economy Portfolio Australia Post Program No. Australia Post Hansard Ref: Page 121 (25/05/2011).

Recommendation 7.4.1

It should be a complete defence to a claim of adverse action where:

- a. An employer had genuine reasons/grounds to take the action it took (even if that is "adverse action"); and
- b. The dominant purpose of the action was not related to a workplace right but for a legitimate ground / reason (i.e. significant safety breaches, physical violence against co-workers, theft, poor performance, etc.).

Complaints about a workplace rightRecommendation 7.4.2

Section 341(1) should be amended to make clear that an individual can only make a complaint about "*the terms and conditions of his or her employment*" and that is the only aspect that will be protected as a workplace right (and then they still should have to prove the employer took the adverse action because of that complaint, not aside from it). The aim is to be clear that generalised complaints about employment do not fall within the definition of a workplace right.

Overlapping anti-discrimination jurisdictionRecommendation 7.4.3

Repeal s.351 of the FW Act. There are existing protections for employees against discrimination at a federal and state/territory level and it is unclear why there needs to be another layer of duplication.

Capping compensation / high income thresholdRecommendation 7.4.4

The unlimited nature of the jurisdiction should be re-examined as should the fact that high income employees who are not able to access unfair dismissal, are able to pursue an adverse action remedy.

Reverse onus of proofRecommendation 7.4.5

AMMA can see no reason that employers must prove they did not take adverse action because of a workplace right. It should be up to the applicant to prove that nexus from the outset.

FWC conciliation processes

Recommendation 7.4.6

The FWC should review its KPIs in relation to the conciliation of adverse action claims such that employers are not encouraged to settle claims that are without merit.

Anti-bullying lawsRecommendation 7.4.7

As highlighted in the separate chapter on Bullying, any changes to the FWC's anti-bullying jurisdiction to hold union-related bullying more to account will require supporting changes to the FW Act's general protections provisions. It should be made explicitly clear that bullying in relation to individuals' participation or non-participation in the union and its businesses, support or non-support for a proposed workplace agreement and participation and non-participation in protected industrial action is not protected. This should include a statutory note or clarification that this expressly extends to verbal, written or online abuse.

Recommendation 7.4.8

At a minimum, it should be clarified in the legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected from any adverse action by the employer. It remains actionable against the perpetrator. Following on from that, unions should be held accountable for the bullying actions of their officials, delegates and members taken on the union's behalf (see chapter 7.3 on Bullying for further details).

7.5. TRANSFER OF BUSINESS

*"[The current transfer of business framework] does not allow for more commercial arrangements to be pursued, and perpetuates outdated and potentially uncompetitive arrangements."*⁴¹⁶

- **AMMA members would take on the majority of employees of a business or contract they are taking over if there were not structural impediments to doing so.**
- **The current transfer of business rules are acting as a disincentive to employment by imposing foreign and inflexible WR arrangements from previous businesses, including bureaucratic public sector entities, onto new businesses, preventing them from being more efficient than the old.**
- **The system previously properly balanced the interests of transferring employees and their new employers, and could again return Australia to a balanced framework which better supports job retention.**

INTRODUCTION

1595. The PC addresses transfer of business in Issues Paper 5⁴¹⁷ as a further or additional WR issue which it might consider. The specific question the PC proposes in this area is:

"What are the problems, if any, about the WR arrangements for the transfer of business? What are the appropriate changes and what effects would these have?"

1596. The current rules for transfer of business are a major area of concern with the FW Act given the non-commercial outcomes they dictate and the anti-employment outcomes that result.
1597. Far from being a "peripheral" or "other" matter in the context of the WR system, this is a very significant area of concern for resource industry employers, particularly given the letting and re-letting of major operating and other contracts in the industry.
1598. This chapter highlights the practical problems resource industry employers are facing in this area and how they could be fixed in a more balanced and sensible approach to transfer of business.

GUIDING PRINCIPLES AND PRIORITIES FOR EMPLOYERS

1599. The PC might like to engage with the fundamental threshold questions as to why additional rules and obligations for transferring employees are part of the system at all, and why a transferring employee could not be treated the same way as any entity new hire, and either employed under the safety net plus any additional market

⁴¹⁶ Respondent to the AMMA Workplace Relations Research Project Survey 2 – October 2010

⁴¹⁷ PC Issues Paper 5, *Other Workplace Relations Issues*, p.15

pay and conditions applying under an individual or collective agreement at the new enterprise.

1600. AMMA would support this level of consideration as a foundation for signposting a more appropriate system for the future in this area, but has in this chapter engaged with how the existing transfer rules need to be rebalanced and recast to better support employment and deliver on goals in the PC terms of reference.
1601. Taking on the employees of an enterprise that has been bought or merged is a very delicate human resources strategy consideration and must balance the value of retaining knowledge and experience with other considerations such as:
- a. The legal liability and risk of keeping existing staff along with their transferring industrial instruments.
 - b. The relative terms and conditions of those employees under transferring instruments compared with others within the incoming business.
 - c. The relative costs of employing those workers, often under separate remuneration structures and payroll systems, against the financial and performance goals of an enterprise.
 - d. If not for the current rules, AMMA member companies would employ a significant proportion of any client's employees in an outsourcing arrangement and a significant proportion of employees of the previous owner in a business sale.
1602. More often than not, the outsourced work can be performed more efficiently by the new business if they take on some if not all existing employees.
1603. As with many other areas of regulation under the FW Act, AMMA members were reasonably happy with the "transmission of business" rules in place immediately before the FW Act took effect. However, they fail to see the merit in expanding those rules to the extent that they are no longer functioning mainly as employee protections but are now discouraging ongoing employment.

WHAT IS A TRANSFER OF BUSINESS?

1604. The FW Act's transfer of business provisions originally dealt with situations where a business was transferred from one national system employer to another. Subsequent changes⁴¹⁸ have meant the provisions now also cover the transfer of all state public sector workers to a national system employer.
1605. The key requirement of the transfer of business provisions (which were known as "transmission of business" under the previous legislation) is that in certain circumstances a new owner of a business must, if taking on employees from the old

⁴¹⁸ The Fair Work Amendment (Transfer of Business) Act 2012

business following a sale or transfer, also take their industrial arrangements into the new business which will continue to cover their employment.

1606. Under the current provisions, which appear in Part 2-8 of the FW Act from sections 307 to 320, a transfer of business occurs when⁴¹⁹:

- a. The employment of an employee of the old employer is terminated; and
- b. Within three months after the termination, the new employer takes that employee on;
- c. The work performed by the transferring employee is "substantially the same" as the work performed by the old employer; and
- d. At least one of the following "connections" exists between the old and new employer:
 - i. An arrangement whereby the new employer owns or is using some of the old owner's assets that relate to the transferring work;
 - ii. The work from the old employer is outsourced to the new employer;
 - iii. Work that was previously outsourced is now insourced; or
 - iv. The two businesses are "associated entities" within the meaning of [s50AAA](#) of the Corporations Act 2001.

1607. Generally, where a transfer of business occurs, transferring employees' industrial instruments transfer to the new enterprise if they are hired within three months of the sale. Additionally, service with the old employer counts as service with the new employer. If that is not the case, the new employer may be obliged to pay the affected employees their accrued entitlements such as annual leave or redundancy.

Why is this part of Australia's WR system?

1608. The original intention of such provisions was to ensure that employment terms and conditions were protected in the event that essentially the same business was transferred to a new owner.

1609. However, the current rules are so broad as to extend to situations where it is not readily apparent that a new business is of the same character as the old, rendering this area of regulation an unwarranted one affecting the continued viability of many businesses and the continued employment of private and public sector workers.

1610. The rationale for transfer / transmission of business provisions dates back to around 1914 when awards were used to settle disputes. The theory was that the dispute should remain settled despite structural changes to the business, i.e. employment terms and conditions should remain constant despite a change of business owner.

⁴¹⁹ Fair Work Ombudsman, Transfer of Business Fact Sheet, accessed 6 March 2015

Note, however, this developed in a regulatory era when all or most competing businesses would have operated under the same award with the same labour costs.

1611. That policy rationale was largely overtaken by enterprise bargaining, which allows enterprise-specific outcomes to be negotiated and which is in direct contrast to the current broad scope of the transfer of business rules which seek to apply former business IR arrangements onto new business owners in a broad range of circumstances.
1612. The transfer of industrial arrangements from one employer to another following the sale of a business or a change of contract has always been a vexed issue, but under the FW Act is even more so given the breadth of scenarios captured.
1613. In the context of this review, it is important to look at the impact of the current provisions on jobs and employment given this is a key focus of the PC's inquiry. AMMA urges the PC to look carefully at provisions like these which are having a job killing effect by discouraging new business owners from employing old entities' employees.

Comparison with previous systems

1614. Under the WR Act 1996 (as it stood immediately prior to the FW Act taking effect), in deciding whether there had been a "transmission of business", the courts and tribunals looked at the "character" of the business in the hands of the old and new owners. The former test was laid out in s.580 of the WR Act (reproduced below):

580 Application of Part

- (1) This Part applies if a person (*the new employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (*the old employer*).
 - (2) The business, or the part of the business, to which the new employer is successor, transmittee or assignee is the *business being transferred* for the purposes of this Part.
 - (3) The time at which the new employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission* for the purposes of this Part.
 - (4) The period of 12 months after the time of transmission is the *transmission period* for the purposes of this Part.
1615. What the above test means is that where the character of the entire business was the same, there was likely to have been a transmission of business if other pre-conditions were met, such as some assets changing hands between the old and new business.
1616. Under the FW Act, a key test under s.311 (reproduced below) is whether the "work" performed by the transferring employees is "substantially the same", along with a transfer of assets and a sufficient "connection" between old and new employers:

311 When does a transfer of business occur

Meanings of transfer of business, old employer, new employer and transferring work

- (1) There is a *transfer of business* from an employer (*the old employer*) to another employer (*the new employer*) if the following requirements are satisfied:
 - (a) the employment of an employee of the old employer has terminated;
 - (b) within 3 months after the termination, the employee becomes employed by the new employer;
 - (c) the work (*the transferring work*) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
 - (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

1617. As might be expected, the new FW Act test captures a much broader range of scenarios than was previously the case, especially given that workers generally keep performing the work they are qualified or experienced to do when ownership of their workplace changes, regardless of whether the employer is operating the same business.

1618. The example in the Explanatory Memorandum for the 2009 changes is a case in point in that it not only signals a broad test being applied in deciding whether the business is the same but also as to whether the work is the same:

*"The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee."*⁴²⁰

1619. If the current test is meant to hinge on the nature of the work being the same, then a strict comparison of like work for like work should be applied in deciding whether another employer's industrial instrument should carry forward into a new business.

1620. Other differences between the old and new rules include that under the WR Act, transferring industrial instruments only applied for 12 months after the sale of a business. Under the FW Act, there is open-ended application of transferring instruments which apply in perpetuity or until terminated or varied following applications to the FWC (itself a very difficult process).

1621. Under the former WR Act, the transmission of business provisions applied if a relevant employee was hired within two months of a sale, whereas under the current system that was extended to three months. This has added further expense for new business owners and uncertainty for all involved.

⁴²⁰ Fair Work Bill 2008 Explanatory Memorandum, page 193

1622. Perhaps most significantly, in the transition from the WR Act to the FW Act, insourcing and outsourcing arrangements were now captured which were not previously. This is a major issue for AMMA members providing services to and operating in the resource industry.
1623. The table below compares key features of the WR Act's "transmission of business" rules with the FW Act's "transfer of business" ones:

Transfer / transmission rules	Workplace Relations Act (as it applied immediately before the FW Act took effect)	Fair Work Act (2009)
Key test	"Business" character test	"Work" character test
Applies to transferring employees taken on within ...	Two months of a sale or transfer	Three months of a sale or transfer
Duration of application of transferring industrial instrument to new enterprise	12 months	Open-ended unless instrument terminated or varied via lengthy and expensive FWC processes
Outsourcing arrangements covered?	No (confirmed by the courts)	Yes

1624. As has been pointed out⁴²¹, the FW Act's rules have had the effect of making null and void many principles in this area that were settled by the higher courts and which assisted in compliance in this area in a balanced manner:
- In PP Consultants Pty Ltd v FSU** [2000] HCA 59, the High Court said only if the incoming employer and outgoing employer had the same "character" of business would industrial instruments transfer (the FW Act overturns that finding).
 - In Stellar Call Centres P/L v CPSU** [2001] 103 IR 220, the Full Federal Court found Telstra's business was providing telecommunications services to its customers while Stellar's was providing telephone answering services and the businesses were not the same. Therefore, industrial instruments did not transfer (the FW Act overturns this finding).
 - In Gribbles Radiation Pty Ltd v HSU** [2005] HCA 9, the High Court said it was a requirement under the WR Act that tangible or intangible assets needed to transfer from the old employer to the new for transmission of business provisions to apply (that finding no longer holds relevance under the FW Act).
 - In Urquhart v Automated Meter Reading Services (Aust) Pty Ltd** [2008] [FCA 1447](#), 23 September 2008, the Federal Court found there was no "transmission of business" in the outsourcing of a contract for meter reading to a new business that conducted a wider array of services (businesses) than just meter reading. However, even if both businesses performed the same services, the

⁴²¹ Transfer of Business Provisions of the Fair Work Act – Negative impacts upon the ICT and other industries, published by AiG, July 2010

outsourcing arrangement meant the new business was not a transmission of business but a new contract with the old employer as the client.

- e. Given the problems with the current system compared with the previous one, AMMA recommends a return to the previous system's transmission of business rules as outlined below.

Recommendation 7.5.1

Return the test for transfer of business under the FW Act to the transmission of business rules under the preceding WR Act and clarify (in line with previous case law) that outsourcing arrangements are excluded from the definition of a transfer.

Recommendation 7.5.2

Following adoption of the recommendation above, reduce the duration that a transferring industrial instrument applies to a new business under the former WR Act (12 months) to 6 months.

Interactions with other parts of the system

1625. The current transfer of business provisions have the potential to interact with other parts of the FW Act in the following ways:
- a. **Redundancy provisions** – due to the “anti-employment” effects of the current rules, many workers of old businesses are being made redundant by their employers because the new owner is compelled to make a commercial decision not to take them on.
 - b. **Agreement making** – In the event a new employer does take on transferring employees, unless the business successfully applies for an exemption or variation from the FWC to an industrial instrument applying, it will infect that new business.
 - c. **Unfair dismissal** – It is entirely possible that disgruntled employees who are made redundant will claim unfair dismissal against their old employer even if the redundancy is for genuine reasons.

Recent transfer of business review

1626. AMMA notes the recent [review](#) of the provisions of the Fair Work Amendment (Transfer of Business) Act 2012 which is due to report but has not yet done so.
1627. The function of that legislation, which took effect on 5 December 2012 on top of the FW Act's existing transfer of business rules on 1 July 2009, was to regulate employment arrangements for employees transferring from state system government employers to national system employers.

1628. This legislation further expanded an already expanded set of circumstances to which transfer of business rules applied under the FW Act, and impacted on any private sector national employer considering hiring state public sector workers as part of a change of contract or sale of an entity.
1629. AMMA notes ACCI's submission to that review which highlighted that the legislation was introduced with little warning and no regulatory impact analysis⁴²². It also gave effect to no previously announced policy objective of the then-Labor government and was not recommended by the FW Act review panel which had reported earlier that year.
1630. The new transfer of business legislation's stated intention was to extend the level of protection in transfers of business to state public sector employees in those state jurisdictions where such protections did not previously exist.
1631. The 2012 Act was, in effect, a response to the state public sector downsizing occurring in Qld and NSW at the time. It entails the transfer of numerous cumbersome state public sector industrial arrangements including "copied" state instruments to new employers in the private sector.
1632. The provisions of that Act, combined with the FW Act's transfer of business provisions generally, now not only burden private sector employers who take over a private sector business with inefficient industrial practices agreed by their predecessors, but also burden those taking over outsourced contracts that may have previously been run by a public sector entity, such as a catering contract previously run by a public hospital then outsourced to a private provider.
1633. The impact of both pieces of legislation is to massively reduce the inclination of new businesses to engage the employees of an old business, and to punish those businesses that do the right thing by offering jobs to existing employees.
1634. This sees employees lose their jobs where their prospective new employer can and would otherwise take them on, but rationally becomes disinclined to do so by virtue purely of the transfer of business provisions of the FW Act.
1635. AMMA can see no reason for state public sector employment arrangements to transfer to national system employers under any circumstances and the recent FW Act amendments to that effect should be reversed.

Recommendation 7.5.3

Repeal the changes in the Fair Work Amendment (Transfer of Business) Act 2012 that included state public sector employees in transfer of business scenarios to new private sector employers.

FW Act review panel recommendations

⁴²² ACCI Submission to the Post-implementation review of the Fair Work Amendment (Transfer of Business) Act 2012, 19 March 2014

1636. The FW Act Review Panel, appointed by the former Labor government, recognised that the transfer of business provisions were not operating acceptably or delivering on the stated aims of the WR system.
1637. At **Recommendation 38** it recommended amending [s.311](#) of the FW Act:
- "To make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer."*
1638. That recommendation, while an improvement on the current system and being taken up in legislation that is currently before parliament, is a minimal one that will only offer a reprieve to employers in a very limited range of scenarios.

Coalition policy / proposed legislation

1639. The FW Amendment Bill 2014 contains some transfer of business amendments in line with the Coalition Government's policy in implementing the FW Act review panel recommendation above. It is worth noting that legislation has been before parliament for 12 months now with no sign of being passed any time soon.
1640. The Bill seeks to amend both Part 2-8 of the FW Act dealing with transfers between national system employers and Part 6-3A dealing with transfers between state public sector employers and national system employers.
1641. In short, the Bill provides there will not be a transfer of business when the new employer is an "associated entity" of the old employer and the employees have sought to become employed by the new employer "of their own initiative".
1642. The term "associated entity" is defined in [s12](#) of the FW Act as having the meaning given by s.50AAA of the Corporations Act 2001.
1643. Unfortunately, the Bill's provisions will not apply further than that narrow range of scenarios where the old and new employer are "associated". The reprieve will only apply to a very limited number of employers and the employees they may choose to hire.
1644. Other employers will continue to have to apply for an exemption from the transferring instrument from the FWC or to have the transferring instrument set aside and, in doing so, go to great time and expense in managing the transfer in the interim for what could be a small number of employees for short periods of time.

Recommendation 7.5.4

If still necessary in light of AMMA's other recommendations above, implement the transfer of business provision under the FW Amendment Bill 2014 that is currently before federal parliament so that transfers between "associated entities" do not trigger the transfer of an industrial instrument.

DOCUMENTED PROBLEMS

1645. In the resource industry and service providers to it, facing the prospect of having to take on another employer's enterprise agreements in the event of a sale or an outsourcing arrangement is unquestionably deterring new owners / providers from employing the former owner's employees. This is true even if those employees have directly relevant skills and experience that would benefit the incoming operator, and in situations where those employees would be more highly-remunerated than they were before.
1646. As such, the current system represents a serious inefficiency for new business owners and a massive disincentive to employment.
1647. The obvious question with the current inflexibilities is why any new employer would bother taking on existing employees? The costs, complexities and delays attendant on the current approach discourage employers from utilising eminently qualified and experienced staff of companies they purchase or whose functions they take over via an outsourcing arrangement.
1648. This is a significant issue for job retention, particularly if existing employees are older, lower-skilled or have largely organisation-specific skills and experience (i.e. that are of less value on an open jobs market).
1649. Our system should better support the businesses that are interested in retaining staff, particularly in remote and regional areas, while at the same time ensuring that unscrupulous businesses are not able to "game" the system.
1650. The idea is to protect employees from any exploitation but at the same time not impose unreasonable costs on business in what is currently a multitude of situations. Such an approach would be consistent with regulatory reform and red tape reduction.

Unique inflexibilities in public sector agreements

1651. Public sector agreements often contain massive inflexibilities and high levels of union involvement every step of the way in their industrial practices. These agreements, in particular, would be a burden to new private sector employers if they took them into their new business, which the overwhelming majority of AMMA members faced with such situations make business decisions not to do.
1652. The PC should note, however, that it is no lack of confidence in hiring such employees on the part of the new business owner / contractor that drives the decision, purely the uneconomic and impractical industrial obligations with which the business would be saddled.
1653. If not for the current transfer of business rules, AMMA member companies report they would employ a significant proportion of any client's employees in an outsourcing arrangement.

1654. Typically, a business would choose to take on 50% to 70% of an outsourced company's employees if there were not structural disincentives to doing so.

1655. The danger for workers who are not picked up, of course, is they will end up unemployed, particularly in rural and regional areas, for older employees with longer job tenure, workplace specific skills, etc.

1656. The disadvantage for new business owners is that they will lose valuable long-term skills from the enterprise and experience in the current operation with working with customers and suppliers, but are forced to do so by the costs created by the current transfer of business provisions.

Changing contracts and outsourcing

1657. In the resource industry, service contracts regularly change hands over three-to-five-year periods. This is how many contracts in the industry operate and is part of the ordinary business cycle.

1658. At the end of each contract, employees might transfer to other sites where the contractor continues to provide services, or they might choose to keep working at the same location and apply for a job with the new contractor (employer) if their current employer loses the contract.

1659. It is not uncommon in such situations for the new service provider or contractor to use some of the infrastructure that is either owned by the mine operator or was owned by the previous contractor, such as kitchen fit-outs or machinery.

1660. The pre-FW Act "transmission of business" rules were relatively clear, with the Federal Court in September 2008⁴²³ confirming they did not apply to outsourcing arrangements. Under the pre-FW Act rules, if a business was outsourced, it would never have involved the transfer of existing employees' industrial agreements to the new employer as they would have been considered two distinct businesses.

1661. It is to those sensible rules that AMMA would like to see the system return.

Recommendation 7.5.5

Expressly exclude outsourcing and insourcing arrangements from the FW Act's transfer of business obligations.

Exemptions / variations take time

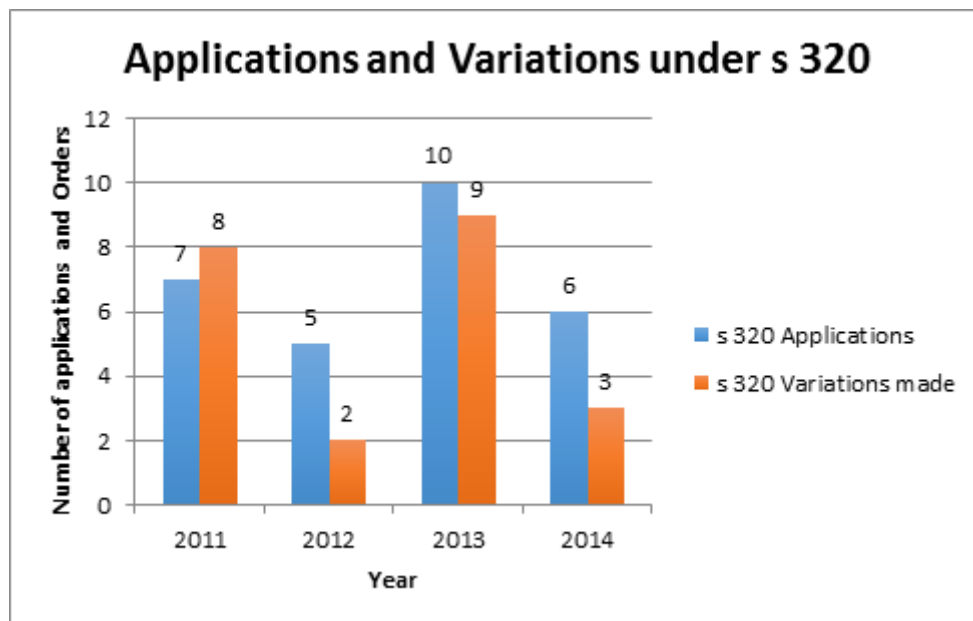
1662. While under the FW Act, new businesses can apply to the FWC for exemptions from old industrial arrangements applying, such applications are generally only granted where:

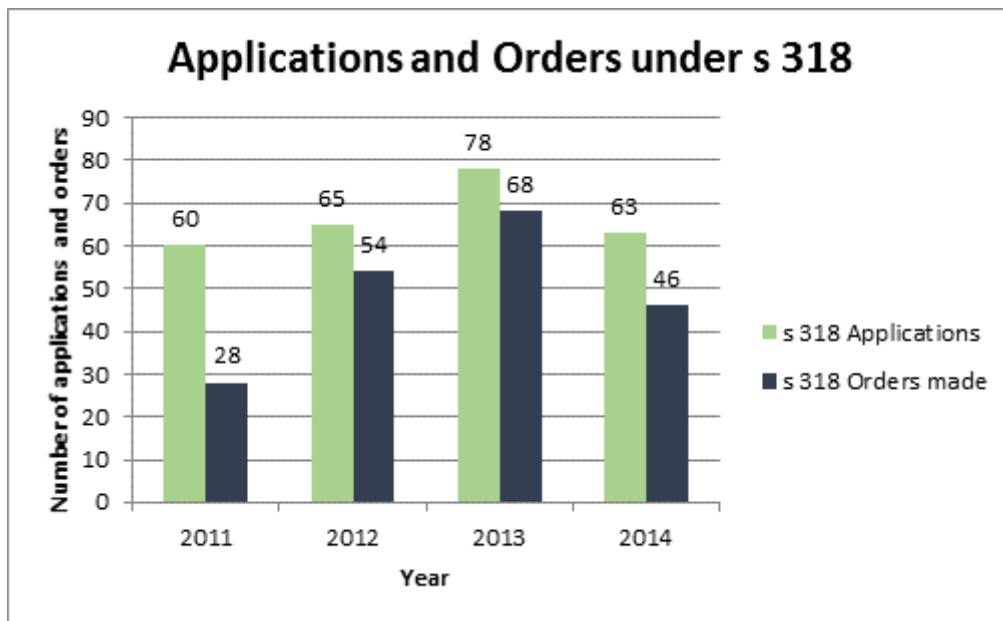
- a. The transferring employees and any unions involved support the exemption.

⁴²³ *Urquhart v Automated Meter Reading Services (Aust) Pty Ltd* [2008] [FCA 1447](#), 23 September 2008

- b. Employees are better off under the new arrangements than they would have been under their old arrangements.
- c. The employer is prepared to give undertakings to recognise employees' prior length of service.

1663. While it is true that a high proportion of transfer of business exemption applications are approved if the above criteria are met, those exemptions take time to be subject to a decision, often several weeks to several months from when the application is made. This is often several months after the employees have been taken on as it takes a long time to get the paperwork together and to hold the necessary employee vote. It can also be expensive to apply for and secure such an exemption.
1664. The below charts show the number of applications to the FWC over the past four years under s.320 (applications for transferring instruments to be varied) and the number of applications under s.318 (applications seeking that transferring instruments do not apply to the new employer).





1665. In the meantime, new employers must put in place a variety of separate payroll and HR systems to accommodate the transfer, which is a considerable complication.
1666. AMMA therefore makes the following recommendation.

Recommendation 7.5.6

Expressly allow employees to voluntarily opt out of having their old agreement cover them in their new employment with immediate or swift effect when agreed.

Difficulties knowing exactly what to transfer

1667. In cases where the new employer does take on transferring employees and does not obtain an exemption from the transferring industrial instruments, it can be difficult to know exactly what transfers with the employees.
1668. The types of industrial instruments that transfer across under the FW Act include:
- Enterprise agreements approved by the FWC (or its predecessors).
 - Workplace determinations.
 - Named employer awards.
 - Individual flexibility arrangements (IFAs) that were in place covering any transferring employee immediately before the sale / change of contract. However, those IFAs only transfer in relation to that particular employee, again adding to the cost of administration if 20 transferring employees have 20 different IFAs in place.

- e. Copied state agreements and other state public sector employment arrangements.

1669. However, in the words of one AMMA member, when it comes to the application of industrial relations entitlements, there is often also “hidden information”.
1670. That hidden information is in the form of custom and practice that sits behind the formal industrial instrument, and which has historically applied in a particular way but may not be obvious to the new employer on the face of the new arrangements.
1671. The help lines of WR advisers are bombarded with questions on this custom and practice on a daily basis showing the complexity of historical WR arrangements and the difficulties new businesses face in applying them without knowing how things were dealt with in the past.

Potential for industrial unease

“The current provisions have the ability to command different standard conditions within the workforce which may impact administration and consistency of employment terms.”⁴²⁴

1672. The potential for, at the very least, miscommunication among employees if the employer is providing two or three different sets of terms and conditions on one site for the same work is huge. An incoming employer wanting to create a unified new workplace melding old and new employment is up against it from the start in having to provide a myriad of differing pay and conditions to employees doing the same work.
1673. In the case study outlined later in this chapter, transferring employees became disgruntled and resentful while the employer awaited the results of an FWC application to have their industrial agreements set aside because they wanted to enjoy the same rosters and remuneration as their colleagues.
1674. This does not bode well for ongoing industrial harmony and equality in the workplace. And those concerns come on top of those accompanying a change of management at a time when new employers are seeking to engender trust and confidence with their new employees.

No provision for voluntarily resignation

“The ‘associated entity’ basis for connection means a transfer of business can occur where an employee voluntarily resigns from one employer and commences employment with another, simply because of corporate ownership.”⁴²⁵

1675. Claims of employees being pressured into accepting new employment arrangements by a new employer on a “take it or leave it” basis are one thing, but AMMA can see no reason why employees cannot voluntarily opt out of being

⁴²⁴ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

⁴²⁵ Respondent to AMMA Workplace Relations Research Project Survey 2, October 2010

covered by an instrument by just providing a statement and a form to do so provided no duress is applied.

1676. There is no reason this could not be done with immediate effect or fast-tracked under the current system to avoid unnecessary costs, noting once again Labor's hand-selected FW Act review panel recommended this course of action in relation to associated entities.

Recommendation 7.5.7

Clarify the rules so that no transfer of business provisions are enlivened in cases where an employee resigns from one employer and takes up work with another.

Case study of transfer of business costs

1677. Sale of enterprises, mergers, acquisitions, sale of assets, etc. are major and complex legal and financial exercises. However, this complexity is being added to in the employment area through flawed and unbalanced transfer of business provisions.
1678. Just one agreement termination application can require significant time and resources to resolve, let alone having numerous applications on foot at the same time.
1679. As the below example from an AMMA member company shows, the transfer of valuable employees from one business to another is unjustifiably time-consuming and expensive as businesses navigate complex risks and liabilities, not to mention sustaining significant legal costs. It is little wonder many companies make a decision to not transfer any employees from the old company to the new.
1680. **In the first scenario**, the company applied to the FWC under [s.222](#) of the FW Act to terminate the enterprise agreement applying to around 100 transferring employees. The middle column in the table below shows the costs involved for that process for one group of workers.
1681. **In the second scenario**, the company applied to the FWC under [s.318](#) of the FW Act for orders that an instrument that would normally transfer with a group of around 200 employees not apply to their business.
1682. Legal costs alone for the two applications to the FWC totalled \$120,000, not to mention the person hours devoted to the tasks internally, which the business said were "unquantifiable".

Summary of activity	Applications to terminate enterprise agreements (s222)	Applications for orders that instruments not apply (s318)
	INTERNAL TOTAL HRS: 137+hrs Unable to calculate costs of those hours	INTERNAL TOTAL HRS: 111+hrs Unable to calculate costs of those hours
	EXTERNAL (BILLABLE) TOTAL HRS: 162.60 TOTAL COSTS: \$76,450	EXTERNAL (BILLABLE) TOTAL HRS: 94.90 TOTAL COSTS: \$43,700
INTERNAL RESOURCING		
Number of persons involved internally and assisting with the preparation of court documents	7 All transferring employees had to vote as evidence for the application	6 Transferring employees had to provide feedback evidence for the application
Approx. time per person spent in assisting with the preparation of court documents	Average of 10+ hours TOTAL: 70+hrs	Average of 10+ hours for those directly working on it (excludes vote) TOTAL: 60 hrs
Preparation of employee information documents	8 hours to put together presentation 12 hrs for review of presentation and to obtain approvals Communicating the presentations took 3 x people approx. 7 hours TOTAL: 41 hrs	8 hours to put together presentation 12 hrs for review of presentation and to obtain approvals Communicating the presentations took 3 x people approx. 7 hours TOTAL: 41 hrs
Costs of interim or other measures	Voting website approx. \$5000 (had to provide and host a voting website for the employee vote as to whether their enterprise agreement should be terminated (ie set aside).) Payroll	Payroll
Legal assistance required – advice, preparation of application, statutory declaration, affidavits	TOTAL: 26 hrs	TOTAL: 10 hrs
Time taken from date of application to FWC to date of order	3 weeks – despite an overwhelming majority support vote by employees. This followed several months leading up to the employee vote.	2 weeks
Interim consequences of having to cater for a transferring instrument – payroll (costs and time involved in organising), pay disparities	5 months of fortnightly payroll with outsourced provider. - Leave balances not accurate for 5 months. - Different roster from majority of business for 5 months. - Different pay rates for supervisors and those covered by EBA for 5 months. - Disgruntled employees for the above reasons. They wanted to be on the same roster and pay as the rest of the workforce.	- Set up a weekly payroll with outsourced provider in case the agreement wasn't set aside in time. - Complicated messages being given to employees, led to some confusion.

1683. The above are massive costs to business purely because of an inability under the current system to take on the employees of another company under their own agreement, even where that agreement clearly offers equal or better terms and conditions and where there is majority support from employees.
1684. In the above scenarios, the new business's existing WR arrangements included a range of benefits not offered in the transferring employees' old agreement, including a bonus structure, the ability to salary sacrifice airline flights, and more favourable rostering arrangements.
1685. The process required a huge effort on the part of the employer who was clearly seeking to do the right thing and take valuable employees into the new business. None of the parties were well-served by the current process. It is not hard to see why many employers do not bother and simply do not rehire employees.
1686. Another AMMA member in metalliferous mining reports that applying for a variation or exclusion from a transferring agreement costs around \$250,000 in costs and time spent. Of that, legal costs associated with applying for the exclusion represent \$100,000. Those costs include around \$50,000 to set up a separate payroll system and \$80,000 a year to operate it.

8. INSTITUTIONS

"The FWC is not the appropriate body for the role of establishing minimum award standards."

"Judicial reviews of FWC Full Bench decisions are very limited. Essentially if the FWC asks the right questions but gets the wrong answers it cannot be overturned."

"With the standards the FWC creates it does not matter how correct or incorrect the standard is, how acceptable or unacceptable it is to employers, employees or the community at large, or if the if seen unforeseen or even foreseen consequences of a decision is damaging on other areas of the economy or community."⁴²⁶

- **FW is a failed organising concept for Australia's employment institutions and legislation.**
- **It needs to be replaced with a focus on the encouragement and regulation of employment.**
- **Australia needs a new, properly organised system of tribunals, more specialised and targeted than the existing generalist FWC.**
- **Appeals from all tribunals should be determined by a new Australian Employment Appeals Tribunal.**

INTRODUCTION

1687. The PC has been asked to review Australia's workplace relations framework. The framework in this context is not only the legislation and delegated legislation under which Australian's are employed (and offer services as contractors), but also extends to the institutions set up by legislation⁴²⁷ and charged with making key parts of the WR system work.

1688. The PC doesn't say a lot about the institutions of the WR framework in its five issues papers. This is very refreshing and encouraging. For too much of the past century the evolution of our system has been shaped by its institutions, rather than the institutions being a function of where the system should head to best serve the interests of employers and employee in workplaces.

1689. This is above all our primary recommendation to the PC on institutions. When considering reforms to institutions and ensuring they can play their nominated role in an improved WR framework for the future, we encourage the PC to maintain this functional approach, shaping institutions to how the system should evolve and what

⁴²⁶ Submission of Brendan McCarthy to this Inquiry.

⁴²⁷ And some like our courts which are not constituted under employment legislation.

it needs from them, rather than limiting how the system could evolve based the history and operation of existing institutions.

1690. The PC asks in Issues Paper 5:

Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?

Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?

1691. As outlined below, the answer is yes and yes:

- a. The existing WR institutions do need to change if Australia's employment regulation system is to play a relevant, protective and supportive role in the evolving workplaces of the future.
- b. Additional institutions, or more accurately, more specialised institutions are required, noting that this should be from within rather than from outside a modernised WR framework.

1692. Resource sector employers call on the PC to approach institutional arrangements for the future, in consideration of the terms of reference, based on the following guiding principles or aims:

- a. Shape institutions to meet the changing needs and nature of the system, not the system to meet the legacy of long standing institutional arrangements.
- b. Have a genuine and properly thought-out system of institutions playing discrete and complementary roles, not the ad hoc jurisdiction that has arisen over time for the FWC and FWO.
- c. Structure institutions to be as effective and relevant as possible, and to respond to the changing needs of employers and employees as our society and labour force changes (not the needs of registered organisations).
- d. Move towards more specialised institutions, targeted to discharging specific and discrete responsibilities under particular parts of WR legislation. Discrete means institutions with the maturity and legislative guidance to do only what they are expressly tasked to do.
- e. Place a greater emphasis on voluntarism and user choice and away from assuming adversarialism is the unavoidable foundation for WR regulation and institutions.
- f. Accepting that not all workplace problems or concerns are solvable by a third party institution and that there are some matters employers and employees need to work out for themselves at the workplace level, or with perhaps the assistance of a voluntary service where agreed (see AECAS below).

- g. Strive to minimise legalism, and to make institutional operations and decisions more transparent, easier to understand, and more relevant and sensitive to the realities of operating businesses.
- h. Ensure greater consistency in decision making by bestowing higher level legal decision making and precedent setting on a new specialist appeals body, constituted for that purpose.

A new paradigm – focused on jobs

- 1693. As set out in the Introduction (Part 1) Australia's WR framework needs a new organising and conceptual paradigm or principle to guide it. FW is a mere slogan – and it's a slogan which should be replaced.
- 1694. This needs to go back to basics, and provide a much clearer and more fundamental encapsulation of what our institutions are there to deliver to employers, employees and the community.
- 1695. For this we need look only to the UK, which has Employment Tribunals, administering Employment acts. No bells, no whistles, no slogans; Employment Tribunals and an Employment Act.
- 1696. Cutting through the various institutionally driven concepts over the years, and the most recent sloganeering of "fair work", fundamentally our regulation and institutions are or should be about employment, and seek to both:
 - a. Regulate minimum terms and considerations employment, and
 - b. Encouraging and supporting employment in their decision making, amongst other economic and minimum standard setting goals.

A new system of institutions

- 1697. We therefore commend to the PC the following a system of Employment Institutions:

Recommendation 8.1

There be a new system of WR institutions, centred on employment, including the:

- Australian Employment Conciliation and Arbitration Service (AECAS)
- Australian Employment Tribunal (AET)
- Australian Employment Appeals Tribunal (AEAT)
- Australian Employment Safety Net Commission (AESNC)
- Australian Employment Ombudsman (AEO)

1698. The key to this new system is specialisation and focus, and a shift from the generalist FWC to more targeted and specialised institutions. This would allow tribunal members to develop expertise and regard in relation to the discharge of particular functions.
1699. During the past 25 years our principal WR statute has:
- Doubled in size.
 - Incorporated entirely new concepts such as enterprise bargaining.
 - Incorporated entirely new jurisdictions such as unfair dismissal, protected action balloting, and bullying.
 - Given rise to a significantly more complex and legalistic jurisdiction
1700. This demands a more specialised and targeted, and deliberately designed system of institutions, instead of the traditional one jack of all trades body muddling through with ever more responsibilities allocated to it, simply because Australia has always done it that way.
1701. **Geographical coverage:** A response to this proposal might be that generalisation is required because there are too few FWC members outside Melbourne and Sydney to specialise as proposed. This can be overcome:
- A future tribunal(s) may be directed to not concentrate so many of its appointees in Sydney and Melbourne.
 - The Australian government should put financial pressure on the States to complete a single federal system for the private sector.
 - State tribunals should retain jurisdiction only over state public servants to the extent they wish to, and any non-WR jurisdictions such as workers' compensation.
 - Merging state tribunals into an expanded federal body in all States should provide the functional coverage upon which our recommendation is based.
 - There is also a great deal already being done by the FWC to use IT to conduct matters interstate.

How well are the institutions performing?

1702. In Issues Paper 5, the PC queries: *How are the FWC and FWO performing?*⁴²⁸
1703. AMMA members rarely have dealing with the FWO, as is appropriate for a sophisticated, high paying and generally compliant industry.

⁴²⁸ Issues Paper 5, p.5

1704. The same cannot be said for the FWC, and as will be clear from the analysis throughout this submission there are a number of areas where the operation of Australia's core employment tribunal, however titled, can and should perform better.
1705. Resource employers have been subject to very major litigation in the FWC often with disappointing and conflicting outcomes. In many cases the solution primarily lies a change of what is determined, **but the effectiveness of transforming the system and individual areas of regulation will also be determined by reforming the institutions of the WR system.**

The jurisdiction is now too complex for generalists

1706. The existing and long-standing model for the FWC (AIRC, CAC, etc.) is one of a body of interchangeable generalists able to lend their expertise to any of the matters that come before them and to innovate and set standards in any area of the jurisdiction.
1707. This is how the tribunal has operated for decades and it is how tribunal members, potential tribunal members and much of the workplace relations community expect it to continue operating. For many, it is what keeps the job interesting.
1708. This made sense when the FWC was a very limited body, making awards based on the conciliation and arbitration power and the limits of the employment relationship. During previous eras, the range of matters dealt with and the scope for innovation was limited.
1709. However, during the past 20 years, however, the job of sitting on the FWC has changed significantly towards greater breadth and complexity. The responsibilities now exceed those which generalists can realistically address and just in the last 20 years have been extended to include:
- a. Agreement approval, including NES and BOOT analysis.
 - b. Award modernisation and regular reviews of awards.
 - c. Administering complex rights and responsibilities in bargaining, such as protected industrial action, majority support determinations, scope orders, bargaining orders and secret ballots.
 - d. Navigating an increasingly complex web of agreement-based, statutory and award entitlements.
 - e. Conciliation and arbitration of unfair dismissal claims, and conciliation of unlawful termination and general protections matters (and soon to have arbitral powers in this area by consent).
 - f. Equal remuneration cases.
 - g. Most recently, anti-bullying applications.
1710. This is simply too wide a set of responsibilities to expect an undifferentiated set of generalists, appointed ad hoc over time, to successfully administer.

1711. Greater specialisation is essential, a point already recognised through the tacking on to the existing system of expert panels for minimum wage setting and reviewing the superannuation provision in awards, and through the deliberate allocation of particular types of matters to particular members of the FWC.
1712. The sheer breath of the contemporary job of sitting on the FWC invites system testing by individual members that has given rise to such concern and to the proposal to reform appeals from the FWC (see below).
1713. The breadth of matters now handled by the FWC and the variety of its work demands specialisation, clearer centralisation and more precedential/hierarchical decision making if the system is to:
- a. Operate clearly and reliably.
 - b. Encourage compliance without needing to go to the tribunal each time, surely the very point of the tribunal's existence (i.e. the signal effects).
1714. It is not the fault of individual FWC members that the job has become too big and complex to be delivered by generalists, but changes must be made to ensure they can deliver on what the community legitimately expects of the tribunal.

Cost savings

1715. The government is navigating a very tight fiscal environment, and options for improved administration must be formulated and considered with regard to their cost impact.
1716. We are under no illusions that advocating for new institutions in a time of budget pressure must be secured is difficult, and one of the arguments against a new system of intuitions will be that the new bodies will cost more than the status quo.
1717. However, genuine improvements in the administration of so critical an area of regulation are completely justifiable even in this budgetary climate, and offer the prospect of improved employment and economic outcomes.
- a. The creation of a new system of WR institutions carries the prospect of such fundamental improvements to the operation of the system that some additional costs can be justified in the immediate term.
 - b. There are potential savings and economies that can minimise the additional costs of implementing new institutions.
 - c. If this is approached innovatively and with regard to minimising additional costs from the outset, it can be delivered cost effectively.
1718. It is possible to create multiple bodies which would secure economies of scale in regard to shared administration, payroll, premises, IT etc, whilst maintaining functional and legal divisions between them.

Recommendation 8.2

The proposed new AET, AEAT and AESNC share registry, front of house services, administrative services and premises to save money. Consideration should also be given to shared administrative services (HR, finance etc.) with the AECAS, however it should maintain its own front of house and premises, separate to the AET, with consideration perhaps to some shared functions with the Ombudsman.

1719. We note, for example, that whilst there are nominally separate registries for the Supreme Court of Victoria and the Court of Appeal, they share the same address.

Performance metrics

1720. The PC also queries whether “*there [are] good metrics for objectively gauging the performance of the FWC and FWO*”⁴²⁹. There are metrics of usage, timeliness and throughput, and we rely on some of these in this submission, but the real performance problems with our current WR institutions go well beyond the statistics we can glean from annual reports and websites.
1721. A particular metric too often hidden from view is how much employers actually spend using the FW Act to initiate or respond to matters, in terms of time away from productive work, time in documenting conduct and developments, and in terms of obtaining specialist advice and representation to name just a few of the costs.
1722. Looking at the problems of the unfair dismissal system, the costs to employers go along way beyond the much publicised and very damaging go away money, paid to employers. When employers make a calculated decision to settle matters they are also taking into account the costs of future witness and managerial participation, further workplace disruption and the direct representational and advisory costs of further litigation.
1723. It is also very difficult to measure the component differences in the costs of doing business and employing in Australia compared to comparator countries, which could be attributed to how our institutions operate. These are not insurmountable problems:
1724. Value experience: The metric that the PC and future shapers of our WR system need to pay greater regard to is the experiences of those who use the system, and what they communicate through organisations such as AMMA on where the system is performing and not performing.
1725. There will not be exact data upon which to assess every point or concern, but organisations such as AMMA have worked with external, independent experts such as KPMG and RMIT to bring forward the experiences of users of the system, in our case in a longitudinal study to see whether the concerns we foresaw with the FW Act came to pass.

⁴²⁹ Issues Paper 5, p.3

1726. Experiential material is the best available information on how the system is performing, and with a proper acknowledgement and understanding of where particular interests and organisations are coming from in policy terms, can still be very useful in shaping how the system should evolve. It should be recognised that the FWC and others have a near continuous performance survey through the organisations that work with them, and far greater use could be made of this.
1727. Surveying: The terms of reference ask the PC to think about how further data could support the future development of the system, and plug any "gaps in the evidence". The answer is properly targeted surveys of users of the system, conducted independently of the FWC (or any other institution), not on the tired old topics of how the registry performed or customer satisfaction, but how the system actually performed, satisfaction with the outcome, and the impact of the litigation.
1728. An example would be properly gauging the operation of the unfair dismissal system, which might look like the following as a starting point:
- a. Take all the claims lodged nationally for a fortnight / month as a sample.
 - b. Find out what it costs employers and employees prior to getting to the Commission.
 - c. Find out the outcome each wants, and what their losses are – is the employee working? Has the employer replaced the position?
 - d. Track the costs of this subset of matters to conclusion (or perhaps for 12 months), tracking legal, application, travel, time lost from work etc., as well as any settlement or determination.
 - e. Also assess satisfaction with both merit and process throughout, pin pointing how each element of the system performs.
1729. The FWC already apparently has funding for quite a few research exercises well beyond its core remit during 2014, including:
- a. The Australian Workplace Relations Study (AWRS) and a planned conference in 2015. Notwithstanding that successive governments have declined requests from the academic community to fund another national AWRS, the FWC seems to have spare funds to go it alone and do their own version.
 - b. A series of 6 essentially academic colloquiums, as part of the Workplace Relations Education Series – there is nothing wrong with these exercises per se, but they should be funded by the academic sector, not an industrial tribunal.
1730. This is part of the FWC's "Commission engagement strategy" and its "Future Directions" strategy. His Honour, Justice Ross, President of the FWC has characterised the future directions initiative thus:
- "The object of the Tribunal's engagement strategy will be to encourage more productive workplaces by promoting harmonious and cooperative workplace relations. The development of a more cooperative workplace*

*culture that facilitates change and fosters innovation will be at the heart of the Tribunal's engagement strategy."*⁴³⁰

1731. The monies funding this non-core business should be removed from the FWC, which in the wake of this review (however constituted and titled), needs to stick to core business of exercising the law it is asked to exercise in the cases which come before it.
1732. Part of this money could be re-directed to address any data gaps the PC might conclude need to be addressed to properly monitor and direct the system in the future. Noting however, that in these times of budgetary tightness, data should only be pursued where information cannot be obtained other less costly ways, including through listening to those that actually use the system.

Recommendation 8.3

Redirect non-operational funding from the FWC, presently being used for surveys and research, into both general budget savings, and into independent, commercially undertaken research on how the systems and institutions actually perform to plug any "data gaps" identified in this review.

A supporting system of legislation

1733. This submission has been drafted on the basis that the PC did not want to engage in detail at this point in legislative architecture and how Acts may need to be organised to achieve a new system.
1734. We can however add that the specialised model of tribunals we recommend, could be based on a single act, or on a set of specialised acts bestowing jurisdiction on one or more of the bodies. The advantage of the specialised legislation model would be that it would ensure that each institution, including any successor to the FWC, stuck to its sphere of powers and responsibilities and did not try to subsume the powers of other bodies.
1735. This might be along the lines of the following:

Institution	Created by:	Exercising powers under:
Australian Employment Conciliation and Arbitration Service (AECAS)	Employment Tribunals Act	Its own chapter of the Employment Tribunals Act
Australian Employment Tribunal (AET)	Employment Tribunals Act	Employment Act (successor to the FW Act)

⁴³⁰ FWC Media Release, 29 October 2012, *Fair Work Australia sets its 'Future Directions'*

Institution	Created by:	Exercising powers under:
Australian Employment Appeals Tribunal (AEAT)	Employment Tribunals Act	Its own chapter of the Employment Tribunals Act – hearing appeals from prescribed bodies, principally the AET.
Australian Employment Ombudsman (AEO)	Employment Ombudsman Act	Employment Ombudsman Act, to enforce the Employment Act, and agreements and awards ⁴³¹ made under that Act, and the Employment Safety Net Act.
Australian Employment Safety Net Commission (AESNC)	Employment Tribunals Act	Employment Safety Net Act (effectively a stand-alone NES Act)

1736. This needs further development, and as indicated we understood the PC as not wanting to engage with the technical design of legislation at this point. However the key point is that discrete institutions can be created and exercise powers under discrete Acts or more clearly delineated omnibus legislation in this area.
1737. Such fresh legislative architecture, rather than the current omnibus approach, will also better ensure each body in the new system has a clear understanding of the limits of its jurisdiction.

AUSTRALIAN EMPLOYMENT CONCILIATION AND ARBITRATION SERVICE (AECAS)

1738. The PC queries how effective the FWO and FWC are in resolving disputes between parties⁴³².
1739. They cannot be effective, or play the role needed for the future, as their starting point and fundamental approach is not what employers and employees need to resolve disputes. The FWO is also an enforcement body rather than dispute resolution body. The FWC is also a determinative or adjudicative, rather than service oriented body.
1740. Employers and employees will increasingly need a more informal, flexible, service oriented body to assist them in resolving disputes to their mutual satisfaction and to provide an improved foundation for ongoing productive, peaceful and rewarding relations in the workplace.

⁴³¹ If awards were to remain part of the system.

⁴³² Issues Paper 5, p.3

ACAS – UK

1741. We request the PC consider the UK's ACAS (Advisory, Conciliation and Arbitration Service), which explains its role thus:

ACAS provides free and impartial information and advice to employers and employees on all aspects of workplace relations and employment law. We support good relationships between employers and employees which underpin business success.

But when things go wrong we help by providing conciliation to resolve workplace problems.⁴³³

1742. ACAS is a long standing institution in the UK, which enjoys the widespread confidence of both employers and employees and is overseen by a council that includes from both senior CBI and TUC figures.

1743. ACAS services on dispute settlement are grouped into mediation, conciliation and arbitration.

Mediation

1744. ACAS outlines its mediation role as follows⁴³⁴:

Mediation is a completely voluntary and confidential form of alternative dispute resolution. It involves an independent, impartial person helping two or more individuals or groups reach a solution that's acceptable to everyone. The mediator can talk to both sides separately or together. Mediators do not make judgments or determine outcomes - they ask questions that help to uncover underlying problems, assist the parties to understand the issues and help them to clarify the options for resolving their difference or dispute.

The overriding aim of workplace mediation is to restore and maintain the employment relationship wherever possible. This means the focus is on working together to go forward, not determining who was right or wrong in the past.

Many kinds of dispute can be mediated if those involved want to find a way forward. It can be used at any stage in a dispute but is most effective before positions become entrenched. You might want to think about writing a mediation stage into your individual grievance procedure.

Agreements reached through ACAS facilitated mediation are not intended to be legally binding or enforceable, but binding in honour only. However, where both parties agree, legally binding agreements can be drawn up in some circumstances, and these are set out below. You are strongly advised to take legal advice before entering into any legally binding agreement.

⁴³³ <http://www.acas.org.uk/index.aspx?articleid=1342>

⁴³⁴ <http://www.acas.org.uk/index.aspx?articleid=1680>

In about 80% of mediations undertaken by ACAS, an agreement is reached.

Conciliation

1745. Conciliation is largely mandatory before a claim for binding settlement can be made, as we understand it either through ASAS or through a more formal and legalistic Employment Tribunal. ACAS outlines its conciliation role as follows⁴³⁵:

Conciliation involves an independent ACAS conciliator who discusses the issues with both parties in order to help them reach a better understanding of each other's position and underlying interests. Without taking sides, the conciliator tries to encourage the parties in a dispute to come to an agreement between themselves.

This is different from ACAS Collective Conciliation, where ACAS facilitates talks to help resolve disputes between groups of employees (usually via trade unions) and employers to help prevent industrial action. Again, our role is not to direct either party on what to do; but to help them develop options and solutions to resolve the dispute.

1746. And further:

ACAS conciliators have substantial experience of dealing with disputes between employers and employees. To explore how the potential claim might be resolved the conciliator will talk through the issues with the employer and the employee separately. Mostly this will take place over the telephone, but sometimes a meeting, chaired by the conciliator, can be helpful. The conciliator will also, where appropriate:

- Explain the conciliation process.*
- Encourage the use of internal procedures such as disciplinary and grievance procedures if available.*
- Explain the way tribunals set about making their decision and what things they take into account.*
- Explain how tribunals decide what to award.*
- Discuss the options available, for example the appointment of an independent arbitrator under the ACAS Arbitration scheme in appropriate cases.*
- Help parties to understand how the other side views the issues.*
- Discuss any proposals either party has for a resolution.*

What the conciliator cannot do:

⁴³⁵ <http://www.acas.org.uk/index.aspx?articleid=1680>

The conciliator:

- *Cannot know what the outcome of a tribunal hearing would be if it went ahead.*
- *Cannot advise either side whether to accept or make any proposals for resolution.*
- *Cannot take sides, represent either party or help prepare either a case for tribunal or a defence to a claim.*
- *Cannot take a view on the merits of a claim or advise whether a claim should be made.*

Stages of ACAS Individual Conciliation:

- *Before an Employment Tribunal claim has been lodged, the claimant must contact ACAS and we will offer Early Conciliation to try and help settle the dispute without the need to lodge a tribunal claim.*
- *ACAS has a statutory duty to offer Early Conciliation for an initial period of up to a calendar month, with the conciliator having the discretion to extend that by two weeks if both parties agree that extra time may help resolution.*
- *During the Early Conciliation period, the time limitation for putting in a tribunal claim is paused (*see section below for details about the time limitation for lodging an Employment Tribunal claim).*
- *When the Early Conciliation period is over, the time limitation clock starts again, but ACAS conciliation continues to be available.*
- *At the end of Early Conciliation, we will issue a Certificate with a number on it. That number is required to lodge an Employment Tribunal claim.*

If the claimant goes on to lodge an Employment Tribunal claim (on form ET1), we will continue to offer a free conciliation service right up until the tribunal hearing to help parties try and find a solution, and avoid the cost time and stress of a hearing. We can provide conciliation after the hearing has started and up to the point a judgement is made.

Arbitration

1747. Arbitration by ACAS is an alternative to an employment tribunal hearing⁴³⁶:

The ACAS Arbitration Scheme is an alternative to employment tribunal hearings...

The Scheme was introduced as a speedy, informal, private and generally less legalistic alternative to an employment tribunal hearing. It's designed to

⁴³⁶ <http://www.acas.org.uk/index.aspx?articleid=1680>

provide a final outcome more quickly and one which mirrors the outcomes available in an employment tribunal. There are few grounds for challenging the arbitrator's award and appeals can only be made in limited circumstances.

Hearings are conducted by arbitrators from the ACAS panel of independent arbitrators. They are chosen for their impartiality, knowledge, skills and employment relations experience. They are appointed on a case-by-case basis and not directly employed by ACAS.

Once both parties have signed an agreement to come to arbitration under the Scheme, an employment tribunal can no longer hear the claim. It is important that everyone involved knows this, and how the arbitration process works. For this reason, you can only agree to go to arbitration with the assistance of an ACAS conciliator, or through a Compromise Agreement signed after the employee has taken advice from a relevant independent adviser. The Compromise Agreement must conform to the requirements of the Employment Rights Act 1996.

1748. Significant further information is available from the ACAS website.

How this would work in Australia

1749. The ACAS' services which are most relevant are those relating to mediation, conciliation and arbitration, which are focussed on assisting parties to resolve disputes.

1750. An AECAS for Australia would, as a broad sketch, be a voluntary service designed to offer an alternative set of options to employees and employers, potentially at no cost to deal with workplace disputes, alleged bullying, claims of unfair dismissal, and even collective disputes on any range of issues.

1751. It would be an alternative to the adversarial and highly legalistic procedures currently surrounding industrial disputes and termination of employment claims. It would involve no costs, no lawyers, and no representatives. Aggrieved persons would simply bring a matter in dispute to a trusted and independent third party who would try to assist them to resolve the dispute in a different context and in a different manner to the current approach in Australia.

1752. We commend the ACAS model to the PC for further consideration, and would be very happy to engage with the PC on how this might be applied in Australia.

1753. Practical considerations could include:

- a. Which matters could go to an AECAS, and from which particular claimants.
- b. What the powers and capacities of an Australian ACAS may be.

- c. Where this is would be voluntary and where it might be required before gaining a certificate to proceed with a more adversarial claim in the new AET (former FWC).
- d. What complementary and supporting changes would need to be made to other parts of the operation based on the introduction of the role of an AECAS, including to the AET (the successor to the FWC).

Recommendation 8.4

The PC consider the role a new institution could play in Australia modelled on the UK's ACAS, and undertake further research into the UK body, including seeking a briefing from its Chair or Chief Executive. The New Zealand Department of Labour should also be consulted.

Recommendation 8.5

This be taken forward in the interim report, and the PC invite submissions on considerations (such as) the role an ACAS modelled institution could play in the Australian system, the pros and cons of such an approach, which matters would be referable to it, what it could determine or recommend, and how it would interact with (and modify) other parts of the system.

- 1754. This would be a very different approach for Australia, in which there is an established history of compulsory conciliation and arbitration, and which the current FW Act is still firmly predicated on "taking matters to the Commission" in an adversarial manner to stop or compel particular conduct.
- 1755. The creation of an AECAS would be a cultural shift, which may take time to become entrenched and widely used, however notions of voluntary external settlement based on consent and respect would move or WR system towards a system more in tune with wider social trends, and changing demands on the system such as bullying and unfair dismissal claims which often have at their heart workplace fit and interpersonal issues.

Advisory role and the Employment Ombudsman

- 1756. The "A" in ACAS is for advice, and its advisory services are extensive.
- 1757. Some employer associations and unions might fear such a service would displace their role. It's up to them to make that point if they wish to, although we would note that the advisory services of ACAS, whilst apparently excellent would be severable from its dispute resolution services.
- 1758. One consideration which would need to be navigated is the advisory roles of any such body and the FWO (Australian Employment Ombudsman), and indeed scope for synergies between the two.

1759. Again this is something which could be noted in the PC's interim report and further submissions sought. However, the Ombudsman cannot be an ACAS, and this should not be taken as any suggestion the Ombudsman be expanded to take on the range of the ACAS dispute resolution services.
1760. The concept of an Ombudsman is too adversarial and complaint based, and would inherently rob the ACAS model of its informal and consensual qualities. This cannot be combined into a single Ombudsman institution, at least in terms of how the bodies are presented to users / the public.

Relevance to the terms of reference

1761. The TOR ask the PC to consider the experience of Australia's counterpart countries in the OECD when examining the impact of the Australian workplace relations framework. Experience in the UK is directly relevant in this regard and should guide the creation of a new body in the Australian system. We also note the New Zealand Department of Labour offers a substantial mediation service.

AUSTRALIAN EMPLOYMENT TRIBUNAL (AET)

1762. As we have pointed out, for too much of the past century the evolution of the system has been driven by considerations of the legacy and current roles of the FWC and its predecessors the AIRC and CAC.
1763. It would be a distraction to attempt a treatise on the role and development of the FWC, and therein lies an important point. The PC need do no more than ask itself what roles a successor to the FWC should play in any new system, and how this should be achieved.
1764. In essence, the FWC should become a new tribunal, the Australian Employment Tribunal (AET), and exercise a new jurisdiction under an Employment Act.
1765. Furthermore, within the new AET there should be a firm divide between two different divisions of the tribunal:
- a. The collective division (discharging statutory responsibilities centred on bargaining, agreement making, collective industrial disputes, and any role in awards or minimum standards if retained).
 - b. The individual division (discharging statutory responsibilities centred on unfair dismissals, individual disputes, bullying if it remains part of its remit etc.), noting that the front end of such a jurisdiction would be an AECAS which would attempt to settle matters consensually without proceeding to this jurisdiction, and there would be access to the individual division only where threshold proceedings have not resolved a dispute.
1766. Members of the tribunal would be appointed to one division or the other, and sit purely on matters from within that stream or division of the Commission.

1767. This would be a far lower key, lower profile institution, funded to undertake specific functions on application as set out throughout this submission. It would not be funded for outgoing research or promotion, and the AECAS and AEO would be the outgoing, promotional, user facing parts of the system. This is far more akin to how the Employment Tribunals of the UK appear to operate, and the quite separate role of ACAS and that country's labour inspectorate.
1768. AMMA has previously expressed concerns that:
- a. Too few appointees to the tribunal have practical experience for employing people, or running complex commercial organisations.
 - b. There has been an over appointment of presidential or senior members to the FWC, to the point where its numbers of presidential and commissioner members are equal.
 - c. The balance between appointments from union / Labor and non-Labor / business backgrounds has been distorted.
 - d. The deliberate demotion of existing vice presidents of the FWC politicised the body and threatened its independence.
1769. The creation of a new Employment Tribunal, centred on regulating and encouraging employment would also provide an opportunity to address some of these structural and functional concerns, including for example moving to a much flatter tribunal structure.

AUSTRALIAN EMPLOYMENT APPEALS TRIBUNAL

Introduction

1770. The FW system applies a highly complex, and in parts flawed statute (the FW Act) and then tasks many dozens of different tribunal members with applying to a myriad of different workplace situations.
1771. Many times they do not get this right, and it is axiomatic that appeals from the original exercise of such a complex jurisdiction are crucially important.
1772. As users of the system have legitimate expectations of the quality of the regulation under which Parliament compels us to operate. The FWC deals with serious matters for business, and it (or its successor) needs to make valid, reliable, transparent and consistent decisions.
1773. Resource industry employers look to FWC decisions and approaches for guidance on observing their obligations under the FW Act. AMMA and its members need regulation which shows us how to comply in order to avoid litigation, rather than an Act which encourages litigation by perpetuating inconsistency and uncertainty, and rewarding litigation.

1774. These "signal effects" which users can take from FWC decisions to guide their actions under the FW Act have been an area of increasing failure under the current system, and are a principal ground on which AMMA supports the creation of a specialist appeals body to assume the current within-tribunal appeals jurisdiction of the FWC.
1775. This translates into a number of **guiding criteria/operating principles** for what an appeals process needs to deliver in any future WR framework:
- a. Discourage litigation: The operation of the workplace relations system/administration of the FW Act should actively discourage litigation and disputation while facilitating conflict resolution:
 - i. The operation of the system should minimise the number of matters that go before the FWC. Our employment legislation should do much of its work in setting reliable norms of behaviour and actions that decrease the number of matters litigated by ensuring the law is properly observed.
 - ii. This is what motivated Justice Higgins in the creation of the conciliation and arbitration system in the first place. He sought to have the then-Commonwealth Conciliation and Arbitration Court make awards that set and varied terms and conditions of employment and minimised both further industrial disputation and further litigation⁴³⁷.
 - b. Ensure consistency: When matters do go to the FWC, there should be consistent decision making and interpretation. Unfortunately, this is currently lacking at both an individual commissioner and Full Bench level in some cases.
 - c. Send clear signal effects: The interpretation of the FW Act should deliver unambiguous and consistent precedents that send clear signal effects on what the Act requires of employers, employees and registered organisations.
 - d. Deliver correct and consistent precedents: Where possible, precedents should be set that are both legally correct and determined by persons with practical experience in employment. This will ensure that future precedents stand and are more consistently observed and applied to subsequent situations.
 - e. Ensure leadership by superior jurists: Interpretation of the Act, and its application to new and novel circumstances, should be led by eminent jurists with the practical ability to generate clear decisions that are not open to inconsistency or adventurism by individual tribunal members, particularly those who are not legally qualified.
 - f. Follow and apply the will of Parliament: The role of the tribunal is to apply and follow the intention of parliament, not to countervail the legislative will in changing legislation, or to seek to distinguish particular matters from the clearly stated will of parliament:

⁴³⁷ This is a vast simplification of one of the most researched/discussed periods of Australian labour history, but the fact remains the very point of Australia's unique labour relations system is send clear signal effects and not require repeated litigation or disputation.

- i. WR is a politically divisive area, subject to competing electoral policies.
 - ii. When a party is elected and its policies pass the Parliament, this should change what the FWC delivers and how it determines matters.
 - iii. There are no incontrovertible higher truths or values that FWC members are independent, inviolate custodians of. The FWC is there to deliver what parliament asks of it. This can and will change from time to time and it's the FWC's job to deliver what Parliament directs.
- g. Encourage productivity and job creation: The tribunal has an important role to play in ensuring its decisions and precedents do not adversely impact on industry and jobs. The FWC needs to better give life to those provisions of the Act which enshrine the importance of enterprise and jobs.
1776. The current approach is to hear many appeals within the FWC, through elevation from a single member to a Full Bench. This is increasingly a failed model and needs to be replaced.

Recommendation 8.6

A new Australian Employment Appeal Tribunal hear all FWC appeals that would be heard by a Full Bench of the FWC.

Existing FWC appeal mechanisms are not performing

1777. The existing FWC infrastructure is not providing essential clarity and consistency to stakeholders on key issues and is not meeting the fundamental expectations of users and the wider community.
1778. Existing appeals mechanisms within the FWC are not delivering sufficient certainty and reliable signals at the Full Bench level as to how employers should:
- a. Manage specific workplace situations.
 - b. Apply the statute, enterprise agreements and awards at workplaces.
1779. This is poor regulation and indicative of an area of the law which has an increasing structural problem that must be redressed at the structural level.
1780. A separate, specialist appeals body is a more appropriate manner in which to deal with the appeal process and would be consistent with the process in many other courts and tribunals.

The current appeals system

1781. Excluding court matters (such as general protections matters), the FW Act currently allows two standards of appeal:

- a. Appeals from decisions of single members or the FWC general manager/ registrar, which are subject to leave being granted when it is in the public interest to do so. The Minister may also request a review of a single member/general manager decision which is subject to the same constraints and tests as an appeal.
 - b. Appeals from single member unfair dismissal decisions which are restricted to cases where it is in the public interest to allow the appeal and the appeal turns on significant errors of fact.
1782. From 1 January 2014, dismissal-related general protections matters and unlawful termination matters which are currently arbitrated by the courts were able to be arbitrated by the FWC with the consent of both parties. This expands even further the FWC's jurisdiction and ability to arbitrate on workplace relations matters, in this case with the potential to award significant amounts of compensation as well as reinstatement.
1783. It is therefore understood that where an unlawful termination/dismissal-related general protections dispute is determined by the FWC with the consent of the parties after 1 January 2014, the appeal rights for that jurisdiction would be the same as those relating to unfair dismissal.
1784. AMMA maintains it is important to allow any new specialist appeals body to not only hear appeals in the above situations but to also hear appeals/conduct reviews of agreement approval decisions.
1785. The current requirements of the FW Act relating to enterprise agreements are being inconsistently applied and this has led to divergent outcomes and a lack of certainty for parties when negotiating and lodging agreements for approval. Under the existing legislation, the Minister of the day is able to ask for such decisions to be reviewed. If a specialist appeals body is established as AMMA suggests, this would be the ideal body to conduct such reviews.

Inconsistency and lack of certainty around tribunal decisions

1786. In recent years, FWC members have handed down conflicting decisions in critically important areas affecting the health and safety of employees, including:
- a. The rights of employers to use urine testing in their onsite drug and alcohol policies.
 - b. The ability for employees to be lawfully dismissed for distributing pornographic material on work computers.
 - c. The ability for employees to be lawfully dismissed for physically assaulting their colleagues.
 - d. The ability for undischarged bankrupts to pursue unfair dismissal remedies.

- e. The capacity for enterprise agreements to include "loaded hourly rates" clauses (i.e. giving employees the option of incorporating payment for annual leave into their up-front hourly wage rate).
- f. The application of the FW Act's requirements for enterprise agreement approvals, particularly the requirement for commission members to make sure that mandatory flexibility clauses are capable of delivering genuine flexibility.

1787. Employment Minister Senator Eric Abetz gave the Senate Education and Employment Legislation Committee during Estimates hearings in Canberra on 21 November 2013 various examples of where FWC decisions were causing confusion and uncertainty for employers.

Implementing regulatory best practice

- 1788. The case for including a specialist appeals body in a revised structure of Australian Employment institution is not solely that the existing process is not performing (i.e. correcting a negative). A second complementary dimension is the positive benefits for reforming appeal arrangements in the FW system, and improving how the system operates.
- 1789. A separate, specialist appeal body is a commonly applied model across a wide range of regulatory areas, and represents a widespread contemporary innovation in the administration of justice throughout the world that can be harnessed to improve outcomes for the clients of the Australian workplace relations system.
- 1790. When we refer to clients of the workplace relations system, we are talking about working people in employment and working people running businesses, and the impacts on their families and communities.
- 1791. The system needs to work for those people and support the widest possible compliance without litigation. At all times it is preferable if the requirements of the law are clear and followed without the need to go the FWC, or to pursue appeals of single member decisions.
- 1792. Critical to this is getting appeals right and ensuring consistent, valid decision-making led by eminent, practical-minded and focused higher level decision makers whose precedents are then followed by ordinary members of the FWC dealing with employers and employees.
- 1793. As set out in this section, moving to a specialist appeals process offers the best mechanism to ensure the FW system, however it evolves in future, operates as it should and in the interests of its employee, employer and organisational clients.

Reflecting wider Australian law reform

Specialist appeal bodies are used widely in Australia to ensure the effective and efficient administration of justice.

1794. The creation of a specialist appeals body would reflect wider contemporary trends and practices in the administration of law in Australia.
1795. Specialist appellate bodies (or separate appellate divisions) are utilised in a number of states, separating the specialist task of determining appellate matters from the exercise of the original or trial jurisdiction of courts and tribunals.
1796. It appears that NSW was the first jurisdiction to embark in this direction in the mid-1960s with the creation of the NSW Court of Appeal. This was a controversial but now accepted change, and other states and territories have followed suit, creating their own appeals courts/appeals divisions.

Applying international best practice

A specialist appeals mechanism would ensure the Australian system reflects international regulatory best practice for reviewing employment tribunal decisions.

1797. Specialised appeals processes from labour arbitration/employment tribunals are a widely known and applied model in a number of comparable legal systems. A number of countries (in particular Australia's fellow OECD countries) have appeal jurisdictions broadly comparable to the proposed AEAT.
1798. These international specialist bodies for employment appeals support the following conclusions:
- a. Best practice favours appeals from employment tribunals being heard in the first instance not by generalist higher courts but by specialist appeal bodies with employment-based expertise.
 - b. These appeal bodies add rigour to tribunal decision making and ensure proper signal effects in which the precedents determined by the higher body determining appeals ensure the quality and accuracy of subsequent tribunal decisions.
 - c. Appeal processes within arbitral/dispute settlement bodies exercising original jurisdiction are virtually unknown outside Australia (i.e. the current FWC approach).
1799. International examples of specialist appeal bodies include:
- a. Asylum & Immigration Tribunal (AIT) of the UK⁴³⁸.
 - b. The Transportation Appeal Tribunal of Canada⁴³⁹, which relevantly is established under a specific Act⁴⁴⁰ as is the UK Employment Appeals Tribunal.

⁴³⁸ www.ait.gov.uk/

⁴³⁹ www.tatc.gc.ca

⁴⁴⁰ <http://laws-lois.justice.gc.ca/eng/acts/T-18.5/page-1.html>

- c. The Employment and Assistance Appeal Tribunal of Canada⁴⁴¹, again set up under specific legislation⁴⁴².

1800. However, approaches in three key OECD counterpart countries most often compared to Australia in the area of employment law offer particular support for incorporating a specialist appeals body into the Australian system.

United States

1801. The structure and responsibilities of the US National Labor Relations Board (NLRB) illustrate how appeals from FWC decisions could be better managed and determined. The parallels between the US model and what is being considered for Australia are striking:

- a. The US NLRB is a 5-member appellate body.
- b. In addition to limited areas of innate or original jurisdiction⁴⁴³, the NLRB sits above a wider body of 40 or so "administrative law judges" who make decisions in the first instance.
- c. The NLRB then hears appeals from those administrative law judges.
- d. NLRB decisions on appeals from administrative law judges may then be appealed to an appropriate US Court of Appeals, and ultimately to the US Supreme Court.⁴⁴⁴

1802. The NLRB website makes clear that the purpose of the appeal or "decision" jurisdiction of the Board is to send clear signals, through appeal decisions, to lower level administrative law judges – i.e. the NLRB is designed to ensure consistency of decision-making and ensure proper signal effects to users of the system on what they must and must not do.

1803. The NLRB has a specialist jurisdiction to hear appeals from original employment law/dispute matters and has been given this role to improve the quality and consistency of decisions made by the wider panel of 40+ NLRB members in the first instance. The NLRB website makes clear that:

The Board sets policy for the Agency primarily through adjudication⁴⁴⁵.

1804. We can also see from the NLRB's own data⁴⁴⁶ that the operation of this 5-member appellate process has yielded a massive reduction (54%) in appealed decisions from 2000 onwards:

⁴⁴¹ <http://www.gov.bc.ca/eaat/>

⁴⁴² [Employment and Assistance Act, 2002](#).

⁴⁴³ For example overseeing union representation elections or investigating complaints alleging unfair labour practices.

⁴⁴⁴ <http://www.nlr.gov/what-we-do/decide-cases>

⁴⁴⁵ <http://www.nlr.gov/news-outreach/graphs-data/decisions/board-decisions-issued>

⁴⁴⁶ <http://www.nlr.gov/news-outreach/graphs-data/decisions/board-decisions-issued>

	C Cases ⁴⁴⁷	R Cases ⁴⁴⁸	Total
FY2000	483	252	735
FY2001	538	210	748
FY2002	286	274	560
FY2003	384	171	555
FY2004	381	205	586
FY2005	348	160	508
FY2006	324	165	489
FY2007	226	173	399
FY2008	191	172	363
FY2009	195	61	256
FY2010	263	51	316
FY2011	272	96	368
FY2012	277	64	341

1805. In terms of successfully sending signal effects to lower courts and ensuring they follow higher level decisions, the NLRB appears to be performing quite well.
1806. This is to be contrasted with comparable data on Full Bench matters from Australia's FWC⁴⁴⁹, which shows no reduction in appealed matters (and in fact an increase of approximately 26%, when comparing the most recent data (2012/13) to the lowest point in recent years (2007/08)).

	Total	% all cases
2006/07 ⁴⁵⁰	876	
2007/08 ⁴⁵¹	146	
2008/09 ⁴⁵²	166	
2009/10 ⁴⁵³	436	
2010/11 ⁴⁵⁴	192	
2011/12 ⁴⁵⁵	143	0.4%
2012/13 ⁴⁵⁶	184	0.5%

⁴⁴⁷ Unfair Labor Practice cases (C Cases)

⁴⁴⁸ Cases involving elections and questions of representation (R Cases).

⁴⁴⁹ Note this data is affected by changes in legislation, the shift of the FWC into and back out of the aggregated Fair Work Australia structure, and difficulties of disaggregating some non-appeal full bench matters.

⁴⁵⁰ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁵¹ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁵² 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁵³ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁵⁴ 2010–11 FWA Annual Report, p11

⁴⁵⁵ 2012–13 FWC Annual Report, Chart 2 (p.1) and Table H3, p.103

⁴⁵⁶ 2012–13 FWC Annual Report, Chart 2 (p.1) and Table H3, p.103

1807. There has been no substantial decrease in appeal matters in Australia comparable to that delivered by the 5-member specialist appeal body in the US (NLRB) across a comparable period.
1808. We can take from the US example that five (5) expert appellate specialists, not part of the original decision making body, hearing appeals appear to be increasing decision making consistency, aiding in the rapid administration of justice, and reducing the costs of appeals to employers, employees and trade unions.
1809. Also relevant to the Australian Employment Minister's considerations, AMMA understands there is a history of NLRB members being appointed from the general body of administrative law decision makers/the lower administrative courts, whose decisions are appealed to the NLRB.
1810. We understand that is relatively common for members of the US body equivalent to the FWC to be appointed to the NLRB (the body equivalent to the proposed new Australian appeals body).
1811. The current head of the NLRB, Mark Gaston Pearce, was previously a member of the New York Industrial Board of Appeals.

United Kingdom – Employment tribunals

1812. The UK has a system of employment tribunals which “*are independent judicial bodies who determine disputes between employers and employees over employment rights*”. They are organised on a regional basis, with 26 such bodies across the UK.
1813. The UK also has a specific Employment Appeal Tribunal, the responsibilities of which are described on its website:

The main function of the Employment Appeal Tribunal (EAT) is to hear appeals from decisions made by Employment Tribunals.

An appeal must be on a point of law, i.e. it must identify flaws in the legal reasoning of the original decision. The Employment Appeal Tribunal will not normally re-examine issues of fact....

The EAT also hears appeals from (and applications relating to) decisions made by the Certification Officer or by the Central Arbitration Committee, however these are infrequent.

The EAT's powers are set out in Part II of the Employment Tribunals Act 1996 (as amended) and the Employment Appeal Tribunal Rules 1993 (as amended). Employment Appeal Tribunal rules 1993 –....

The EAT is headed by a President, currently The Honourable Mr Justice Langstaff, and a Registrar, currently Ms Pauline Donleavy. Details on judges and lay members can be found on the Judiciary page.⁴⁵⁷

⁴⁵⁷ <http://www.justice.gov.uk/tribunals/employment-appeals>

1814. The functioning of the UK Employment Appeals tribunal is further described on its website⁴⁵⁸ as follows:

Hearings are conducted by a judge alone or by a judge and two lay members.

The judge is normally a High Court or circuit judge or Scottish Court of Session judge. Occasionally the judge will be a Recorder or Commissioner.

The lay members have practical experience in employment relations (one on the employers' side and one on the employees').

1815. Again, the UK experience further underscores the relevance and utility of a specialist appeals tribunal in the area of employment law/employment disputes.

1816. There is a dedicated process of appeal from the UK's equivalent of the FWC, to a specialist employment appeals body constituted by judicial members.

1817. Importantly, the UK Employment Appeals Tribunal survived the massive reduction in numbers of QANGOs and specialist bodies in the UK pursued by the Cameron government to reduce government spending. It could have been abolished in favour of appeals solely to the courts, or perhaps even an appeals process within the tribunals (like the current FWC appeals process).

1818. Those options were not pursued and the UK Employment Appeals Tribunal was retained. This further illustrates the relevance and utility of such specialist appeals bodies in another of the major OECD economies/labour markets most comparable to Australia.

United Kingdom – Specialist appeal tribunals

1819. The UK has a specific Courts and Tribunals Service which articulates the roles that appellate tribunals generally can play very neatly and relevantly for the current review⁴⁵⁹:

Appeals to the First-tier Tribunal are against the decisions from government departments and other public bodies. The Upper Tribunal hears appeals from the First-tier Tribunal on points of law i.e. an appeal made over the interpretation of a legal principle or statute. Further appeals may be made, with permission, to the Court of Appeal.

1820. The UK has created two specific tiers of tribunals, upper and lower, which appear to embody precisely the principles which would underpin the creation of an independent, specialist employment appeals body above the FWC.

1821. The role of the Upper Tribunal is explained as follows:

⁴⁵⁸ <http://www.justice.gov.uk/tribunals/employment-appeals/hearings>

⁴⁵⁹ <http://www.justice.gov.uk/about/hmcts/tribunals>

The Upper Tribunal is a newly created court of record with jurisdiction throughout the United Kingdom. It has been established by Parliament under the Tribunals, Courts and Enforcement Act 2007. Its main functions are:

- *To take over hearing appeals to the courts, and similar bodies from the decisions of local tribunals;*
- *To decide certain cases that do not go through the First-tier Tribunal*
- *To exercise powers of judicial review in certain circumstances ; and*
- *To deal with enforcement of decisions, directions and orders made by tribunals.*

What has changed?

A major reorganisation of tribunals is taking place. Most tribunals are being combined into a single First-tier Tribunal with jurisdiction for some purposes throughout the United Kingdom. The Upper Tribunal has been created to deal with appeals from, and enforcement of, decisions of the First-tier Tribunal.

All the legally qualified members of the First-tier Tribunal and Upper Tribunal are now judges (that includes all of those judicial office holders who transferred into the new tribunals structures with their jurisdictions (for example the Lands Tribunal, the Social Security and Child Support Commissioners). Other judicial office holders (for example the surveyors in the Lands Chamber (Lands Tribunal) and disability experts in social security cases) are known as Members. All new judges and members are appointed through the independent Judicial Appointments Commission.

The opportunity provided by these changes is being used to reform and simplify the rules and procedures for jurisdictions as they move into the First-tier Tribunal and Upper Tribunal.

How does it work?

The Upper Tribunal is divided into four chambers:

- *The Administrative Appeals Chamber*
- *The Tax and Chancery Chamber*
- *The Lands Chamber*
- *The Immigration and Asylum Chamber*

1822. If (as AMMA recommends) the Government does progress a specialist appeals body, there would be value in asking the Department of Employment to do further research on this UK appellate structure and reforms of recent years across the UK jurisdictions, with a view to learning lessons from the UK experience and harnessing appropriate practices and approaches.

New Zealand

1823. New Zealand has a 17-member Employment Relations Authority (ERA), sitting in Auckland, Christchurch and Wellington. Appeals from the ERA also go to a specialist employment appeals body, the Employment Court of New Zealand⁴⁶⁰.

1824. The jurisdiction of the Court is described⁴⁶¹ as follows:

The Employment Relations Act 2000 section 187 gives [the court] jurisdiction to hear all matters relating to employment disputes, either direct (in the case of strikes or lockouts) or after the parties have been to the Employment Relations Authority. The Employment Court is constituted as a court of record and has standing equal to the High Court of New Zealand.

Jurisdiction covers the following areas:

Challenges from the Employment Relations Authority either a de novo hearing when the election relates to the whole of the determination or, a challenge of the part of the determination when a hearing is sought only in relation to certain issues involved in the matter.

Parties seek damages, an injunction, or compliance orders relating to actual or proposed industrial action - unlawful strike, lockout, or related picketing for example.

To review how various persons have exercised, or refused, or proposed, or purported to exercise, any of their powers under the Employment Relations Act 2000.

Where proceedings are referred or removed to the Court by the Employment Relations Authority.

When an individual seeks a declaration of whether or not he/she is an employee.

When people are alleged to have committed offences under the Employment Relations Act 2000.

1825. In terms of further appeals⁴⁶²:

There is a limited right of appeal from the Employment Court to the Court of Appeal. Leave to appeal must be sought from the Court of Appeal and it must be based on a point of law not fact. Leave may be granted where the question is one of general or public importance or for other reasons the Court of Appeal considers justified.

By leave there can be a further right of appeal to the Supreme Court.

⁴⁶⁰ See: <http://www.era.govt.nz>

⁴⁶¹ <http://www.justice.govt.nz/courts/employment-court/jurisdiction-of-the-court>

⁴⁶² <http://www.justice.govt.nz/courts/employment-court/jurisdiction-of-the-court>

1826. The point from these examples is that it is widely established across a number of areas of legal administration and decision-making that expert, specialist appeals bodies can represent the most sound and efficient way to deliver consistent, efficient, correct decision making whilst:
- a. Properly separating the appellate from the original jurisdiction.
 - b. Ensuring appeals are heard by experts familiar with the area of law and administration concerned.
 - c. Not clogging up higher courts with expensive appeals from highly litigious areas such as employment law.
1827. It would be quite consistent with wider trends in the organisation and administration of justice, and specifically management of appeal matters, for the Government to move to establish a specialist body to hear all appeals arising from the FWC's exercise of its original jurisdiction.

Improved precedents – clearer signal effects

A new, separate appeals body, independent of the FWC will provide clearer precedents and send clearer signals to FWC members and users of the system than the current within-tribunal appeals system, which is not performing.

1828. As the preceding section illustrates, one of the key concerns for employers with the operation of the FWC is inconsistency in its application of the FW Act and lack of predictability in how users of the system are to comply with the law in key areas such as termination of employment, implementation of drug and alcohol policies, agreement making, etc.
1829. At the heart of the failings of the current system illustrated in the preceding section are failures of precedent. Precedent should operate at two levels:
- a. Ensuring that individual members of the FWC dealing with matters in the first instance have very clear models and approaches to follow that will ensure consistency of decision making and predictability of outcomes.
 - b. Signalling to users of the system how particular matters will be dealt with, and thereby how they should manage issues at the workplace level (i.e. knowing how the FWC will deal with claims instructs employers and unions on how to act to avoid ending up before the FWC).
1830. A proper signal effect (operating consistently) should minimise the work of the tribunal. If it is clear what is allowed and not allowed, and what obligations apply and when, the FW system will operate far more effectively.
1831. Reducing demand for the remedial and corrective elements of the system would represent an improvement in our WR system and superior and more financially responsible government administration.

Addressing the contemporary workload of the FWC

The current within-FWC appeals system is a product of an employment tribunal tasked with hearing significantly fewer appeal matters than the present system generates.

1832. The FWC deals with exponentially more business than its predecessor tribunals for reasons including:
- The FWC being tasked with addressing entirely new areas of responsibility during the past two decades (e.g. unfair dismissal, general protections, individual dispute resolution under the mandatory award or agreement dispute clauses, and from 1 January 2014 workplace bullying matters as well as dismissal-related general protections and unlawful termination matters).
 - Decentralisation of industrial relations and enterprise level bargaining so that where once a common rule award created a single item of tribunal business covering thousands of workplaces, each one of those workplaces now potentially brings an individual matter to the tribunal.
 - An expanded federal jurisdiction taking over significant responsibilities from the states, with many more workplaces now being covered by the FW Act 2009 than the pre-1993 *Industrial Relations Act*⁴⁶³. The shift of the retail industry into the federal system alone has brought tens of thousands of additional workplaces into the sphere of the FWC.
1833. Doing more business and dealing with speculative and new concepts and regularly changing legislation throws up more and more appeals. The following table shows that on average the FWC now deals with over 200 Full Bench matters annually.
1834. The vast increase in appeals flowing from the expanded work of the tribunal requires a re-examination of how appeals are heard and consideration of whether alternative structures could deal with them more efficiently and consistently (sending superior signal effects to members of the tribunal to ensure that precedent is more tightly observed).

Year	Total Full Bench matters
2007/08 ⁴⁶⁴	146
2008/09 ⁴⁶⁵	166
2009/10 ⁴⁶⁶	436
2010/11 ⁴⁶⁷	192

⁴⁶³ 1993 having been the point at which significant transference into the federal system was facilitated for the first time.

⁴⁶⁴ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁶⁵ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁶⁶ 2010–11 FWA Annual Report, Table 2, p.10 – Note may include a small minority of non-appeal Full Bench matters. (http://www.fwc.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf)

⁴⁶⁷ 2010–11 FWA Annual Report, p11

2011/12 ⁴⁶⁸	143
2012/13 ⁴⁶⁹	184
Average	211

Reducing the costs of appeals

A specialist appeals body may offer scope to reduce appeal costs.

1835. Some would argue that the existing system is relatively inexpensive, as appeals proceed within the FWC and senior counsel, juniors etc. are not required as they may be in higher courts.
1836. However, the expense associated with the current system is hidden and pervasive. The flaws outlined above lead to many employers not appealing matters, or trying to work around conflicting and inconsistent decisions, and we see that even where matters are remitted for rehearing following a successful appeal, further costs are incurred.
1837. The new system under consideration would be cheaper overall for employers as matters would ideally be appealed once, and precedents then followed, meaning fewer employers would be drawn into funding unnecessary appeals matters.
1838. With suitable expedition and smart practices, rules, forms, use of technology etc. (see Section 4) there will also be scope to run many appeal matters on the papers and save parties time and money.
1839. Consideration could also be given to directing the new body to do all it can to minimise appeal costs, and making this one of the statutory aims of the new body.

Fewer higher appeals through superior decision making

A specialist appeals bench would improve the quality of decision making and interpretation of the FW Act, in time minimising both the number of appeals from the FWC and the number of appeals from the new body to the Federal Court/High Court.

1840. The new appeal body, the AEAT, should be made up of higher level legal decision makers, able to focus on making correct appeal decisions and to guide the lower level FWC members exercising that body's original jurisdiction.
1841. The increasing propensity of the principal industrial statute to be varied by Parliament during each parliamentary year (at least prior to the current Parliament) brings with it an increasing demand for appeal matters and increasing demand for appeals to create precedents to guide users of the system.

⁴⁶⁸ 2012-13 FWC Annual Report, Chart 2 (p.1) and Table H3, p.103

⁴⁶⁹ 2012-13 FWC Annual Report, Chart 2 (p.1) and Table H3, p.103

1842. It is inevitable when the Act is changed – and AMMA advocates significant reform to the FW system – that those changes will need to be tested and contested into a standard and consistent approach.
1843. However, more generally, if the appeals process works as intended and precedent and signal effects are improved, then we should expect to see fewer appeals in the system. Appeals should under the proposed model resolve uncertainties and competing interpretations, and resolve them as expeditiously and unambiguously as possible (quicker and more clearly than the FWC has proven itself capable of).

Better reflecting the will of Parliament

A specialist appeals bench would ensure that the interpretation of the will of Parliament is consistent, led by senior and appropriately qualified members, and better reflects the intention behind legislative amendments.

1844. The FWC, or its successor bodies, should be a creature of parliament and consistently deliver on its statutory responsibilities by applying the law consistently and predictably to the factual circumstances that come before it.
1845. There are concerns that this is not currently delivered by dealing with appellate matters *ad hoc* and is not sending consistent signal effects to ordinary members of the tribunal as to how their responsibilities should be applied to particular facts.
1846. This is particularly important when legislation changes as it does frequently in this area. A specialist appeals body would examine matters on appeal and send a clear signal effect on how particular provisions of the Act are to be applied.
1847. This would leave the FWC as a body of application, focusing on consistently applying the precedents and approaches determined by the appeals body to appropriate factual circumstances.
1848. Clearer signal decisions from this body being followed by members will better give effect to Parliament's intentions.
1849. As part of this, the specialist appeals body could have separate or additional statutory objectives emphasising its role in providing interpretive clarity and consistency, and ensuring FWC decision making better gives effect to the intention of the parliament.

Correcting an historical accident

The current within-tribunal appeals system is a function of the unique and highly contested history of the FWC rather than a structure optimally placed to deliver best practice in hearing employment appeals.

1850. AMMA suspects that the form of appeals process we have in the FW Act is something of an historical accident rather than a deliberate design or best practice.

1851. The FWC (and its predecessors) started life as a Court, with the President/Chief Judge and members all being judges (the Commonwealth Court of Conciliation and Arbitration).
1852. It appears⁴⁷⁰ that the original *Conciliation and Arbitration Act 1904* bestowed a natural or innate appeals jurisdiction on the Commonwealth Court of Conciliation and Arbitration under s.38(o):
38. *The Court shall, as regards every industrial dispute of which has cognisance, have power-*
- (o) to vary its orders and awards and to re-open any question;*
1853. It may well have made sense when all members of the court were judges to constitute an appellate bench from within the body of members (as is still the case under s.613 of the FW Act), particularly in light of:
- a. Higher courts operating that way at state and federal levels.
 - b. A significantly smaller federal legal system, centred on Melbourne in the first decades of the 20th century, not requiring or encouraging the creation of a separate specialist appellate body.
 - c. The Court of Conciliation and Arbitration hearing far fewer matters than are heard by the contemporary FWC, and having fewer matters proceed to appeal.
 - d. The propensity in the initial decades of the Court's operation to challenge its decisions in the High Court, not to appeal them within any specialist Arbitration Court.
 - e. The concept of specialist appeal courts not yet having been developed across common law jurisdictions.
1854. However, the Court of Conciliation and Arbitration was abolished in 1956 following the decision of the High Court in the *Boilermakers' case*⁴⁷¹. This led to the urgent creation of a non-Chapter III tribunal rather than a Court to exercise conciliation and arbitration powers (and more latterly powers based on the corporations' power and state referrals).
1855. It appears that the process of appeals under the successor to the Conciliation and Arbitration Court maintained a "within tribunal" approach, more befitting a Chapter III court than a non-judicial tribunal.
1856. This is somewhat conjectural, but the *Boilermakers'* decision seriously disturbed the status quo in Australian industrial relations in 1956 and demanded urgent legislative amendments to maintain the conciliation and arbitration system.

⁴⁷⁰ Absent a level of proper historical legal research that is not possible at this time.

⁴⁷¹ *R v. Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254

1857. The creation of the then Conciliation and Arbitration Commission to replace the Conciliation and Arbitration Court appears to have been “knocked together” in somewhat of a hurry with a view to maintaining the operation of the Conciliation and Arbitration system (i.e. a minimal change model rather than a fundamental re-examination to establish a new body with the best possible structures and processes).
1858. We contend that the approach to appeals at that time was one of maintaining the status quo, not a carefully considered approach to determining the best way to address appeals. A within-tribunal appeals process was applied without proper regard to the fact that the Court had been replaced with a non-judicial tribunal (which over time gained more and more non-judicial and lay members).
1859. Regardless of the specific historical lineage of the appeals process within the FWC, the fact that something is being done in a specific way, or has been done that way for some time, does not make that process inviolate to change.
1860. The operation of the FWC is determined by Parliament, and the Parliament has a great deal more discretion in determining how it operates than it would in regard to a Chapter III Court (which the FWC clearly is not, nor is this proposed for the new specialist appeals body).
1861. At all times it is the duty of Parliament at the instigation of the government of the day to ensure that expensive administrative/determinative processes dealing with core areas of policy affecting millions of Australians operate as efficiently and consistently with the will of parliament as possible.

Recent precedent for changing FWC for greater efficiency

1862. In introducing the *FW Amendment Bill 2012*, then-Minister for Workplace Relations, the Hon Bill Shorten MP, stated that⁴⁷²:

The bill also includes additional measures relating to the internal structure of the FWC that the government considers will improve the operation and the integrity of the body. The measures include creating two statutory positions of vice-president. This will assist in attracting senior practitioners to the commission, a highly desirable outcome given the significance of the matters that the commission deals with, and will ensure assistance can be provided to the president in managing the work of the commission as required.

1863. Under the previous government, not only was the structure and operation of the tribunal changed, but two incumbent Vice Presidents were effectively demoted when freshly chosen Vice Presidents were slotted in in their stead.
1864. At the heart of the justification for this was improving the efficiency of the tribunal and ensuring that correctly qualified and eminent persons could act as precedent leaders in how the FWC approached the discharge of its duties under the *FW Act*. Putting to one side the rights and wrongs, the stated rationale rested on tribunal efficiency and soundness of operation.

⁴⁷² [BILLS - Fair Work Amendment Bill 2012 - Second Reading - House of Reps Hansard - 30 October 2012](#)

1865. Clearly the FWC is not set in stone, and it is open to this review to recommend, and a government to take action to, reform tribunal structures in Australia.

Implementation

1866. **Key guiding principles** for implementing a new specialist appeals jurisdiction, through the AEAT, should include:

- a. This should be a small body, tightly focused on appeals and ensuring the correct and consistent interpretation and application of the FW Act.
- b. Where uncertainties or questions emerge, there should be scope for the new body to address them quickly and deliver appropriate appellate guidance.
- c. The decisions of the new appeals body must be authoritative and actually be followed by the FWC. This new body must deliver the clear signal effects emphasised throughout this submission.
- d. The new body should be implemented as cost-effectively as possible and, where practicable and not compromising independence, share costs/services with the existing FWC.
- e. There should be opportunities to harness recent legal innovations and new technology.
- f. This should not see the creation of a new court (or further empowering of an existing court), rather this is a proposal for a new non-court appeals tribunal/body.

1867. It appears a minimum of five members are necessary to constitute the proposed new specialist appeals body. This presumes benches with a minimum of three members.

1868. The new body should:

- a. Hear all appeals from the FWC/under the FW Act (or the new AET).
- b. Assume responsibility for all appeals currently heard within the FWC, which would no longer hear any appeal matters.

Speed and access

1869. If a new specialist appeals body is to play its guiding and precedent role effectively, it must be able to determine appropriate matters at the right juncture, including when inconsistencies in decisions emerge, when an FWC member identifies inconsistent approaches or questions to be tested, or as new provisions come to be interpreted.

1870. Consideration therefore needs to be given to how matters will come to a new specialist appeals body. This might include:

- a. On appeal by a party to the initial matter.

- b. Perhaps on appeal from a person/organisation materially affected by the decision (e.g. an organisation with multiple agreements including loaded hourly rates may have an interest in clarifying or testing a decision that this cannot happen).
- c. At the instigation of the Minister for Employment, akin to [s.605](#) of the FW Act.
- d. At the instigation of the FWC President (who may be guided by an amended FW Act in this regard) where he/she becomes aware of inconsistencies of decision making/live questions to address.
- e. Some capacity for the new body to instigate on its own motion a review of decisions or even seize carriage of matters if/where appropriate.

Selectivity and expedition

1871. The flip side of measures to get appropriate appeals into the new body quickly some threshold processes for discretion, selection and refinement to control what is heard. Consideration might be given to:

- a. Some form of preliminary mention, docket, or special leave hearing on whether it is in the public interest that an appeal proceed (or to apply whatever other threshold considerations might govern access to the new jurisdiction).
- b. Examining what might be heard by single members of the new body to control access to its three member full bench/full court hearings.
- c. Consideration needs to be given to "smart rules" and practice guidance for the new body, to expedite matters, deal with issues on papers to the extent possible, harness electronic technologies, etc.

Test case as well as appeals matters

1872. Much of this section is focused on appeals and resolving ambiguity through appeal matters and testing competing interpretations in the decisions issued by members of the FWC.
1873. However, proper signal effects and avoiding ambiguity might also be delivered by the new AEAT having an "original" jurisdiction over a limited set of matters.
1874. The key to this would be the capacity for the new body to make the determination in the first instance as to what are effectively test case matters on how the Act is to apply in key areas. The panel could make the guiding decisions and set directions to be followed on key matters, rather than having to wait for an appeal, or resolve conflicting approaches from individual FWC members.

1875. **What we want to avoid:** This is a somewhat older example, but the Award Simplification Full Bench of the then AIRC⁴⁷³, which was designed to take central and lead carriage of what was a very significant task for the tribunal, did not have clear air to unambiguously assume this leadership role.
1876. When lead national parties came to advocate on what they thought was a blank canvass for the interpretation and application of the new statutory provisions, they found no such thing.
1877. Due purely to the way matters had been lodged and allocated, award simplification was shaped in the first instance not by peak organisations and a president led panel of the AIRC, but by a single employer award that had somehow got in first.
1878. The Parliamentary Library explains this as follows:
- In a number of award simplification rulings, developments have been taking place away from the test case review. For example, a full bench did not accept that section 89A prevented the AIRC granting the Finance Sector Union's application for accident pay to be inserted into the Bank Officers award. It also accepted that a claim for medical expenses for the costs of an injury incurred at work was an 'allowance', but refused the claim for impairment insurance.⁴⁷⁴ Elsewhere, a training clause in the National Metal and Engineering On-Site Construction Industry Award was held by Senior Deputy President Watson to be necessary to give effect to a new skills-based classification structure.⁴⁷⁵*
1879. What we saw was the ordinary ad hoc work of the AIRC create various key precedents of how awards were to be simplified, notwithstanding the convening of a high profile Full Bench for that purpose.
1880. The creation of the new appeals body, assuming it has some scope to deal with prescribed Full Bench matters from the outset, would avoid this possibility. The new body could seize or be allocated matters that would generate substantial principles or precedents or that would shape the interpretation of provisions of the Act.
1881. **Harnessing the power of principles:** Critical to the new specialist appeals body being able to send signal effects would be its capacity to create clear principles which will not only guide, but guarantee consistency of approach in comparable future matters.
1882. The pre-Fair Work *Workplace Relations Act 1996* directed the creation and use of principles for various tribunal functions precisely to ensure clarity and consistency, including wage fixing principles (s.218), award simplification principles (s.548), principles for the variation of transitional awards.
1883. Previous s.106 of the *Workplace Relations Act* illustrates how this could work:

⁴⁷³ http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98CIB06

⁴⁷⁴ AIRC, Print P1297, 29 May 1997

⁴⁷⁵ AIRC, Print P4026 25 May 1997.

106 Allowable award matters to be dealt with by Full Bench

- (1) After the commencement of this section, a Full Bench of the Commission may establish principles about the making or varying of awards in relation to each of the allowable award matters.
- (2) After such principles (if any) have been established, the power of the Commission to make or vary an award is exercisable only by a Full Bench unless the contents of the award:
 - (a) give effect to determinations of a Full Bench made after the commencement of this section; or
 - (b) are consistent with principles established by a Full Bench after the commencement of this section.
- (3) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.
- (4) After making such investigation (if any) as is necessary, the member must provide a report to the President or Full Bench, as the case may be.

1884. Two elements of this are critical:

- a. The guiding principles are set once, centrally by the highest level of decision maker, which should become the new appeals body.
 - i. This is not a remarkable proposition. If the new body were created with a purely appellate function and no original jurisdiction, it would at this stage have to attempt to remedially provide the guidance that principles could have delivered in the first instance without many avoidable problems emerging.
- b. Subsequent tribunal matters must follow the principles.

1885. What AMMA is advocating is a return to a well-known concept. There is a long history of the predecessors to the FWC setting principles at its central or highest levels, and this is a function the new appeals body could perform, not only for appeals, but also for some "test case" type matters.

1886. **Implementation:** Implementation of this additional jurisdiction might include:

- a. An obligation for the President of the FWC/AET to formally inform the President of the AEAT of the convening of any AET Full Bench.
- b. Power for the AEAT President to assume carriage of any matter before or pending a full bench of the AET, subject to his/her being satisfied of particular prescribed requirements / tests.
- c. Power for the Minister to have any full bench matter referred to the new body.
- d. Power for any party to request the hearing of any full bench matter by the new body (perhaps subject to suitable threshold tests).

Legislative foundations

1887. New legislation: The clearest way to create and empower the new specialist appeals body would be through:
- New legislation establishing a system of tribunals (an Australian Employment Tribunals Act), creating the new body, identifying its jurisdiction and empowering it; and
 - Consequential amendments to the FW Act or its successor to remove the appellate jurisdiction of the FWC/AET.
1888. Specific objects: Whatever approach is taken, the new body needs specific stand-alone legislative objects for the exercise of its appellate jurisdiction, that either entirely displace or are clearly superior to the primary objects of the FW Act (with the former clearly preferable).
1889. New objects for the appeals jurisdiction should emphasise, amongst other things:
- Sending clear signals to the FWC/AET on how particular elements of the FW Act should be interpreted and implemented.
 - Clarifying the interpretation and application of the FW Act, and its specific provisions to specific matters to the extent possible.
 - Minimising disputation and competing interpretations, and minimising and the numbers of matters brought to the FWC/AET.
1890. The objects of the Social Security Appeals Tribunal (SSAT) require it to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick⁴⁷⁶. Such concepts may be relevant in this instance.
1891. Secondary and Interpretive Materials: Extraneous and supporting materials for the passage of amendments, such as explanatory memoranda, should identify the type of examples of inconsistent decision-making set out in Section 2 of this submission, as those the new body should avoid/stamp out.

Remuneration and pensions

1892. Senate Committee evidence from President Ross about the FWC highlighted the difficulties of attracting suitably qualified senior legal practitioners into the tribunal on the basis that in essence they would not take the pay cut.
1893. Critical to this was the lack of access to a judicial pension:

Justice Ross: ... The only issue that I raised—that I am assuming this is in part a response to—was to reflect the views of my predecessor, and that is that there are difficulties in attracting senior legal practitioners to tribunal appointment, associated with the current remuneration levels for deputy presidents. You would be aware that the remuneration arrangements changed with the FW Act. Whereas previously a deputy president or a presidential member would have essentially the same remuneration as a Federal Court judge, including

⁴⁷⁶ <http://www.ssat.gov.au/about-the-ssat>

access to a pension, those arrangements changed with the current act. I am aware that that has created a barrier for senior legal practitioners in seeking to express interest in appointment. A number have raised that with me. I have communicated that.⁴⁷⁷

1894. The members of the new appeal body will be very senior appointments for which it will be essential to attract pre-eminent employment law practitioners.
1895. Pensions and remuneration arrangements should not be any barrier to getting the right people to do the right job – the government may need to reverse the decision highlighted by President Ross and his predecessor.

AUSTRALIAN EMPLOYMENT SAFETY NET COMMISSION (AESNC)

1896. There are various models for setting minimum wages and conditions (the safety net) in comparable OECD economies:
- a. Direct legislation of both minimum wages and minimum conditions, with government discretion on when to consider minimum wage increases (e.g. the USA).
 - b. Direct legislation of both the minimum wage and minimum conditions of employment, with a statutory requirement for periodic minimum wage review and automatic processes to advise on minimum wage increases triggered independent of the government (e.g. New Zealand⁴⁷⁸):
 - i. The NZ Minister of Labour's has a statutory obligation under the Minimum Wage Act 1983 to review the minimum wage rates by 31 December each year and make a recommendation to government⁴⁷⁹.
 - ii. Cabinet then considers any recommendation from the government to increase the minimum wage.
 - c. Direct legislation of minimum conditions, with minimum wages separately reviewed and set by an independent, specialist body (e.g. the UK with its Low Pay Commission).
 - d. A tribunal that is independent of government setting both minimum wages and other conditions (Australia, noting however that Parliament sets the NES).

Changes in Australia

⁴⁷⁷ Hansard transcript, Wednesday 17 October 2012 Employment and Workplace Relations, p.40 (http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/d2c06b3a-3c6d-45ad-8324-1b99462d7327/toc_pdf/Education,%20Employment%20and%20Workplace%20Relations%20Legislation%20Committee%202012_10_17_1463_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/d2c06b3a-3c6d-45ad-8324-1b99462d7327/0000%22)

⁴⁷⁸ <http://www.dol.govt.nz/er/pay/backgroundpapers/2014/index.asp>

⁴⁷⁹ Under 5 of the Minimum Wage Act 1983 (NZ)

1897. Traditionally in Australia, judges and industrial relations commissioners set minimum wages, and increased them, as a function of the dispute based system on which system was based.
1898. During the past decade in Australia both parties have recognised that this model is not the right one to take Australia forward, and that a more or less separate, dedicated and more specialised body will be better equipped to make what is a very careful economic, community and labour market decision:
- a. The Australian Fair Pay Commission was established by the former Coalition government and discharged primary national minimum setting responsibilities in Australia between 2006 and 2009.
 - b. With the passage of the FW Act, Labor did not simply return minimum wage setting to the pre-work choices approach of FWC only minimum wage setting, and instead created the current hybrid approach of FWC members and independent specialists, sitting as an expert panel solely to set minimum wages. The FWC website explains this as follows:

The Act provides for annual wage reviews to be conducted by an Expert Panel of the Commission [FWC].

The Expert Panel is made up of the President, three other full-time members and three part-time members.

The part-time members' sole function is to work on the annual wage review. Such members must have knowledge of, or experience in, one or more of the following fields:

- Workplace relations
- Economics
- Social policy
- Business, industry or commerce.

The full-time members of the Expert Panel are chosen by the President from the full-time members of the Commission [FWC].⁴⁸⁰

1899. Thus, during the past decade Australia has already moved from solely the lawyers and WR specialists sitting on our general WR tribunal once a year trying to make a specialist economic decision affecting incomes, jobs, and business viability, to greater use of specialists in these fields.

A new specialist body

1900. Australia should build on this going forward with future minimum wage and conditions setting. As part of moving towards a more specialised institutions, with the right people sitting to make the right decisions:

⁴⁸⁰ <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews>

Recommendation 8.7

A new Australian Employment Safety Net Commission (AESNC) should take over the safety net review and minimum wage setting powers of the FWC. AESNC members should be appointed for a prescribed period (perhaps 5 years) and be independent of the FWC, and not members of the FWC (or the new AEC).

1901. This would be a part time body, on which appropriate experts participate for annual minimum wage setting and conditions setting as required (see below). The current qualifications for those Expert Panel members who are not FWC members appear an appropriate starting place for the new tribunal members, being expertise in one of the following fields:
- a. Workplace relations.
 - b. Economics.
 - c. Social policy (although this might usefully be additionally framed in terms of labour market policy and economic expertise).
 - d. Business, industry or commerce.⁴⁸¹

Minimum wage setting

1902. Part 6 of this submission analyses the Australian employment safety net in detail, and in particular the current dual safety net between modern awards and the NES. As we recommend there, this is not an appropriate model to be carried forward in Australia and really needs to be resolved in favour of one or the other, and in AMMA's submission in favour of a move towards more uniform statutory minimum standards (the NES). This would see awards start to move towards minimum wage and classification orders only for such a period as they would need to be retained.
1903. Under the model AMMA recommends, the new AESNC would be responsible for the safety net in the system, on both minimum wages, as set out above, and minimum conditions under the NES.
1904. On minimum wages, there would be an annual safety net review, procedurally similar to the current process, subject to a rebalancing of the statutory considerations for minimum wage setting as recommended by those industry, employee etc. representatives to whom the rate is most relevant (not AMMA and the resources industry).
1905. There would be a new head of the AESNC, and he or she, would as provided for under the Act, determine how a minimum wage review would be run, and for example the mix between hearings and submissions. Again, submitting parties for whom the minimum wage is more directly relevant would assist the PC in reforming

⁴⁸¹ From existing s.620 of the FW Act.

the substance of minimum wage setting by the new body the resource sector is commending to you as part of a restructure of WR institutions.

Minimum conditions / NES setting

1906. AMMA is not recommending a solely minimum wage setting body, but a wider employment safety net commission that would have a role in both minimum wages and minimum conditions.
1907. The AESNC role in minimum wages would be as the minimum wage setter. In contrast on minimum conditions, it would provide expert advice and recommendations to government which would then be able to consider them and take proposals to Parliament, or exercise regulation making powers (in some cases) to accept them.

Recommendation 8.8

The new Australian Employment Safety Net Commission (AESNC) would also be able to review the minimum statutory conditions in the NES, or to recommend consideration of new NES :

- This would be triggered by a referral from the Minister for Employment, just as this Commission (the PC) reviews what the Treasurer directs to it under its legislation⁴⁸².
- Consideration could be given to requiring the Minister to consult the members of the National Workplace Relations Consultative Council (NWRCC)⁴⁸³.
- The AESNC would make a recommendation to government on varying, adding to, or refining the NES. This would be a public document tabled in Parliament, to which the government of the day would be required to undertake.

1908. So how would unions run a future claim for increased conditions or new conditions?

1909. They would:

- a. Be more strongly encouraged by the system to make the first step trying to work with employers and government to engage with their concerns and work towards an agreed solution.
- b. Either write to minister or give some formal notification under legislation that they wished an NES matter reviewed.
 - i. This could be tabled for consideration at the tripartite NWRCC:
 1. There should then be an attempt to see what can be resolved by agreement and working together.

⁴⁸² Productivity Commission Act 1998, s.11

⁴⁸³ National Workplace Relations Consultative Council Act 2002

2. The NWRCC can create committees, including ad hoc and specific purpose committees to consider matters, and this could be a very useful step in examining any claims to revise or expand the safety net.

1910. This is not designed to delay or obfuscate claims for new or increased NES, but it is without question advanced on the assumption that we get the NES right in legislation, this varies rarely, and new claims or agendas are addressed in bargaining, a principal we have nominally accepted for more than 20 years but never realised in practice.

Overcome the politics

1911. In the US, legislated minimum wage and condition setting is widely thought to have frozen minimum wages and conditions for such periods that:

- a. Minimum wage employees are considered to suffer declining purchasing power.
- b. When increases do come, they are strongly based on catch up, can be very significant and deliver quite a shock to the minimum wage economy / minimum wage employers.

1912. Australia never traditionally had constitutional scope for government determined minimum wages and conditions (i.e. by parliament or the executive) due to our unique constitutional history and conciliation and arbitration system. Even when this was periodically considered, there was substantial concern from employers that base politics would get the better of everyone. The risk was that our politicians could not resist the urge to bid up minimum conditions to appeal to the electorate, or would lack political capacity to insist on sound policy.

1913. This risk was greatest for minimum wages, and in era in which a more stable NES and genuinely bargaining weighted system came to pass, there would be less risk of base politics distorting proper policy outcomes.

1914. Australia has already chosen to set minimum conditions through Parliament (through the creation of the NES and preceding Australian Fair Pay and Conditions Standards) and the above is a mechanism to build on that in a post-award system.

Scope for tripartism?

1915. When the UK introduced its Low Pay Commission in the 1990s, it was able to have a role for UK employers through the CBI and unions through the TUC. Senior national union and employer figures sit on the LPC and participate in its minimum wage reviews.

1916. It would be refreshing if we could recommend this approach as open to the PC for Australia, but... it is not. Australia's workplace relations culture is too adversarial and some would say immature to empower current union and employer representatives with the discharge of specific determinative powers under the Act.

AUSTRALIAN EMPLOYMENT OMBUDSMAN

1917. Labour laws need to be inspected and enforced, and throughout the world there are labour inspectorates that advise on and enforce labour laws. Australia ratified ILO Convention 81 on Labour Inspection almost exactly 40 years ago, and has had labour inspectors for the best part of a century.

1918. The PC explains the role of the current FWO thus:

The FW Ombudsman (FWO) provides information about the roles, rights and responsibilities of actors in the system, monitors compliance with suspected breaches of workplace laws and regulations (for example, under award payments), and can seek penalties for breaches (through the Federal Circuit Court and the Federal Court of Australia).⁴⁸⁴

1919. Resource industry employers and employees are not major "clients" of the FWO, paying as we do well in excess of the safety net and pursuing sophisticated and extensive human resource strategies which have moved so far past minimum standards as to be almost unrelated to them. The industry also has wide coverage of collective agreements, taking employment out of the minimum stream which is the focus of the Ombudsman.

1920. We suspect AMMA's professional WR staff have less to do with the FWO than those working for almost any other major industry body. However, we will address this function of the system briefly.

1921. Another key point to understand about labour inspection in Australia is that it is already and will remain world leading. Our inspectorate is well resourced and highly functional, and the penalties for non-compliance with labour laws are high and enforced.

Information and promotion, not scalps

1922. An inspectorate does its job when there is declining demand for its work, and we should aspire to a system in which underpayments, errors or deliberate transgressions of our employment law are increasingly rare. As set out above, this would be assisted by a much simpler system of WR regulation, which could be more clearly publicised and enforced.

1923. It is absolutely critical that the state, in this case through the ombudsman function, is doing all it can to inform promote and support compliance rather than seeing simply to take employer scalps. We have periodically heard some unions complain that a given system of enforcement is not pursuing enough prosecutions – that's a very crude and short sighted frame of reference.

1924. It must remain equally important in the resourcing and responsibilities of any enforcement body that, that it inform and promote and support compliance, as well as acting on instances of non-compliance. There should also continue to be an

⁴⁸⁴ Issues Paper 5, p.2

emphasis on securing voluntary compliance and working with employer to fix problems rather than seeking to punitively punish them.

Federal only

1925. As set out in the introduction, the time has come to end the rump jurisdiction of State WR systems and move to a solely national system for the private sector. All remaining state labour inspectorates should be abolished and become state offices of the national body.

Be seen to enforce the law against both unions and employers

1926. Whether the FWO or the General Manager function of FWA, it is vitally important that our system send a very visible signal that it will enforce the law equally against both employers and unions.
1927. The FWO regularly strives to publicise its activities against employers⁴⁸⁵, and it clearly views part of its role as making an example of employers and naming and shaming them. From a cursory glance at the website this is regularly based on underpayments amounting to a few thousands of dollars per employee (which is very serious, but not more serious than some very poorly handled matters of far larger scale).
1928. We saw a major systemic failure in the time taken for the investigation and reporting on very serious investigations into the HSUA, involving many millions of dollars of member monies. We also see very poor reporting currency of registered organisations, and no comparable naming and shaming of them.
1929. It is vitally important that all enforcement bodies be seen to equally enforce our current and future WR laws against both employers and when appropriate trade unions and employees.

No union enforcement or financial benefit

1930. Unions can and do litigate against employers, particularly in relation to bargaining related rights and obligations. That is going to continue under any new system.
1931. However, one prospect under some state laws in particular which should not form part of any national system, and which should end, is any scope for unions to bring prosecutions of employers for alleged WR breaches – of awards, minimum wages, the NES etc.
1932. Even worse is any scope for unions to financially benefit or share in any determination of penalties against employers in such prosecutions. Costs for a successful party are one thing and are dealt with under established law, but unions securing an income line from seeking out and prosecuting employers risks independence and invites

⁴⁸⁵ <http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases>

misuse. This may or may not be raised with the PC, but as a matter of principle and practicality should form no part of any future system.

1933. The Australian Employment Ombudsman / FWO should have a monopoly on enforcement and prosecution under our WR laws.

It's not an Ombudsman

1934. The current FW Ombudsman is not an ombudsman at all – it is and always has been an inspectorate. An ombudsman is an institution to which the public or those subject to government can go to complain about how that regulation is administered, or in increasing usage, to complain about private companies and their billing and service standards (for example telecommunications and utility ombudsman bodies).
1935. The existing FWO enforces the law, advising, inspecting, seeking redress and where appropriate prosecuting employers. It is not a body to which users of the system can complain of how the laws are administered, or indeed the fairness of those laws.
1936. However, this horse has bolted, and successive the Australian governments have invested many millions of dollars in having an Ombudsman body, and it should retain this label, however inaccurate.

Recommendation 8.9

Rename the FW Ombudsman to the Australian Employment Ombudsman.

COURTS

1937. Courts play an important role in our WR system, albeit a different one from the first half of the 20th Century when a court exercised the powers we now associate with the FWC.
1938. Disputes in relation to the meaning of particular parts of the FW Act, powers and processes under that Act, and how the FWC and parties can proceed under the Act quite regularly go to our courts, principally the Federal Court for determination. The PC expresses this as follows in Issues Paper 5:

The FW Divisions of the Federal Court and the Federal Circuit Court have jurisdiction over matters under the Fair Work Act 2009 (Cth) (FWA) and other workplace legislation.⁴⁸⁶

1939. There is a long standing trend towards greater legalism in our workplace relations system. The role of lay members of our tribunals (the FWC) has diminished over time in favour of increasing trappings of a court, and growing importance of legal expertise.

⁴⁸⁶ Issues Paper 5, p.1

1940. On balance we would contribute the following to consideration of the future role of the Courts:

- a. Some of the matters that currently go into the Federal Court will be addressed by the proposed new appeals body, the Australian Employment Appeals Tribunal (AEAT). However there will be other matters that will still require elevation to the courts.
- b. The WR system benefits from the interpretative rigour and dispute settlement offered by elevating matters to higher courts of general application. For all of its trappings, the FWC is not a court, and periodically needs the additional rigour and clarity which courts offer, particularly those dealing with a range of areas of law.
- c. Periodically, someone will dust off the decades old concept and failed experiment of having a dedicated Industrial Relations Court in Australia. This is a product of very different times, when the FWC and its predecessors exercised very centralised and direct power. The FWC's job now, and for the future AET, is far more focussed on supporting a system based on bargaining.

Recommendation 8.10

There not be any return to a separate Industrial Relations Court, however titled, and the existing structure and operation of the Federal Court, High Court and other Commonwealth courts retained as relevant to WR and any successor to the FW Act, albeit that what the act asks of the courts may change as the system evolves.

OTHER MATTERS

Fair Work Building and Construction⁴⁸⁷

1941. As set out in Part 9, the resource industry supports the passage of legislation to replace FWBC with a restored ABCC, with its full former powers and responsibilities.

Road Safety Remuneration Tribunal⁴⁸⁸

1942. For the reasons widely canvassed in the review of this body:

Recommendation 8.11

The Road Safety Remuneration Tribunal should be abolished and its functions assumed by the proposed new AESNC, as they may be relevant, or the FWC if the structure proposed in this submission is not accepted.

⁴⁸⁷ Issues Paper 5, p.2

⁴⁸⁸ Issues Paper 5, p.2

1943. The PC may also wish to note that the longer term trend in Australia has been to mainstream industry regulation and to move away from specialist tribunals for particular industries. The creation of the RSRT was quite contrary to regulatory reform in Australia over some decades, and should be reversed.

Ministerial Intervention

1944. The PC queries ministerial intervention under s.569 of the FW Act⁴⁸⁹, and whether this should remain in the Act.

1945. We recall that:

- a. Our WR system places great reliance on the courts to make it work and litigation (and often re-litigation) seems to be required to regularly test the boundaries and scope of the text our Parliaments put into legislation.
- b. Many areas of WR regulation are devolved to tribunals in Australia that comparable countries directly legislate. It is entirely legitimate that our government be able to be able to intervene in litigation on these settings, as of right, to put the government's views of how the legislation should be interpreted and applied.
- c. Ministerial intervention is not the same as ministerial determination. This provision simply allows the Minister to contribute to what decision makers have before them, and in no way privileges the Minister's take on interpretation.

1946. The PC queries any appropriate modifications to the existing ministerial intervention powers. These should be in the direction of extending rights of intervention by government to assist the determination of matters, and ensuring governments can ensure the intention of legislation is properly applied by WR institutions:

Recommendation 8.12

Rights of Ministerial intervention be extended to all matters before the proposed new tribunals, save those taken to the AECAS voluntarily by parties.

Recommendation 8.13

Whether appeals are heard by the new AEAT (as recommended), or by the FWC, there should be a requirement for formal notification of all appeal matters to the Minister to provide her/him with an opportunity to consider intervention.

⁴⁸⁹ Issues Paper 5, p.3

9. OTHER WORKPLACE RELATIONS MATTERS

1947. Various other issues are raised in the Terms of Reference and Issues Papers, in particular in Issues Paper 5. There is also a limited set of additional issues AMMA wishes to briefly note. Some of the issues the PC has included in Issues Paper 5 are major issues for AMMA members and have been addressed in some detail here.
1948. This chapter includes the following items:
- a. Casual work
 - b. Superannuation
 - c. Registered organisations – trade union and employer
 - d. Sponsored foreign workers
 - e. Public sector and workplace relations
 - f. TCF outwork and piecework
 - g. ABCC/the construction industry
 - h. Independent contractors
 - i. Labour hire
 - j. Union attempts to stop labour hire and contracting and
 - k. Competition law.
1949. In addressing these considerations, disparate as they are, it is useful to recall:
- a. The principal thrust of the terms of reference, focusing on employment, prosperity, productivity and competitiveness.
 - b. The general policy guidelines for the Commission under s.8 of the *Productivity Commission Act 1988*.
 - c. The guiding principles and aims for our workplace relations framework that AMMA commends to the PC to guide this review (which are also distilled from the framework for this inquiry), including supporting Australia's future capacity to support greater employment and engagement with the labour market (see Chapter 1 - Introduction).
1950. A key thread running through each is better encouraging jobs and work opportunities for the benefit of individuals and the community. Restricting avenues and opportunities to work in Australia would be the very antithesis of what the PC is asked to do in this review.
1951. However, a range of the matters canvased in Issues Paper 5, reflecting the agendas of unions and others, have at their heart restrictions on avenues into work for casuals, employees of labour hire companies, contracting companies, etc.

1952. Implicit in the purported concerns which give rise to such issues being raised is a presumption towards regulation, restriction and prohibition of viable and useable avenues into work that are currently delivering jobs and incomes to many hundreds of thousands of Australians, either directly or indirectly.
1953. Such an approach would be precisely the wrong one for not only the current labour market, but also the foreseeable labour markets of the future in which:
- a. More diverse employees, with more diverse preferences and needs, will demand greater flexibility and options in how they work.
 - b. Employers are exposed to greater global pressures from international markets which demand more flexible, productive and competitive operations.

CASUAL WORK

1954. Issues Paper 5 identifies “*alternative forms of employment*” that “*cater to certain needs of either the employer or the worker, which are not fulfilled by the standard employment form*”⁴⁹⁰. One of these “alternative” forms of employment is:

*“casual workers who are employed on an informal and irregular basis and account for around 20 per cent of employed people”*⁴⁹¹.

1955. Ultimately, Issues Paper 5 says little about casual employment because, quite frankly, there is far less to be said about it than some interests would have you believe. Casual work is a legitimate and properly regulated mode of employment. It successfully facilitates employment for millions of Australians, particularly those prioritising flexibility or additional income, and many of those working casually would not participate in the labour force if this option were removed and restricted. This includes many parents relying on the flexibility, preferred hours and additional income that casual work can provide.
1956. Ultimately, casual employment offers choices to employers and employees. These choices have been with us for decades, and they have successfully kept pace with changes in work and in the community. For an entitlement originating in pre-federation daily hiring, casual work has adapted remarkably successfully to modern labour market challenges, such as supporting labour market engagement by working parents and students.
1957. Many unions don't like casual employment and campaign against it, notwithstanding clear demands and preferences from employees for casual work, particularly from parents and young people.
1958. Unions will assert an inherent vulnerability and added risk to employees in casual work, something which is not borne out by sustained demand for such work from significant cohorts of the labour market.

⁴⁹⁰ Issues Paper 5, p.9

⁴⁹¹ Issues Paper 5, p.9

1959. To the extent that valid concerns do arise, the inspectorate (FW Ombudsman) provides considerable services and assistance directly dedicated to casual employees.
1960. However, we also suspect that part of union opposition to casual work really comes from:
- a. A casual labour force being harder for trade unions to organise industrially.
 - b. Casual employees often being younger and less likely to identify with or join unions.
 - c. Casual employees prioritising incomes and being less likely to pay union dues.
 - d. Many casual employees not making a career in the area they are working in and having different priorities to those of the union and its established membership base.

Recommendation 9.1

The PC should be very cautious in making any recommendations on casual work, and in particular, should decline to make any recommendations that would have the effect of restricting access to casual work either directly or indirectly, or making it more complicated or costly.

Casualisation is a myth

1961. There is a veritable cottage industry observing with alarm that casual work is increasing and this is somehow undesirable, much of it using the pseudo-academic sounding scare term *casualisation*.
1962. The problem for opponents of casualisation is that this is not borne out in the data.
1963. The PC cites around 20% of employed persons are working casually⁴⁹². The ABS series behind this data⁴⁹³ shows a stable, if not declining, level of casual work in a growing Australian labour market:
1964. The ABS observes that:

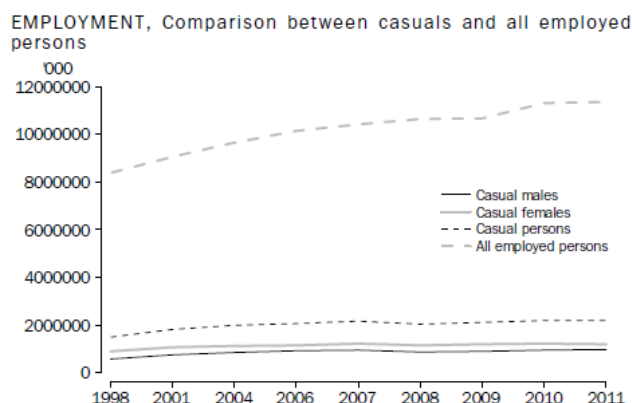
While the number of casuals (those without either paid sick and paid holiday leave) is generally increasing over time, it is not at an equivalent rate to the entire workforce, resulting recently in a small fall in the proportion of the labour force employed on a casual basis.

⁴⁹² Issues Paper 5, p.9 citing ABS data from 2011.

⁴⁹³ ABS 6359.0 - Forms of Employment, Australia, November 2011, p.11

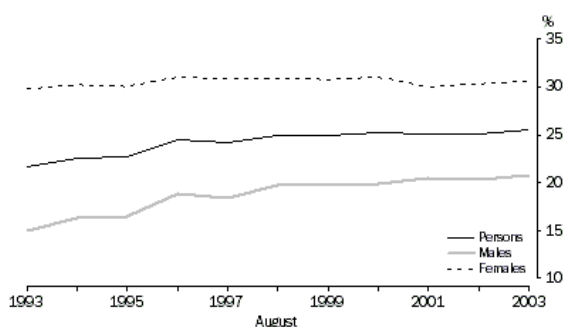
The number of employed persons has continued to increase in the workforce in comparison with those deemed to be casuals (employees without paid leave entitlements).

Generally, the number of casuals in the workforce is increasing, however it is increasing at a rate lower than that of all employed persons⁴⁹⁴.



1965. Looking back a little further, between 1996 and 2003, rates of casual working were stable and at a higher rate than the 2011 data. Based on this data, claims of casualisation simply don't hold water.

Proportion of employees who were casual⁴⁹⁵



Casual working is not atypical, and this is an outdated concept

1966. Employers do not share any notion of casual work or casual employees being an atypical or other form of employment that differs from the standard working week.

⁴⁹⁴ ABS 6359.0 - Forms of Employment, Australia, November 2011, p.11

⁴⁹⁵ Source: Australian Labour Market Statistics, October 2004 (ABS cat. no. 6105.0), cited at: 4102.0 - Australian Social Trends, 2005, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/40868763e5d4d172ca25703b0080ccda!OpenDocument>

1967. This is a 20th Century frame of reference which is no longer useful or capable of providing a sustainable foundation for policy. Employers also eschew any view of casual work being an illegitimate “other” to be punitively regulated or discouraged through disadvantageous or additional regulation compared to other types of employment. There is no evidence beyond prejudice against casual working from those seeking to discourage or minimise it.
1968. In fact, one of the wider trends which the PC should take into account is the move in Australia, as with much of the developed world, away from a standard 9-5, Monday to Friday working week. The PC should consider what utility is served by now-outdated assumptions about standard working weeks or modes of engagement, and what the consequences are of assuming or imposing those on employees and employers with increasingly diverse preferences.
1969. Ultimately, employers would not characterise casual work as an alternative form of employment or as some form of questionable or illegitimate other, and unless there is evidence to do so, this should not be treated as a concern by the PC.

Standardised loadings and modes of employment

1970. Modern awards follow a largely standardised format under which one of the introductory award clauses addresses “types of employment” and sets out options for full-time, part-time and casual employment. Casual employment is made subject to an additional loading, and the casual employee is consequently excluded from paid leave entitlements.
1971. Casual employment is ripe for standardisation and codification into a legislated community standard, along with the codification of options for full-time, and part-time work (and the removal of types of employment from awards). In future, an employee could then specifically be employed “on a casual basis under Part X of the *Employment Act*”, and this would build in many of the rights and conditions for casual work as a community standard.
1972. This was achieved more than 20 years ago in Western Australia. That state’s former *Minimum Conditions of Employment Act 1992* contained the following⁴⁹⁶:

**“casual employee” means an employee who is employed
on the basis that —**

(a) the employment is casual; and

(b) there is no entitlement to paid leave,

**and who is informed of those conditions of
employment before he or she is engaged;**

⁴⁹⁶ Noting that employers are not arguing for a 15% casual loading, and are commending to the Commission the form of the WA Act and its simplicity not the quantum of the then loading,

Minimum rate of pay for casual employees

12. A casual employee is entitled to be paid 15% more than the amount which he or she is entitled to be paid under section 11 (a) or (b) as the case may be.

Entitlement to leave for sickness etc.

19. (1) Subject to sections 20 and 22, an employee, other than a casual employee, who is unable to work as a result of the

Entitlement to annual leave

23. (1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 160 hours.

1973. Some industries seek to restrict casual work by not providing for it as a mode of employment under the award. Of course, not every industry is going to use casual labour, but shouldn't it at least be possible in all or almost all industries? Restricting access to work that can be agreed between employer and employee under proper levels of wages and entitlements is inconsistent with meeting the current and forecast employment needs of Australia, as set in the terms of reference and the general policy guidelines under which the PC operates.
1974. There will be some occupations and industries in which there may well never be casual work, perhaps the pilot, the surgeon, etc., but there is no reason why a statute covering all employment could not make it a general mode of employment.

Recommendation 9.2

Types of employment should be removed from awards and codified into the governing statute as standard formulation governing all industries, with a standardised definition of casual work, a standardised casual loading and a clear standard on which terms and conditions are and are not applicable to casual employment⁴⁹⁷. All industries should have access to full-time, part-time, and casual employment via a statutory provision applying to all work in Australia.

Recommendation 9.3

There should be a standard percentage loading for casual work in all industries and a standard definition of casual work in the FW Act, or its successor, and not in awards.

1975. Such an approach would also counter moves by some unions to fundamentally undo what casual employment is and to seek a "double dip" on leave entitlements, being

⁴⁹⁷ However titled in the future.

paid for once in the casual loading, and a second time in purported clauses providing leave entitlements for casuals.

Casual conversion

1976. For all the heat and noise generated around casual work, and the rank misrepresentation in claims of growing “casualisation”, very little has been done (quite correctly) to try to restrict or discourage such work. This reflects that it is not possible to paternalistically seek to “correct” the clear labour market preferences of tens of thousands of employers and millions of employees.
1977. This is a sensible product of the system to date, and one which the PC should in essence maintain as set out above, albeit in a codification and standardisation of the long-standing status quo.
1978. However, there is one particularly misguided and damaging development, which the PC should recognise and recommend be excised from the system as not forming a useful foundation for a more appropriate workplace relations framework for Australia's future – and that is the proliferation of “casual conversion” clauses.
1979. A “casual conversion clause” is best understood by reviewing its terms:

14.4 *Casual conversion to full-time or part-time employment*⁴⁹⁸

- (a) *A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.*
- (b) *Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b).*
- (c) *Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.*
- (d) *Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time*

⁴⁹⁸ Manufacturing and Associated Industries and Occupations Award 2010 [MA000010], Clause 14.4 and 14.5

employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

- (e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.
- (f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 14.4(d), the employer and employee must, subject to clause 14.4(d), discuss and agree on:
 - (i) which form of employment the employee will convert to, being full-time or part-time; and
 - (ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.
- (g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.
- (h) Following such agreement being reached, the employee converts to full-time or part-time employment.
- (i) Where, in accordance with clause 14.4(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.
- (j) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

- (k) *For the purposes of clause 14.4, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.*

14.5 *An employee must not be engaged and re-engaged to avoid any obligation under this award.*

1980. Such provisions are misguided, and fundamentally misunderstand the nature of employment through offer and mutual acceptance of terms. It should remain a matter for employers whether to offer jobs on a full-time, part-time or casual basis based on their assessment of their commercial and operational requirements and their chosen commercial, operational and employment strategies. Such clauses have no place in enterprise agreements, given that their presence seeks to restrict managerial decision making in a systematic way.
1981. Employers are also navigating increased levels of risk and uncertainty. Some seek to manage this risk by hiring non-ongoing employees and paying a premium to do so. Casual conversion provisions restrict this, and directly make employers less capable of managing their employment levels and skills mix to take into account levels of risk and uncertainty from clients and markets.
1982. The proliferation of such clauses would also add a structural risk to employment in Australia. A manager in Australia would have to assume more ongoing employment risk and would be less able to adjust workforce levels to changing commercial and operational needs based on such clauses.
1983. This is also a very complex and confusing provision, which can be a sign of a prescription searching for a wrong to right. AMMA understands that even where such clauses form part of industrial agreements, most employees are not electing to convert to a lower remuneration mode of employment, giving lie to the very premise on which such clauses are based.
1984. Employers and employees generally understand the terms of casual employment. Nothing stops any employee discussing a shift of mode of employment with their employer and reaching agreement consensually. Such clauses are not about that – they are another mechanism whereby unions try to determine what is good for employees, and the very casual employees least likely to join trade unions.
1985. Ultimately, these casual conversion clauses are paternalistic, if not patronising of employee capacities and choices, and typify the regulation of process rather than outcomes that should be removed from a genuinely modernised Australian system for our future.
1986. It is also asymmetrical to empower one party to a contract to unilaterally change that contract, where there is no such power for the other. This is a particularly acute asymmetry when one considers the employer has specifically paid an additional premium (loading) for flexibility, only to have that flexibility removed at the employee's discretion.

1987. Furthermore, the terms of reference ask the PC to consider⁴⁹⁹:
- a. *"the ability for employers to flexibly manage and engage with their employees"*.
 - b. *"red tape and the compliance burden for employers"* – and by implication options to reduce this burden where possible.
1988. Such considerations favour a reduction in restrictions on casual working, and a move to a more standardised, well-understood option for such work through the statute rather than awards.

Recommendation 9.4

Casual conversion provisions should be removed from awards, not appear in statute, and become a specifically non-allowable/prohibited matter in bargaining and agreements. Such clauses should not be able to be sought by unions in negotiations towards a registered agreement and should not be able to create rights to take legally protected industrial action in support of them.

1989. A caution on terminology. On p.9 of Issues Paper 5 the PC refers to casual work as "informal". The term "informal employment" or "informal work" has a well-understood meaning globally, which cannot legitimately be applied to casual work in Australia.
1990. Informal work is unregulated, undeclared, un-taxed, and operates beyond the reach of national labour regulation, inspection and enforcement. Examples include informal agricultural or street work in developing countries in the barter or cash-only economy. This is not a term that can be applied to casual work in Australia, which is a form of formal, regulated employment supported by world leading employment rights and enforcement mechanisms.

SUPERANNUATION

1991. In Chapter 6 of this submission, resource employers recommend that superannuation be removed from industrial awards entirely. Superannuation regulation, including default fund choice, should become the sole province of superannuation legislation and regulation as it already is for vast cohorts of Australia's 11.6 million employees.

REGISTERED ORGANISATIONS: TRADE UNION AND EMPLOYER

1992. Far too much attention has been paid for far too long to the interests and perceived institutional role of trade unions in shaping Australia's WR system.
1993. Resource employers encourage the PC to focus in this review on what our economy, community, employers and employees need rather than the self-interests of registered organisations. Those in work, out of work, those doing business and those

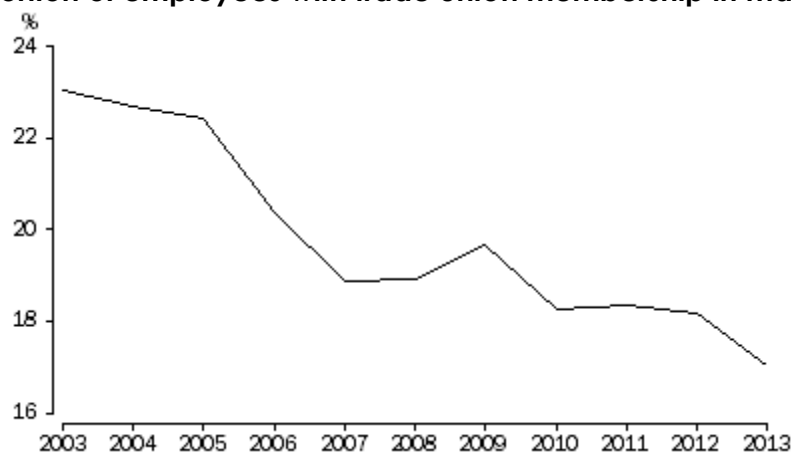
⁴⁹⁹ Issues Paper 1, p.iv

in the wider community and economy are the “clients” of this review whose interests need to be considered, not the organisations making submissions.

1994. Self-interest of WR organisations, particularly unions seeking to reverse massive and sustained decline in support, should be of no relevance to the PC's recommendations.
1995. In the private sector, just 12% of employees are now choosing to join trade unions, half that for casuals, and lower for employees aged under 45⁵⁰⁰. The ABS indicates that:

Trade union membership has steadily declined over recent years, with 2013 being the lowest proportion in the history of the series.

Proportion of employees with trade union membership in main job



1996. Whether this is a good thing or a bad thing for our country remains to be seen, and attempts to turn this around are a matter for trade unions. Reduction in union membership is a persistent social trend not only in Australia but throughout the developed world, particularly in the Anglosphere.
1997. Notwithstanding decades of union decline, few other WR systems globally have so encouraged and rewarded the creation and registration of collective organisations of employees and employers. Few other national systems have vested them with such power and in few other systems have unions been such a significant and successful force in shaping the development of the WR system in directions advantageous to them.
1998. In this review, unions will (presumably) be a participating interest variously supporting the status quo and calling for changes purportedly in the interests of those they represent. It would be very surprising if unions were not passionate defenders of the

⁵⁰⁰ 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6310.0>

current *FW Act* given it was deliberately drafted to advantage them and to counteract the persistent reduction in support for them amongst employees.

1999. The PC will make of this what you make of it and engage with submissions on their merits. Perhaps the only caution we would offer is that the PC is entitled to be very sceptical of union claims to speak for all employees, and in particular for the unemployed or casual employees. Ultimately, what is good or bad for registered organisations (unions or employers organisations) is quite irrelevant to identifying the best WR framework for Australia's future.
2000. However, the regulation **of** trade unions is more important than ever, evidenced by various, well-publicised instances of unlawful and criminal conduct. The PC has indicated that it does not want to engage with the specific governance of individual unions⁵⁰¹. However, the more general imperative to properly regulate the financial conduct and accountability of unions is, and must remain, a key part of the FW framework being considered by the PC.
2001. Notwithstanding their declining clientele, unions are major financial undertakings and are substantial employers in their own right. They administer hundreds of millions of dollars of members' money and there is a clear policy imperative to ensure proper accountability and governance.
2002. AMMA, on behalf of employers in the resource industry, supports the passage of proposed changes to strengthen regulation and accountability. However, this should go further and require all unions and employer organisations to be subject to the *Corporations Act 2001*, as AMMA is, and to the same responsibilities and penalties applicable to those running trading corporations.

Recommendation 9.5

Registered trade unions and employers' organisations should become subject to the governance, financial and reporting obligations (and penalties) that apply to corporations.

Recommendation 9.6

In the absence of full application of the *Corporations Act 2001* to unions and employer organisations, they should become subject to the revised responsibilities set out in the *FW (Registered Organisations) Amendment Bill 2014* which is currently before the federal parliament.

SPONSORED FOREIGN WORKERS⁵⁰²

⁵⁰¹ Issues Paper 1, p.6.

⁵⁰² Some might see the term "Foreign Workers" as a touch pejorative and exclusionary, and it appears quite deliberately used rhetorically by opponents of the system to create a sense of the alien or other for these working people. This is very unfortunate given high proportions of 457 visa workers ultimately transition to permanent residency. The website for example refers to "Overseas Skilled Workers", which seems a less loaded and more appropriate term.

2003. In Issues Paper 5⁵⁰³, the PC raises WR issues for sponsored foreign workers. This appears to principally be directed at those entering Australia under 457 temporary skilled work visas.
2004. The PC is quite correct that 457 visas have become a contentious issue. However, contention in this area, campaigns by trade unions, or indeed differences between unions and employers make this a WR issue or something relevant to this review. 457 visas are creatures of migration law and policy.
2005. The interaction of 457 visa workers and the WR system is quite straightforward:
- a. An employee is an employee for the purposes of the *FW Act* regardless of their visa status as long as they meet certain criteria.
 - b. All employees working in Australia, regardless of their nationality, residency or visa status enjoy their full rights and entitlements under the *FW Act*, awards, etc.
 - c. If there are particular vulnerabilities or concerns for any cohort of workers, these are addressed through enforcement, including proactive enforcement by the FW Ombudsman and the Department of Immigration & Border Protection.
2006. The 457 visa system is a creature of migration law and regulations, and the skilled migration policies of the Commonwealth. WR laws can be taken as a given in this process – they apply in full, they should be enforced, and where there are problems or breaches, appropriate penalties should apply.
2007. There is some interest from unions to directly or indirectly use bargaining to somehow restrict the capacity of enterprises to sponsor 457 visa holders, something which should be stamped out as both an unacceptable interference with the efficient running of enterprises, and as a danger of cutting across the multi-cultural community in our workplaces.
2008. Some argue WR laws are being breached for some 457 visa holders. To the extent that is correct, the laws should be properly enforced via the inspectorates, and such problems in no way demonstrate any problem with the migration law or our visa system.
2009. Again, simply because trade unions are exercised about a policy matter, and employers have contrary policy views, does not make it a WR matter, nor bring it within the scope of this review.

Minimum salary and occupational controls

2010. Lower-paid and lower-skilled occupations are not able to access the 457 visa system, which is about facilitating temporary, **skilled** migration.

⁵⁰³ Issues Paper 5, p.14

2011. There is a minimum salary threshold of \$53,900 per year⁵⁰⁴ for access to a 457 visa which equates to:
- a. 61% higher than the national minimum wage of around \$33,000⁵⁰⁵.
 - b. 38% higher than the typical award tradesperson's minimum wage of around \$39,000⁵⁰⁶.
2012. In terms of what is actually paid, the average base salary for 457 visa workers is \$89,100⁵⁰⁷, and average total remuneration is \$96,300⁵⁰⁸. This is 24.8% higher than average weekly earnings across all industries of \$77,136⁵⁰⁹.
2013. 457 visas are also only available from a prescribed set of occupations, listed on the Consolidated Sponsored Occupations List⁵¹⁰, further distinguishing such work from the lower-paid.

Extensive and well-resourced enforcement

2014. The Department of Immigration & Border Protection in conjunction with the inspectorate, the FW Ombudsman, can and does enforce and correct any underpayments or denials of workplace entitlements for 457 visa holders. FWO inspectors have also been "dual badged" as migration inspectors to be able to address the range of concerns that may be raised with them.
2015. Overseas-born workers, and those for whom English is a second language, are considered one of the cohorts of our workforce (along with, for example, younger workers or the lower-paid) who require particular information, assistance and support in knowing their employment rights and how to enforce them. This is regardless of visa and residency status, although the FW Ombudsman also maintains direct resources for 457 visa holders.
2016. The FW Ombudsman website explains its services and support for 457 visa holders quite clearly⁵¹¹, including:

Subclass 457 visa monitoring

We work with the DIBP to monitor certain subclass 457 visa arrangements. Our Fair Work Inspectors have been appointed as Migration Inspectors.

We check that 457 visa holders:

⁵⁰⁴ The Temporary Skilled Migration Income Threshold (TSMIT)

⁵⁰⁵ <http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>

⁵⁰⁶ https://www.fwc.gov.au/documents/documents/modern_awards/award/MA000010/default.htm

⁵⁰⁷ Subclass 457 quarterly report quarter ending at 31 December 2014, <https://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm> - Table 1.08 Average nominated base salary for primary applications granted in 2014-15 to 31 December 2014

⁵⁰⁸ Subclass 457 quarterly report quarter ending at 31 December 2014, <https://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm> - Table 1.09 Average nominated total remuneration for primary applications granted in 2014-15 to 31 December 2014

⁵⁰⁹ 6302.0 - Average Weekly Earnings, Australia, Nov 2014, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>

⁵¹⁰ <http://www.immi.gov.au/Work/Pages/skilled-occupations-lists/csol.aspx>

⁵¹¹ <http://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>

- are being paid the market rate specified in their approved visa
- are doing work which matches the job title and description approved in their visa.

We also make sure that employers who sponsor 457 visa holders are cooperating with us and DIBP so that we can monitor the arrangements effectively.

The information we collect is passed on to DIBP for further investigation and enforcement, as required.

2017. Note also that the FW Ombudsman offers information in 27 languages, translation services, and community presentation packages in 13 languages.⁵¹²

Declining numbers of 457 visa holders

2018. It is also worth putting the relevance of this issue into context:

- a. The number of primary 457 visa holders in Australia on 31 December 2014 was 90,040⁵¹³, 0.8% lower than the same period in the previous year (90,780) and 22.6% lower compared to November 2014 (110,360)⁵¹⁴.
- b. It appears in a typical month, approximately 110,000 457 visa holders work in Australia, in a workforce of 11.6 million people. 457 visa holders thereby equate to just 0.9% of persons employed in Australia.
- c. The use of 457 visas is also declining markedly:
 - i. In 2012, 6,000 to 7,000 457 visa applications were lodged monthly⁵¹⁵.
 - ii. In the most recent monthly data, the number of primary applications lodged was 4,360 in December 2014, and less than 5,000 applications have been lodged per month since 2013⁵¹⁶.

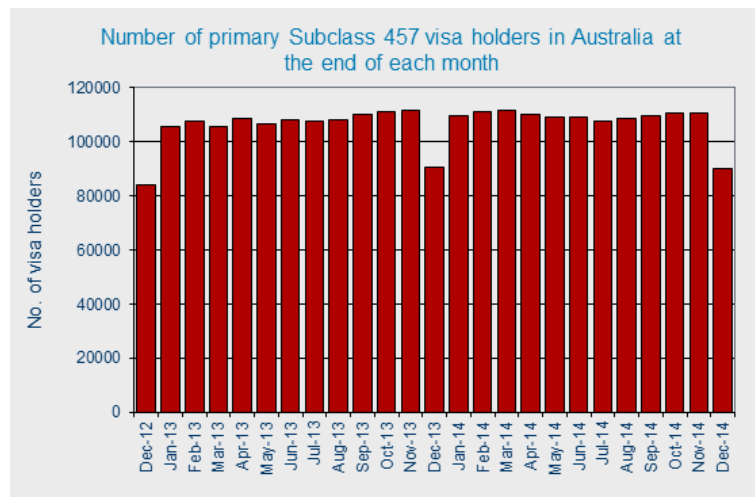
⁵¹² <http://www.fairwork.gov.au/contact-us/language-help>

⁵¹³ Source: Subclass 457 quarterly report quarter ending at 31 December 2014, <https://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm>

⁵¹⁴ This seasonal decrease can be attributed to the holiday period where employees return to their country of origin.

⁵¹⁵ <https://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june12.pdf>

⁵¹⁶ <https://www.immi.gov.au/media/statistics/pdf/457-quarterly-report-2014-12-31.pdf>



2019. This is not to say that the rights and entitlements of 457 visa holders are not important, nor that they should not be protected. However, unique interests and considerations for just 0.9% of persons employed in Australia, who are subject to dedicated protections and regulation, should not drive the future of WR regulation for the other 99% plus of the workforce in this review.

This area is frequently reviewed

2020. The PC may also wish to take into account the frequency of reviews into the 457 visa system, including multiple independent integrity reviews⁵¹⁷. This is an area which has been examined and re-examined extensively, and in which legislation and regulation has changed with some frequency.

2021. The Australian government most recently received expert recommendations on the 457 visa system in 2014 and is acting on them. This work in the migration portfolio is being progressed and it does not appear to be ground that can usefully be further traversed in this WR-centred review. AMMA has made extensive submissions to the reviews to date which are available on AMMA's website at www.amma.org.au.

PC questions regarding sponsored foreign workers

2022. The PC poses two questions in Issues Paper 5⁵¹⁸:

- How does the WR system affect the use of sponsored foreign workers?*
- Does any element of the WR system affect the incentives of employers either towards or away from the use of sponsored worker visas?*

2023. There are two possible ways to respond to this.

2024. **View 1:** Viewed one way, and as set out above, it is not the WR system which drives the use of sponsored foreign workers under 457 visas. Domestic scarcity of specific

⁵¹⁷ <http://www.immi.gov.au/pub-res/Pages/reviews-and-inquiries/submissions.aspx>

⁵¹⁸ Issues Paper 5, p.14

skills, often globally scarce skills, drives demand for internationally available skills. Whether this demand translates into sponsorships/457 visa applications is then a function of the regulation in that area, the operation of the migration system, and strategic and cost/benefit assessments by employers.

2025. In some cases, employers simply must have skills they cannot access in Australia. In others, they will make commercial decisions based on the relative additional costs of hiring international workers because it is more expensive to use 457 visas than hiring Australians.
2026. Critically, there is no WR saving or advantage to a sponsored international worker, and indeed it costs more to recruit and employ someone from outside Australia than it does to employ domestically. Award, agreement and other workplace costs and liabilities apply equally to employees born in Australia, resident in Australia and those working under 457 visas.
2027. Viewed from this perspective, the WR system does not affect the use of sponsored foreign workers, and provides no incentives for employers either towards or away from the use of sponsored worker visas.
2028. **View 2:** Alternatively, some might argue that domestic skills shortages, to the extent they drive demand for 457 visas, are impacted on by the WR system. For example, some might argue Australian training wages are prohibitively high (or low), or that rules on casual employment make it impossible to work and study, or alternatively that wages for particular skilled professions and occupations do not encourage occupational renewal. Lifting things up to a more fundamental level, some might argue the entire WR system is not generating labour demand such that skills shortages are created due to skills not being developed.
2029. The Australian labour market is operating far from acceptably and we do need to ensure there is scope and incentive to develop skills for Australians. However:
 - a. No labour market is perfect. Labour markets for scarce skills are increasingly global and all countries need international workers. Australia's OECD counterpart countries, particularly key comparators such as New Zealand, the UK, the USA and Canada, all have visa arrangements for temporary skilled entry and take in thousands of skilled workers per year, many of them Australian.
 - b. It would seem impossible to isolate the causation attributable to the WR system from other policy areas. How would one, for example, isolate the impact of any issues with training wage levels from problems in skills forecasting, or skills development, and the complexity of the VET system?
2030. **What to make of this:** Employers are not arguing the WR system forces or incentivises them to use international workers. Rather, employers make choices in this area based on their skills and operational needs, and are satisfied with pursuing any changes to the 457 visa system through the migration portfolio. For all the rhetoric in this area, we suggest unions also recognise that migration visas are a product of the migration system, not the WR portfolio.

2031. Employers do not consider sponsored work on 457 visas to be relevant to this review, nor do 457 visas either justify or preclude any particular changes to the WR system. The PC can reliably proceed based on the first of the views set out above, and that 457 visa policy is not relevant to the best WR system for the future.

Recommendations

Recommendation 9.7

The PC should recognise the 457 visa system is regulated through migration law and not WR law, and should not make recommendations on the future of the WR framework based on sponsored foreign workers.

Recommendation 9.8

Clauses in enterprise agreements that seek to limit the use of skilled international workers (however framed⁵¹⁹) should become a specifically non-allowable/prohibited matter in bargaining and agreements. Such clauses should not be able to be sought by unions in negotiations towards registered agreements, and should not be able to create rights to take legally protected industrial action.

PUBLIC SECTOR AND WORKPLACE RELATIONS

2032. AMMA represents the private sector rather than the public sector, but we note the PC raises public sector WR in Issues Paper 5.⁵²⁰
2033. As the PC considers the future of the system it may be challenged with examples or “what ifs” from the public sector. For example:
- a. Some persons employed in the public sector may have little or no alternative market for their labour or no alternative employers (perhaps ambulance drivers or air traffic controllers).
 - b. Some persons with very high levels of income may only have limited employers in the public sector, perhaps some medical specialists.
2034. AMMA has some key concerns in relation to public sector workers and the FW Act's transfer of business rules. These are addressed under “Transfer of business” in Part 7 of this submission.

⁵¹⁹ For example as job protection or Australian worker provisions.

⁵²⁰ Issues Paper 5, pp8-9

2035. The PC notes the exceptional nature of public sector employment at Part 5.5 of Issues Paper 5⁵²¹, and the different issues it presents compared to private sector employment.
2036. The PC appears to acknowledge that public sector employment is often an exception to the rules of employment generally. Employees agree and emphasise that exceptions should not drive the rule.

Recommendation 9.9

If exceptional or atypical issues are raised from the public sector, deal with them exceptionally for the public sector only, and do not create rules or regulation of general application in response to public sector-driven concerns.

If necessary, the PC should recommend dedicated sections of the legislation, or appendices to the legislation, to relate to public sector employment, or dedicated institutional arrangements modelled on the old-fashioned public sector arbitrator (which is already the role largely being played by some state tribunals).

If additional “complementary measures”⁵²² are needed to realise the benefits of reform for the public sector, put them in place for the public sector, but isolate/quarantine them from provisions of general application covering private sector work.

TCF OUTWORK AND PIECEWORK

2037. AMMA does not represent employers of TCF outworkers. However, resource industry employers do have to navigate legislation peppered with exceptions and complexity for small subsets of employment, which make interpretation harder and add to the length of legislation and overall complexity of the WR system employers need to work with.

Recommendation 9.10

Exceptional or atypical cohorts of employment, for which special or additional regulation applies, should be subject either to separate, stand-alone legislation, or all such regulation should be excised from the principal statute into stand-alone appendices at the back of the FW Act.⁵²³

ABCC / CONSTRUCTION INDUSTRY

⁵²¹ Issues Paper 5, pp.8-9

⁵²² Issues Paper 5, p.9

⁵²³ This proposal is advanced with absolutely no position or submission on how such work should be regulated, the levels of regulation, or the levels of entitlements for the employees covered.

2038. In Issues Paper 1, the PC lists a set of matters which, whilst intersecting with the WR system, are not intended to be examined and are described as “largely not in scope”⁵²⁴. This includes:

Institutional arrangements in the construction industry, which were addressed in the Commission's inquiry into Public Infrastructure.

2039. However, the PC has recently found that:

The industrial relations (IR) environment in construction has long been seen as problematic. It exhibits greater than average levels of industrial disputes. There are concerns about excessive union control of work sites and expedient deals between head contractors and unions to buy industrial peace and preserve the market advantage of good relationships. Multiple reviews have found unlawful (and sometimes criminal) conduct in some parts of the industry — mainly involving larger commercial building projects rather than infrastructure projects. A prominent concern is that union and employer behaviour is not only fuelling unlawful conduct, but also frustrating productivity and raising costs.⁵²⁵

2040. One of the key institutional arrangements in the building and construction industry is the specialist body charged with enforcing WR laws, and in particular key protections on freedom of association and ensuring there is no unlawful conduct in day to day onsite workplace relations.

2041. The current specialist enforcement body at the Commonwealth level is FW Building and Construction (FWBC).⁵²⁶

2042. The resource industry has long been a strong and constant supporter of specialist regulation in the Australian building and construction industry, especially following the findings and recommendations of the Cole and earlier Giles Royal Commissions.

2043. AMMA and its members are very strong supporters of the restoration of the Australian Building and Construction Commission (the ABCC) with the full former powers and responsibilities it discharged prior to the deliberate watering down by the previous government. This includes strongly supporting the passage of the two Bills yet to be passed by the current Parliament:

- a. *The Building and Construction Industry (Improving Productivity) Bill 2013.*
- b. *The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013.*⁵²⁷

2044. It is for the PC to determine whether the ABCC and specialist regulation of WR in the building and construction industry is within or beyond the scope of this inquiry, and it is the case that the ABCC and the appropriate suite of its powers were specifically

⁵²⁴ Issues Paper 1, p.6

⁵²⁵ Productivity Commission (2014), *Public Infrastructure Inquiry Report*, July 2014, p.30

⁵²⁶ <http://www.fwbc.gov.au/our-role/>

⁵²⁷ AMMA lodged a major support of this legislation and restoration of the ABCC in late 2013: <http://www.amma.org.au/help/mining-reform/mining-publications/submission-to-the-senate-standing-committee-on-education-and-employment-improving-productivity/>

recommended by a Royal Commission to address unlawful and unacceptable conduct which continues to plague the industry.

2045. However, we will say that it is a major issue for AMMA and its members, and that there is the need for additional regulation in the industry as proposed by the Bills currently before parliament.
2046. We note that the case for restoring the ABCC, and indeed that organisation's proven track record prior to changes in 2012, goes directly to the considerations the PC is directed to in these terms of reference. The PC also extensively examined the former ABCC in its 2014 Report on Public Infrastructure.

Recommendation 9.11

To the extent the PC engages with and makes recommendations on workplace relations in the building and construction industry, it should support the passage of the two Bills currently before Parliament, and the restoration of the ABCC with its previous powers and responsibilities.

2047. In its 2014 Public Infrastructure Inquiry Report, the PC also recommended that:

Strengthening of regulatory responses is clearly needed, but the industry itself needs to embrace changed behaviour.

A sensible starting point is for all jurisdictions and the Australian Government to deploy the Victorian guidelines (or something akin to them) for their building codes of practice. Breaching the guidelines would potentially disqualify contractors from tendering for public infrastructure projects if they had mismanaged their industrial relations arrangements or had reached 'sweetheart' deals with unions that precluded competition from sub-contractors with lower wage costs.

The Commonwealth could encourage the Australia-wide adoption of such guidelines in several ways:

- *where the Commonwealth is the procurer (say, as in the National Broadband Network), it would apply the new guidelines to its tenderers*
- *where the Commonwealth is a funder of state projects, it would require compliance with a code and guidelines embracing the Victorian principles as a precondition for funding.*

In addition to this measure, there are also grounds for raising the ceiling for penalties for unlawful conduct. This would enable the Federal Court to set penalties more commensurate with the economic damage of industrial unrest, or to provide greater deterrence where there was recurring recidivism by an employer, employee or union for unlawful conduct.

Adoption of the guidelines and higher penalties would be likely to significantly improve the industrial relations environment and avoid industrial disputes and excessively generous enterprise bargaining agreements. ⁵²⁸

Recommendation 9.12

To the extent the PC engages with and makes recommendations on workplace relations in the building and construction industry, it should maintain/repeat the recommendations of its Public Infrastructure Inquiry on:

- The importance of building codes and guidelines in encouraging lawful workplace-relations behaviours.
- Increased penalties for unlawful conduct.
- Ensuring national harmonisation of any state-based building codes.

2048. We would be pleased to provide further information and background on the industry's support for proper enforcement in this area.

INDEPENDENT CONTRACTORS

2049. The PC terms of reference make clear that the government recognises and supports the important role of independent contracting in Australia, now and into the future:

- a. The terms of reference talk about workers, not the narrower group of employees. This encompasses those working as independent contractors.
- b. The terms of reference ask the PC to consider the impact of the WR framework on "appropriate scope for independent contracting".
- c. The terms of reference also specifically encompass the *Independent Contractors Act 2006*.

2050. It appears settled that contracting is and should remain a critical element of the Australian labour market. It would be inconsistent with the terms of reference for this review to recommend any further restrictions on independent contracting, intended or unintended.

Barriers or incentives to contracting

2051. The PC poses inter-related questions on contracting:

*Are there any impediments in the current legislation to the efficient mix of independent contractors and ongoing workers?*⁵²⁹

⁵²⁸ Productivity Commission (2014), *Public Infrastructure Inquiry Report*, July 2014, p.33

⁵²⁹ Issues Paper 5, p.11

*Are there any general concerns about the WR system as it applies to independent contractors?*⁵³⁰

*Do any aspects of the WR system represent a barrier to independent contractors?*⁵³¹

2052. Independent contracting is regulated in Australia, including through both the FW Act and the *Independent Contractors Act*.
2053. However, demand for contracting is what it is. In some situations, a contract of service (employment) is appropriate, and in others, a contract for services (independent contracting) is appropriate. This decision-making is essentially operational and commercial, and should remain so. Seeking to intervene in this area, or to attempt a regulatory intervention will necessarily have an effect on the competitiveness and capacity of Australian enterprises to do business. To the extent that the use of independent contractors is a measure to increase productivity, or reduce costs, any further restrictive regulatory interventions would necessarily structure options for business sub-optimally.
2054. The use of contracting should be determined organically by each business (which may in other areas be an employer) based on its productive, competitive and operational imperatives and its strategic approaches. In particular, Australian enterprises must have globally competitive options to enter both contracts for services and contracts of service. This is particularly important as new generations or employees with new skill sets want to contract their services without employment in a growing number of areas.
2055. Unions have long opposed independent contracting and cited it as a concern, but in reality there is little evidence of a pervasive spread of contracting, nor of endemic problems being caused by contracting arrangements. Again, independent contractors are far less likely to become union members, and it is entirely rational for unions, in their self-interest, to try and maximise their customer base.
2056. This adds up to a situation in which there is no wrong to be righted and no concern which the PC should respond to in making its recommendations. There is no contracting problem in the Australian labour market and no basis for additional regulatory action.
2057. Equally, resource employers are not agitating for additional or more specific rights to contract with independent contractors, particularly not rights in legislation. The primary change employers seek in this area is stamping out the use of collective agreement clauses to limit, prohibit or regulate the use of contractors and labour hire (as outlined earlier).

Recommendation 9.13

The Australian WR system should not seek to either encourage or discourage independent contracting, nor should it be able to be used to do so through bargaining. Independent

⁵³⁰ Issues Paper 5, p.11

⁵³¹ Issues Paper 5, p.12

contracting should arise organically from the ongoing evolution of doing business in Australia, subject to existing tests and the existing levels of regulation only.

Recommendation 9.14

Unless there is some demonstrated basis to further canvass changes in this area, the PC should err in favour of making no changes to independent contracting.

A statutory definition of an independent contractor

2058. The PC asks in Issues Paper 5 “What are the advantages and disadvantages of creating a statutory definition of an ‘independent contractor’?”
2059. The resource industry does not think there is any basis for embarking on such a course, has substantial doubts about whether this is even possible, and is concerned at the impacts and consequences of trying to do so.
2060. **Advantages:** The only possible advantages identified in the paper are to “make the test simpler” and that “this might reduce ambiguity and the errors that employers and workers sometimes make in determining the nature of the employment contract”.
- a. This is highly speculative and if there is nothing beyond a vague “might” then that is not enough to attempt such a course of action.
 - b. As we set out below, such a statutory definition is not only probably impossible, but it would also be damaging and harm the economy and work opportunities. Employers are particularly sceptical of any attempt at codification to make this simpler, and would be very concerned at the unintended negative consequences of attempting to do so.
2061. **Disadvantages:** The foreseeable disadvantages of such a course of action massively outweigh the so-called advantages.
- a. Impracticality: First and foremost from the case law in this area and the inherent diversity in contracting situations, it is not clear that a useful or practical single statutory definition of independent contractor could be created, beyond the long-standing distinction between contracts of, or for service(s) which would add nothing. This area is inherently complex and contingent, and a simple or useful single definition would seem something of a pipe dream.
 - b. Complexity: The reason for distinguishing an independent contractor from an employee is complex, and that's because it is an inherently complex and contingent test or tests. Both contractual options are complex and with some cause, and whilst it is laudable to simplify (which is indeed one of the priorities

of resource employers throughout this submission), some areas defy simplification for a reason.

- c. Specificity is limiting: If a single definition were forced onto this complex area, it is almost inevitable that it would either be so broad as to be pointless, or limit or omit contracting options that employers want to use. A forced delineation of contracts for and of service(s) would inevitably have the effect of limiting capacities of some existing and future independent contractors to use this option.
- d. Additional regulation: Creating such a definition would also create a foundation for adding to regulation and forcing some future contract arrangements into the employment model. Unions and others would seize on a definition and continuously seek to narrow and qualify it. Any single statutory definition also sounds like a great vehicle for a future government to deliberately make a real mess of contracting, which many unions would support.

2062. We also note that Australia has had a dedicated *Independent Contractors Act* since 2006, and this has operated successfully without attempting a single statutory definition.

2063. Above all, employers see no wrong with the status quo which the PC should seek to right, and the status quo should remain in this area.

Recommendation 9.15

There should be no recommendation for a statutory definition of independent contractor/independent contracting.

Education and information

2064. The resource industry's 2011 message to the ABCC in its review of sham contracting is equally applicable to the PC in this review to the extent there are concerns about ambiguity and errors. Our key recommendation is to inform and assist, not attempt to change regulation.

Recommendation 9.16

If the PC is inclined to take any action following this inquiry, an aggressive and targeted education campaign should precede anything else. This could include educating individuals at the point of applying for Australian Business Numbers (ABN).

Individuals could be educated about their rights, entitlements and obligations under an independent contracting arrangement, as opposed to an employment relationship, to ensure they are fully informed.

Sham contracting

2065. The FW Act already seeks to prohibit sham contracting with a range of offences in regard to independent contracting⁵³². The PC has requested information on the adequacy of existing statutory provisions on sham contracting, noting previous submissions and examination of this issue⁵³³.
2066. AMMA knows of no basis to conclude that the current regulation is not sufficient or not operating as intended.
2067. Any such evidence needs to come from those arguing such a position, and following a review of existing material on this issue, including the 2011 review by the ABCC⁵³⁴.
2068. AMMA does not intend to engage with any changes in this area pending the PC's interim report, reiterating that we know of no basis to proceed to make any recommendations for change or to conclude that the status quo on sham contracting is not operating as intended.
2069. We can, however, assist the PC at this point by recalling the resource industry's recommendations in our submission to the 2011 ABCC inquiry into sham contracting⁵³⁵:

1. *The ABCC needs to collect hard evidence about the extent of the sham contracting problem, including where it is most likely to occur, before any further compliance mechanisms are introduced in this area.*
2. *If the ABCC is inclined to take any action following this inquiry, an aggressive and targeted education campaign should precede anything else. This could include targeting parties at the sub-sub-contractor level as well as educating individuals at the point of applying for Australian Business Numbers (ABN).*

Individuals could be educated about their rights, entitlements and obligations under an independent contracting arrangement as opposed to an employment relationship to ensure they are fully informed.

3. *If the inquiry recommends any regulatory/ legislative changes, these should be restricted in their application to arrangements involving individuals earning less than \$113,800 a year⁵³⁶. This is in recognition of the fact that high-income earners are generally not vulnerable individuals in need of extra legal protection on top of what currently exists.*

⁵³² See Issues Paper 5, Footnote 9, p.12

⁵³³ Issues Paper 5, p.12

⁵³⁴ <http://www.fwbc.gov.au/sites/default/files/ShamContractingInquiryReport-1.pdf> and <http://fwbc.gov.au/outcomes/>

⁵³⁵ AMMA Submission: <http://www.amma.org.au/help/mining-reform/mining-publications/submission-to-the-abcc-on-sham-arrangements-and-the-use-of-labour-hire-in-the-building-and-construction-industry/>

⁵³⁶ The current high income threshold is \$133,000.

4. *Allowing employers to give enforceable undertakings as an alternative to prosecution in the first instance would be a reasonable regulatory measure following evidence of the extent of the sham contracting problem being provided and an education campaign being conducted. Such a measure would require changes to be made to the Building & Construction Industry Improvement Act in order to allow the ABCC to accept such undertakings from employers.*
5. *'Opt-out' arrangements could be considered whereby parties earning more than \$113,800⁵³⁷ a year could sign a statement saying they are fully informed about the independent contracting arrangement they are entering into and understand their liabilities under such an arrangement, including workers' compensation coverage and superannuation contributions.*

Changing generational aspirations

2070. The PC is directed to give key consideration to “the capacity for the workplace relations framework to adapt over the longer term to structural adjustments and changes in the global economy”. One of these changes is in generational attitudes and aspirations.
2071. We note the pace of change in what constitutes work in the contemporary world, and the options for work which are being created faster than regulation can encompass. The latest example is Uber⁵³⁸, which is an organic form of self-employment driven by the opportunities offered through personal ICT technologies.
2072. Independent contracting is a tool in our labour market which provides Australia with options if the labour market of the future evolves (as many predict) towards greater demand for self-employment and flexibility for individuals to contract for their services, rather than enter employment. It would be perverse and short-sighted in the extreme for Australia to wittingly or unwittingly limit options to contract for services as more and more working Australians have such expectations (and the skills to do so).
2073. Emerging generations of Australians have strong aspirations towards self-determination, self-employment and business ownership. An example of this is the growth of franchising in recent years.
2074. The PC will undoubtedly hear calls to further regulate self-employment and independent contracting. However, this would be the wrong course to embark upon and we would be better as a country to nurture and encourage self-employment, and indeed to encourage the closely-related options of entrepreneurship and self-employment.

Recommendation 9.17

⁵³⁷ The current high income threshold is \$133,000.

⁵³⁸ www.uber.com/

Rather than any additional regulation around contracting or any attempt at a statutory definition, the PC should recommend government better support entrepreneurship in Australia and the greater number of Australians, especially younger Australians, aspiring to be self-employed and to carve out their own labour market opportunities through self-employment and entrepreneurship.

LABOUR HIRE

2075. The PC addresses labour hire at p.13 of Issues Paper 5. A range of issues have been grouped together in Section 5.6 under the label of "Alternative Forms of Employment" which need to be unpacked to understand the practice of labour hiring.
2076. Employers see no link between labour hire work and independent contracting. Labour hire work is clearly employment, but it is a unique subset of employment for a labour hire company in which work is directed to occur at one or more client workplaces.
- a. There are many reasons why host enterprises may want to use labour hire, which centre on either the temporary or uncertain nature of particular work, and/or a risk assessment not favouring an ongoing hire.
 - b. At no point, however, is there anything cheap or undercutting about labour hire work. WR obligations are enforced in full and costs to the "host" enterprise can be higher than direct employment.
 - c. There are also a variety of reasons why individuals want to do agency work, including additional income if paid as a casual, flexibility in where and when they work, and variety in work and workplaces. Many nurses, for example, do agency work around their work and family priorities.
 - d. We do not agree with the PC that "*Labour hire businesses provide a means by which people who do not wish to become independent contractors can have ongoing employment with one employer, while being able to obtain work at other enterprises*". It is true that such employment helps individuals work in multiple workplaces without paying a tax penalty, but plenty of people work multiple jobs without ever considering becoming independent contractors (e.g. students and nurses).
 - e. The PC is quite correct in observing that "*there is no equivalent to sham contracting for labour hire This reflects that any labour hire employee is still covered by the FWA*". There should be no further bracketing or grouping together of sham contracting and labour hire which would be entirely without foundation.
2077. Employers view labour hire work as simply one cohort of the overall labour market, and as an entirely legitimate form of commercial service between enterprises and employment for many thousands of Australians.

2078. There has been a level of historical trade union opposition to labour hire work globally, as with casual work, and many unions don't like it because employees are harder to organise and generally less likely to join trade unions, or join different trade unions.
2079. A very small number of economies prohibited or restricted labour hire in the first half of the 20th Century. However, global thinking has changed completely and no longer disparages labour hire or treats it as illegitimate. Major economies have moved away from punitively regulating in this area.
2080. The PC should be very wary of treating labour hire employment as some form of questionable or illegitimate "other". Unless there is evidence to do so, labour hiring should not be regarded as a concern, and AMMA knows of little or no such evidence, particularly not for labour hiring in and in support of the resources sector.

Recommendation 9.18

Unless some significant trigger level of concern is born out in data or evidence to the review, the PC should not treat labour hiring as any special class or part of the WR system requiring dedicated consideration, action or regulation. In the absence of such evidence coming out in initial submissions in March, this issue should not progress to the PC's interim report.

2081. Going back to the current and foreseeable challenges in the terms of reference, labour hire offers a mechanism to manage risk, and secure skills and labour input where there is no commercial or operational basis for an ongoing or "permanent" hire, or on balance risks mitigate against an ongoing hire:
- a. Labour hire thereby supports Australian enterprises in being competitive, productive, flexible and responsive, and in being nimble and capable of responding to changing market and client needs.
 - b. Labour hire reduces and helps manage risk in more volatile markets, particularly for globally exposed sectors. Labour hiring is directly relevant to the PC's consideration of key parts of its terms of reference:
 - i. *"the ability of business and the labour market to respond appropriately to changing economic conditions"*.
 - ii. *"the ability for employers to flexibly manage and engage with their employees"*.
 - c. In reducing risk and giving businesses strategic options for flexibility and output without additional ongoing labour costs, labour hiring helps make Australia a more competitive and attractive place to invest and do business.
 - d. It adds to employment opportunities both directly with labour hire employers, and as a product of the work on-hired staff contribute. Labour hire can also

be a precursor to direct hiring or a scaling-up of labour hired work into extended contracts.

- e. Labour makes operations more productive, lending labour inputs to work where and when required.

2082. There are also parts of modern, complex operations which the employer/operator does not want, nor should seek, to manage through direct employment. In the resource industry, entirely distinct commercial entities often:

- a. Explore and identify resources.
- b. Construct resource production facilities.
- c. Operate resource production facilities.
- d. Feed, house, clothe, and transport those constructing and operating resource facilities.

2083. In the resource industry the "contractor" is often a major organisation and employer in its own right (as said, often employing more persons than the company they contract to). They might construct a production facility for a client, or deliver catering, cleaning, logistics, etc. for major construction and production operations. Labour hire companies provide specialists and crews to parts of the industry.

2084. These arrangements have been used for decades, are well-known, well-accepted and generally at the high rates of remuneration which typify resources employment. Trade unions often have agreements in place with those contracting to construct or support the operation of major resource industry operations.

2085. There is absolutely no systemic or structural wrong to be righted in contracting and labour hiring in Australia's highly paying resource industry. The industry is very cautious not to get caught up in any artificial arguments of non-applicable concerns coming from other quarters.

Union attempts to stop labour hiring and contracting

2086. One widespread contemporary development regarding labour hire employment and the capacity of enterprises to enter into commercial contracts should be of particular concern in this review, and should be addressed by the Commission in its recommendations.

2087. The Commission identifies this in Issues Paper 5⁵³⁹:

'some unions have been seeking the inclusion of terms in enterprise agreements that purport to regulate the terms and conditions to be observed

⁵³⁹ Issues Paper 5, p.13

by contractors and labour hire agencies in such a way as, in effect, to control the engagement of contract and agency staff' (BCA 2012).

'Fair Work Australia's approval in industrial agreements of clauses restricting the use of contractors is a huge issue for resource and construction industry employers' (AMMA 2012).

'fair work system enables unions to demand enterprise agreements that severely limit the use of independent contracting' (IPA 2012).

2088. An example of such a "contractor clause" emerged from litigation in 2011:

4.3 Security of Employment Arrangements⁵⁴⁰

(a) Overview

- (i) *the employer is committed to maintaining a stable and skilled workforce, recognising its contribution to the operation of the employer. Subject to the terms of this Agreement, full-time direct and ongoing employment is a guiding principle of this Agreement.*
- (ii) *the employer will take all measures to achieve employment security for the direct permanent employees of the employer. All persons covered by this Agreement recognise the importance of measures to protect and enhance the employment security, health and safety, terms and conditions of employment and career development of the Employees.*
- (iii) *The employer agrees that it is highly important that work is performed effectively, efficiently and without undue pressure or bullying, and in a way that promotes OHS and EO principles and practices in the workplace and appropriate representation of Employees should they so request. The employer will ensure that its employment practices are consistent with the above principles and practices.*

(b) Contractors

- (i) *Where the employer makes a definite decision that it intends to engage contractors or labour hire companies to perform work covered by the Agreement, (which would ordinarily be undertaken by the employees), the employer shall consult with the employees and their representatives, in accordance with this clause.*
- (ii) *In the normal course, it is expected that consultation will occur within the 14 days leading up to the commencement of the work by the contractors / labour hire employees. If for any*

⁵⁴⁰ Australian Industry Group v Fair Work Australia [2012] FCAFC 108 (14 August 2012), at [12]

reason this does not occur, or if the employer has less than 14 days' notice of the need to commence the work, consultation will occur as soon as reasonably practicable - and in any case not more than 14 days after the contractors / labour hire employees commence work.

- (iii) For the purpose of the consultation, the employer must inform the employees and their representatives of:*
 - (A) the name of the proposed contractor(s) / labour hire company;*
 - (B) the type of work proposed to be given to the contractors(s) / labour hire company;*
 - (C) the number of persons and qualifications of the persons the proposed contractor(s) / labour hire company may engage to perform the work; and*
 - (D) the likely duration.*
- (iv) The employer will consult with the employees and their representatives over the following issues:*
 - (A) safety; and*
 - (B) inductions and facilities for contractor and labour hire employees.*
- (v) the employer shall only engage contractors and employees of contractors, to do work that would be covered by this Agreement if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement. This will not apply where the employer is contractually obliged by the head contractor / client to engage a specific nominated contractor to do specialist work.*
- (vi) This clause does not apply in respect of specialist contractors engaged by the employer where the provisions of sub clause (v) are met. However, this exclusion will not be effective if the specialist contractor further sub-contracts any portions of the works for which it has been contracted by the employer, unless otherwise agreed by the employer and the union.*
- (vii) In the event of a dispute about whether consultation has occurred under this clause, the employee or the union may refer the matter to the Disputes Board to determine. Nothing in this clause will be taken to in any way limit, prevent or delay the commencement of work by contractors or employees, or provide justification for work to cease pending determination by*

the Disputes Board. Any commencement of work will not prejudice the outcome of the dispute. The Disputes Board's determination shall be final and binding on the Parties (and there shall be no right of review by FWA in respect of such a decision).

- (vii) *No employee shall be made redundant whilst labour hire employees, contractors and/or employees of contractors, engaged by the employer, are performing work that is or has been performed by the Employees on the particular site or project. This clause does not apply in respect of specialist contractors.*

2089. There has been extensive litigation on whether such clauses can legitimately be included in agreements under the FW Act. Unions currently pursue very carefully crafted anti-contractor and anti-labour hire provisions, deliberately worded to steer through apparent contradictions with the Act. It is, however, fair to say that in unions' minds, such clauses create greater expectations and obligations upon employers than may be apparent from a plain reading of them.
2090. These clauses constitute deliberately punitive treatment of businesses exercising quite legitimate and lawful rights to properly structure the functions of their operations between direct engagement of employees, contracting with labour hire companies, and contracting with other businesses to deliver functions which were previously delivered by directly engaged staff.
2091. It is critical to understand that the contracting prohibited or punitively regulated by such clauses is not generally labour contracting by individuals or former employees. Unions are actually trying to use anti-contracting clauses to control (and discourage) commercial and operational decisions to contract specific functions to other commercial enterprises, which are employers in their own right.
2092. Australia's major labour hire companies are far larger in terms of their employee numbers than most of the companies contracting work to them, and it would not be correct to address such contractor clauses from unions from the perspective of either:
- a. An individual who contracts for services to a single employer, which some refer to as the dependent contractor model.
 - b. The rights and interests of employees of contracting companies and labour hire agencies. Unions are not pursuing such clauses to protect employees of contracting or labour hire companies.
2093. This is solely about keeping established union members in direct employment at host companies and stopping employees of contracting companies and labour hire agencies taking over such work and gaining jobs, even where it is commercially

prudent to do so and would support the retention of more jobs and the ongoing sustainable operation of the host enterprise.

2094. In short, it is about controlling the flow of labour onto Australian worksites (this issue is discussed under “Agreement content” in Part 3 of this submission).

Such clauses are fraught and damaging

2095. Many of these clauses are framed in terms of job security, or even the importance of developing Australian industry. Job security, job retention and the development of industries in Australia are laudable aims shared by employers, employees and unions. Unfortunately, the so-called job security and contractor clauses unions are seeking to include in agreements will deliver nothing of the kind. An example of such a clause appears below:

“The employer will take all measures to achieve employment security for the direct permanent employees of the employer.”

- a. The clause places a purported legal obligation on the employer to do something which can be in contention with both the clause itself, and the duties which companies owe to their shareholders and under the precepts of corporations law.
- b. This isn’t about endeavours or priorities. It requires the employer to take “all measures” for one predefined outcome.
- c. What of a situation in which the most prudent business strategy, for the business staying in business and continuing to employ anyone, is outsourcing or using labour hire?
- d. What of a situation in which job security and the ongoing viability of the enterprise is best secured through outsourcing or reducing levels of direct engagement in some areas, including areas which are non-core, or which are more contingent on demand, or carry greater commercial risk? What if one set of employee positions covered by the agreement should rationally be excised from the business, or outsourced, to retain other positions?

2096. Another clause appears as follows:

“The employer shall only engage contractors and employees of contractors, to do work that would be covered by this Agreement if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement.”

2097. This is an attempt to transfer labour law and wage liabilities from the direct employer (the contractor or labour hire company) to the host employer who has no legal relationship with such employees.

2098. And another example:

"No employee shall be made redundant whilst labour hire employees, contractors and/or employees of contractors, engaged by the employer, are performing work that is or has been performed by the Employees on the particular site or project."

2099. This is poorly drafted. It is not clear if this means no employee's position can ever be made redundant where labour hiring is elsewhere used in an organisation.

2100. This treats employees as inherently interchangeable and pays no regard to skills or experience within different roles. Simply because labour hiring or contracting is making a contribution in one part of a complex organisation does not dictate that other entirely separate functions of the business are precluded from being structured optimally and making changes to positions in reaction to changing market or client needs.

Impact of anti-contractor provisions in agreements

2101. Unions really want these clauses included in agreements and are willing to either play very hard to get them or make concessions impacting on employees to get them (on wages, hours etc.). This is notwithstanding that the employees who work under such agreements don't want such clauses and are more focused on their wages, conditions, hours, etc.

2102. Contractor clauses are the epitome of priorities that are dictated downwards from union head offices, rather than upwards from employees at workplaces.

2103. The primary impact of these clauses is that they force managers to surrender critical capacities for commercial decision-making and force them to surrender scope for the adaptability and competitiveness Australian enterprises require.

2104. This is inconsistent with longer-term structural changes in organisations throughout the developed world. A wide range of organisations have for many years sought to refine their operations to core work and core functions. Some peripheral and supporting functions are retained, but others can be more efficiently, productively and cost-effectively done by specialist businesses who can be productive and efficient in these areas through economies of scale and specialisation. The wider spread of anti-contractor clauses will rob Australian enterprises of an essential tool of positioning, targeting and refinement, which is enjoyed by competitors in other OECD countries and will give third parties unjustified control over commercial staffing decisions.

2105. To disallow organisations from making essential changes in the best commercial interests of the business risks making Australian enterprises less competitive than their colleagues in other OECD countries, and risks jobs.

2106. Taking forward this notion of risk, contractor clauses rob enterprises of the capacity to minimise assessed risks and to position their businesses for changing commercial

and operational circumstances. They also entrench cost structures competing organisations may not be saddled with.

- 2107. To set in stone levels of wages and conditions for future employees with no regard to their productivity, exchanges on flexibility, and costs and capacities to manage labour, can be irresponsible and potentially damaging⁵⁴¹. These provisions create a “bargained floor” and would entrench terms and conditions entirely divorced from any flexibilities or efficiencies which may have given rise to them.
- 2108. Such clauses also restrict avenues into work for the unemployed who may have had job opportunities in enterprises being contracted in greater numbers, were they able to work across enterprises without being tied to highest common denominator levels.
- 2109. Such clauses also rob Australian managers of the capacity to pursue the best possible organisational structures and mixes to manage the current and foreseeable operating environment, and to do so in a quick and efficient manner, given that such clauses often require consultation with unions before decisions are made. These clauses threaten to stop Australian employers being sufficiently nimble and adaptable to changing circumstances.
- 2110. Investors would also be concerned at the extent to which the widespread use of such clauses makes Australian employers less able to manage growing risk and uncertainty, which is something taken into account by investors.
- 2111. And finally, these clauses disparage contracting and labour hiring, and make it something to treat as exceptional or as the other and to be approved by trade unions.
- 2112. It is also worth recalling that, under the genesis of the Australian WR system, using the conciliation and arbitration powers under the constitution, such a claim would almost certainly never have made it into an award or agreement. We had in Australia a clear recognition that some matters pertained to the employment relationship, and others were the sphere of management decision-making and the discharge of differing areas of legal relationships between commercial entities.
- 2113. The PC has an opportunity to restate going forward that there are still areas that should remain managerial prerogative, and that there are matters that cannot be regulated by trade unions or tribunals through contortions of employment law.

Prevalence of anti-contractor provisions

- 2114. The PC queries the prevalence of anti-contractor and anti-labour hire clauses in agreements. Data on the proportion of operative agreements containing such provisions would need to come from the Department of Employment or the FWC. AMMA can, however, assist the PC through our experience assisting employers in addressing union bargaining claims.

⁵⁴¹ Issues Paper 5, p.14

2115. AMMA assists our members in their dealings with the range of unions with coverage of employees across the resources industry. Our professional staff report that **almost all** negotiating/agreement claims from all unions in current bargaining rounds (during 2014 and 2015) include claims for anti-contracting/anti-labour hire provisions of the type outlined above.
2116. Furthermore, these attempts to seize legitimate strategic, commercial decision-making from management are “inviolate” requirements for unions in almost all cases. They are not up for negotiation, and unions are taking a position that they will simply not enter into or sign off on any agreement that does not contain the union’s “standard” or chosen contractor provisions. With union monopoly over greenfields agreement making, the clauses are almost obligatory in new project agreements (see the chapter on Greenfields agreements in Part 3 of this submission for further details).
2117. Thus, where terms and conditions of employment can be agreed, including wages, agreements will not be finalised unless employers surrender critical operational and competitive decision-making to trade unions.
2118. This means a pre-condition for securing a workplace agreement in the contemporary resource industry, which is often essential for securing investment or being able to plan and run operations, is surrendering an essential strategic capacity of management to unions. Unions are making the price for entering into any agreement (and thereby gaining industrial peace), the employer surrendering their power to use contractors or labour hire to union determination, if not outright discouragement through punitive costs and controls.
2119. It is also important to recognise that the impact of such provisions extends beyond instances in which they actually make it into registered agreements. In the minority of cases where employers refuse such regulation, the cost for doing so will be additional wages or conditions, or employers not pursuing claims that would make work more productive, or making other costly or inefficient concessions to trade unions.

Greenfields bargaining

2120. A particular indictment on the current WR system is the extent to which union insistence on such clauses can hold up greenfields agreement making. It is absurd to have a situation in which there are not yet any employees to instruct a union or join a union, but what can be agreed on terms and conditions of employment cannot be finalised to the point of registration because a union wants to rob the employer of its future capacities for commercial decision-making in the interests of the business.

Recommendations

2121. Employers have litigated extensively to argue such provisions are not lawful under the *FW Act*. This remains a point in litigation.

2122. However, at the time of writing, ways are being found to shoehorn such clauses into agreements to navigate a number of FWC and Federal Court decisions and provisions of the FW Act which do not appear to allow such claims. It is not sound to have unions seeking to lead employers into bargaining which tests the scope of what the FW Act allows in this way.
2123. However, the problem here is a policy one, and as a matter of policy when one considers how the WR system should be able to be used, and what it should deliver for our economy and doing business in Australia, such clauses should not be allowed to be included in agreements or give rise to protected action.

Recommendation 9.19

Anti-contracting and anti-labour hiring clauses, being clauses purporting to restrict or disparage the legitimate innate legal capacity of businesses to contract work commercially or use labour hire, should be specifically prohibited and excluded from being included in agreements or in union bargaining claims that can give rise to protected industrial action. They should become prohibited or non-allowable matters.

2124. This also needs to be supported by capacity to react to and correct trade union attempts to work around or go behind such a sensible restriction:

Recommendation 9.20

This must be supported by a regulation-making capacity for the Minister for Employment to add ongoing specificity to non-permitted or prohibited matters.

COMPETITION LAW⁵⁴²

2125. At Section 5.4 of Issues Paper 5⁵⁴³, the PC queries whether competition law is “a neglected limb of the workplace relations system”.
2126. The PC further addresses the interaction, or indeed non-interaction of workplace and competition policy at pages 5-8 of Issues Paper 5, and summarises the current situation thus:

... aside from some secondary boycotts, WR is effectively excised from competition law. Instead, industrial law permits some degree of anticompetitive conduct by unions and employer associations, and offsets it by constraining the exploitation of market power (for instance, an employer must still pay at least minimum wages and comply with the NES. Similarly, only some forms of industrial disputes are lawful).

2127. Key starting points/principles for employers in this area:

⁵⁴² Note, Secondary Boycotts are addressed in Part 3 of this submission, “Industrial Action”.

⁵⁴³ Issues Paper 5, pp.5-8

- a. **Support competitive enterprises:** The primary “competition” concern of industry is that WR laws support the competitiveness of Australian enterprise. As set out throughout this submission, the resource industry supports reconsideration of how existing provisions of our WR legislation, including those on enterprise bargaining agreement content and the taking of protected industrial action, operate and impact on the competitiveness of Australian enterprises.
- b. **Support competitive employees:** With the skills and employability to be competitive in changing domestic and global labour markets, and working subject to minimum terms, conditions, workplace rights and rules which support, rather than limit, scope for their employment, and do not price them out of the market for jobs.
- c. **Secondary boycotts must be effectively prohibited:** The primary concerns for employers in the discharge of the *Competition and Consumer Act 2010* and the work of the ACCC remain centred on effective prohibitions against secondary boycotts.
 - i. These prohibitions must continue to comprehensively dissuade Australian unions from pursuing secondary boycott or indirect industrial action on suppliers, clients, etc. that are not party to industry disputes or agreement negotiations.
 - ii. Their success is demonstrated when unions understand the rules and refrain from secondary boycott conduct, which has generally been the case under the current *Competition and Consumer Act 2010* and its predecessors⁵⁴⁴.
 - iii. The ACCC must do its job promptly and take action to enforce laws on secondary boycotts. Workplace relations is not a unique or dark art which should see any regulator, or indeed the police, fail to discharge their duties in relation to any prohibited conduct they are notified of.
 - iv. There have been well publicised concerns with the promptness of ACCC action in relation to actions against suppliers to the construction industry, which we understand are now subject to litigation brought by the ACCC.
 - v. The ACCC also needs some introspection, and to consider how it could more promptly and clearly address allegedly prohibited behaviour, and send refreshed and renewed signals to unions not to test or transgress the law in this area.
- d. **Union competition is not welcome in workplaces:** One area of competition that employers clearly do not support is the internecine struggle between unions being played out in our workplaces, to our detriment and cost, for the ever-declining proportion of working Australians interested in joining them. As we make clear in Chapter 5 of this submission on ‘Union access to

⁵⁴⁴ Putting to one side the confused situation created by the passage of the Industrial Relations Reform Act in 1993.

workplaces', union entry can remain part of the system, but there needs to be a review and rebalancing of union entry for discussion purposes.

Focus on getting our workplace laws right

2128. Above all, Australia's challenge is to improve our WR laws and focus on getting these laws right.
2129. Workplace laws and statutes have always coexisted with other areas of the law and with the advent in recent years of, for example, superannuation, privacy, anti-discrimination, workplace surveillance laws, etc., the spheres of law which employers need to navigate in addition to workplace laws is increasing.
2130. The PC raises some interesting interactions, or potential interactions, between competition law and workplace law and practice, and in particular the actions of unions and some employers⁵⁴⁵.
2131. However, this should not distract from the focus on the *FW Act*, and fixing the manifest and myriad problems with the *FW Act*.

Recommendation 9.21

Address employment challenges through employment legislation. This review should focus on improving our employment legislation and ensuring our system of employment laws better delivers on key goals for the system, such as those in the terms of reference, now and into the future.

Recommendation 9.22

The existing clear demarcation between competition and workplace laws should remain in place and there should be no change to existing s.51(2) of the *Competition and Consumer Act 2010*.

Wider capacity for the *Competition & Consumer Act* to address collective bargaining

2132. The PC queries whether:

...there [are] grounds for widening the capacity of the CCA to address concerns about misuse of market power exerted through collective bargaining by employees and employer groups?

⁵⁴⁵ Issues Paper 5, pp.6-8

2133. Unions can and frequently do misuse their powers and capabilities to the detriment of our community and economy, and do so on three levels:
- a. Direct contravention and flouting of the law.
 - b. Testing the boundaries of lawful conduct as a matter of daily operating practice.
 - c. As specifically allowed under the law, particularly following the changes made at the behest of unions in the 2009 FW package, see for example Part 5 of this submission on union access to workplaces.
2134. Employers are the leading voice in pointing out where our system is failing to properly regulate union conduct, and we are on the receiving end of this commercially and operationally. It is employers who suffer the cost and reputational damage from union misconduct and misuse of power.
2135. However, resource employers want union misbehaviour and misuse of power addressed through more effective WR legislation rather than any extension into WR of our competition law, provided existing protections are retained.
2136. Limitations on contracting and labour hiring are of very significant and pressing concern to employers as set out in this chapter and in Part 3 of this submission. However, this should be fixed through the FW Act and the WR system. Reformed and recast WR institutions will be quite capable of limiting the claims unions pursue and the policing the misuse of legally protected action if they are properly directed by clear, tight, comprehensive and unambiguous legislation and not given excessive discretion.
2137. In relation to institutions (Part 8 of this submission) the resource industry has been a passionate and constant supporter of having WR powers exercised by those with practical experience in running commercial enterprises and administering employment within those enterprises.
2138. One of the key problems with the FWC is not that its members are WR experts, it is that the balance of appointments to the tribunal was disrupted during the Rudd/Gillard governments through an undue concentration of appointments from a very limited group of WR experts.
2139. It would not be positive to shift additional powers and responsibilities to the ACCC, the appointees to which are not appointed based on any particular WR expertise.

Secondary boycotts should be regulated in competition law

2140. The PC notes the history of the secondary boycott provisions, thus:

Secondary boycotts first found a home in the Trade Practices Act 1974 (Cth) in 1977, only to be evicted into workplace relations legislation in 1993, and

then re housed in trade practices legislation in 1996, where it has stayed ever since.⁵⁴⁶

2141. The Keating government's *Industrial Relations Reform Act 1993* did far more than relocate long standing s.45D and E of the *Trade Practices Act 1974*. It watered down vitally important and longstanding protections for doing business in Australia and broke down an essential distinction between trades practices and WR laws.
2142. The test to make out a secondary boycott was strengthened (making it harder to establish that a union was engaging in prohibited conduct), defences for unions were increased through new tests of purpose, and most importantly (and uselessly) the then-AIRC was dealt into boycott matters through compulsory conciliation prior to any court relief being available, breaking down the distinction between a legitimate industrial dispute and a secondary boycott⁵⁴⁷.
2143. Any importation of secondary boycotts from competition law into WR law is a failed experiment which should never be repeated.

Recommendation 9.23

Employers strongly oppose shifting any aspect currently covered by the *Competition and Consumer Act 2010* to the *FW Act*. Secondary boycotts in particular belong in the trade practices / competition legislation and under no circumstances should they be returned to the employment statute (currently the *FW Act*).

Fix union pattern bargaining and anti-contractor provisions

2144. In June 2014, AMMA lodged a submission to the Australian Government Competition Policy Review⁵⁴⁸, primarily focusing on secondary boycotts.
2145. However, as we also stated in our submission, unions continue to strategically use their significant rights and capacities under the *FW Act* to limit the ability of an employer to engage workers on agreed terms and conditions which meet the operational needs and cost parameters of resource projects.
2146. This includes the seemingly currently lawful ability for unions to limit and restrict employers' use of independent contractors through "pay parity" clauses in enterprise agreements which do not offend the existing general protections provision of the *FW Act*, nor the *CCA*.
2147. The *FW Act* allows unions to pursue such terms in enterprise agreement bargaining so long as they pertain to the relationship between employers and trade unions and

⁵⁴⁶ Issues Paper 5, p.7

⁵⁴⁷ For an explanation of the 1993 changes see: Naughton, R. (1993) *The Industrial Relations Reform Act 1993*, University of Melbourne, Centre for Employment and Labour Relations Law Working Paper 2, May 2004
http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCQQFjAB&url=http%3A%2F%2Flaw.unimelb.edu.au%2Ffiles%2Fdmfile%2FCELRLWorkingPaperNo2May19942.pdf&ei=llH6VPiXOs_X8gWwqYHAAw&usq=AFQiCNFiQIXtnlQ7cRhKX5Dqfyr8XMV2A&bvm=bv.87611401,d.dGc&cad=rja

⁵⁴⁸ http://www.amma.org.au/wp-content/uploads/2014/06/20140616_AMMA_Subn_to_Competition_Policy_Review_Final.pdf

employers and their employees under s.172. In 2012, AMMA intervened in a significant Full Federal Court judicial review proceeding/appeal against an earlier Full Bench decision of the FWC⁵⁴⁹.

2148. The decision of the Full Federal Court essentially gives a green light to trade unions pursuing pattern agreements across an entire industry or sub-sector, which restricts competition for labour, particularly in the building and construction industry which feeds into resource projects. This appears to have been intended by the Rudd government when it introduced the FW Act in 2009.

2149. Relevantly the court noted at [26]:

"If it was intended that s 194 had the effect of disallowing such a clause in an enterprise agreement, the legislature would have made that clear."

2150. As we set out elsewhere in this submission, these clauses should not be capable of being pursued in enterprise negotiations, should not be a basis for legally protected industrial action, and should not be able to be included in agreements registered and enforceable under the FW Act.

2151. Apart from direct changes to the FW Act, another option to ensure that trade unions are not restricting companies from engaging independent contractors on terms and conditions which suit the company and the contractor is to consider amendments to the *Independent Contractors Act 2006*.

2152. For example, amendments to this piece of Commonwealth legislation could prohibit and/or nullify terms in enterprise agreements which would restrict or control the terms and conditions of an employer engaging contractors.

2153. AMMA notes that the proposed *Building Code 2014* prescribes certain types of clauses which a code-covered entity must not include in enterprise (collective) agreements:

- a. Impose or purport to impose limits on the right of the code-covered entity to manage its business or to improve its productivity.
- b. Prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time.
- c. Restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be offered, by the employer.
- d. Prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor).

2154. Such restrictions should not only apply to code-covered entities in construction, but should apply more broadly to the making of all enterprise agreements, similar to the

⁵⁴⁹ See for example *Australian Industry Group v Fair Work Australia* [2012] FCAFC108 which dismissed an appeal to overturn a Full Bench decision relating to an enterprise agreement which contained terms dictating that independent contractors should be paid the same as employee who would be covered by the enterprise agreement.

prohibited content rules applying under the now-repealed s.356 (and associated regulations) of the *Workplace Relations Act 1996*.

10. RECOMMENDATIONS

3. THE BARGAINING FRAMEWORK

3.2 INDIVIDUAL BARGAINING

New type of individual statutory agreement option

Recommendation 3.2.1

There be capacity to enter into a new form of individual statutory agreement which is entered into between an employer and an employee. Once approved by the FWC (or a successor body) the individual agreement will have the same characteristics and enforceability as a collective agreement and no industrial action could be taken during the life of the agreement.

Statutory test

Recommendation 3.2.2

The individual statutory agreement would be subject to the same statutory approval process as registered collective agreements, including passing a no-disadvantage test or BOOT test against the relevant safety net. Matters in the agreement could only be those that pertain to the relationship between an employer and employee. The nominal expiry date would be up to 5 years. If no nominal expiry date is included, the default period of 5 years would apply.

Alternatively

Recommendation 3.2.3

As an alternative, making an individual statutory agreement could be subject to some higher test than applies for other forms of agreement, such as for example an assessment by the FWC that a proposed agreement must leave the employee no less than X% better off than the award safety net to be approved.

Condition of employment

Recommendation 3.2.4

It should be possible to make an offer of employment conditional upon entry into an individual statutory agreement, provided the agreement meets the applicable tests for approval.

Employee protections

Recommendation 3.2.5

Individual statutory agreement making should be subject to appropriate protections of employee choice and against coercion or duress in the making of the agreement.

Approval process

Recommendation 3.2.6

Individual statutory agreements would be required to be registered by the FWC and be accompanied by co-signed supporting statutory declarations from the two parties.

Fast track approval process

Recommendation 3.2.7

A fast track approval process would apply for higher-income employees who would be able to lodge their agreement with the FWC and upon receipt of lodgement, the agreement would commence and be subject to audit by the FWO. This would be a form of **High Income Employment Agreement**, with the threshold for such agreements potentially being set at the current unfair dismissal high-income threshold of \$133,000.

Objects of the FW Act

Recommendation 3.2.8

Existing s.3(c) be removed from the objects of the FW Act.

3.3 INDIVIDUAL FLEXIBILITY ARRANGEMENTS (IFAS)

Recommendation 3.3.1

IFAs should be able to operate for fixed terms of up to four years but be terminated earlier by mutual consent. In the meantime, however, the 13-week notice period included in the FW Amendment Bill 2014 should apply, increasing the notice period from the current 28 days.

Recommendation 3.3.2

Parties to an IFA should be able to agree that, in return for the benefits received by the employee under the IFA, no industrial action will be taken during its life.

Recommendation 3.3.3

Parties should be allowed to agree on an IFA prior to employment commencing given the statutory protections in place for employees and prospective employees requiring that employees must be better off as a result of signing an IFA.

Recommendation 3.3.4

As an added protection for employees, the better off overall test should be ongoing and either party should be able to invite the FW Ombudsman to make an assessment at any time during the IFA's operation.

Recommendation 3.3.5

The legislation should be amended to explicitly require employers to be left better off overall as a result of entering into an IFA.

Recommendation 3.3.6

Before the FWC approves an enterprise agreement, all parties to the agreement should be required as a matter of course to clearly demonstrate that the terms of the flexibility clause are capable of delivering genuine flexibility benefits under a subsequent IFA and do not restrict the flexibilities available for either party.

Recommendation 3.3.7

The FWC's "model" flexibility clause should be the minimum level of flexibility mandated under enterprise agreements and awards, with parties able to agree on additional flexibility by consent. This is included in the FW Amendment Bill 2014 in relation to enterprise agreements.

Recommendation 3.3.8

Union scrutiny of IFAs after they have been entered into should be expressly prohibited as an enterprise agreement clause given this is an invasion of privacy and contrary to the intention of individual arrangements.

Recommendation 3.3.9

The proposed requirement under the FW Amendment Bill 2014 that an employee entering into an IFA must provide a written statement should be removed. If this requirement is retained it should only have to be completed where a monetary benefit has been traded off for a non-monetary benefit. Alternatively, the genuine needs statement should be a simple pro forma rather than a written document.

Recommendation 3.3.10

Consideration could be given to a high-income threshold for IFAs which could also attract faster approval and more flexible provisions than for lower-paid employees.

3.4 GREENFIELDS AGREEMENTS

AMMA's proposed reforms in this area would divide greenfields agreement-making into **three concurrent streams** depending on the needs of the enterprise:

- a. Stream 1: Union-negotiated greenfields agreements.
- b. Stream 2: FWC-determined greenfields agreements.
- c. Stream 3: Employer greenfields agreements

All streams would be available concurrently under modified provisions of the FW Act. Some of the streams, such as union-negotiated greenfields agreements and FWC-determined greenfields agreements, are modifications of existing provisions or proposals, while others are new proposals such as employer greenfields agreements and project proponent agreements. The proposed three streams and how they would work are detailed in the table below.

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
Five-year maximum life Extend the current maximum four-year terms for union-negotiated greenfields agreements to five years.	Five-year maximum life Extend the current maximum four-year terms for greenfields agreements to five years, including for FWC-determined greenfields agreements under this stream. Importantly, this stream would start with businesses negotiating with unions but would move to FWC determination after agreement was not able to be reached within a reasonable time. Three-month negotiation deadline As proposed in the FW Amendment Bill 2014, if agreement between a business and union(s) is not reached within a three-month time limit (triggered by the employer), the business can take its best offer to the FWC for ratification (note this does not give the FWC power to arbitrate an outcome). One-month deadline in some cases While a three-month deadline is workable in cases where work has not yet begun on a project, a shorter negotiation deadline of one month is more practical in cases where work has begun and / or other greenfields agreements are in place at the site that the employer could sign up to. Prevailing industry standards test The additional test proposed for FWC-determined agreements under the FW Amendment Bill 2014 would either be removed altogether or modified in the way AMMA identifies in this submission.	Two-year maximum life Provide businesses with the option of making a greenfields agreement without union involvement on the understanding this type of agreement would last a maximum of two years. This type of agreement would see the employer determine the terms and conditions of employment provided they exceeded the award safety net.
"Major project" agreements		

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
This type of greenfields agreement would run the entire construction phase of projects (up to 8 years). These agreements would be union-negotiated and would only be available for construction projects with a capital expenditure of \$50 million or more.		
"Project proponent" agreements Introduce a "project proponent" greenfields agreement that could be negotiated by the head contractor with relevant unions, and which other employers on the project could sign up to if they chose. This type of agreement could last for up to five years as with other union-negotiated agreements, or for the entire construction phase of a project if it fits the description of a "major project" (above).		
Roll-over / continuity of supply agreements Given the generous terms and conditions applying in resource industry agreements, the parties should be able to agree to roll over all of the above types of union-negotiated agreement with the majority support of employees covered by the agreement for an additional two years . This would mean no protected industrial action could be taken in support of a new agreement as part of the rollover. If the parties wanted to renegotiate, they could do so with all the usual rules applying.	Roll-over / continuity of supply agreements Given the generous terms and conditions applying in resource industry agreements, the parties should be able to agree to roll over an existing FWC-determined agreement with the majority support of employees covered by the agreement for an additional two years . This would mean no protected industrial action could be taken in support of a new agreement as part of the rollover. If the parties wanted to renegotiate, they could do so with all the usual rules applying.	
Good faith bargaining Good faith bargaining obligations should apply to	Good faith bargaining Good faith bargaining obligations should apply to this	

STREAM 1	STREAM 2	STREAM 3
Union-negotiated greenfields agreements (i.e. as currently apply under the FW Act)	FWC-determined greenfields agreements (i.e. as proposed under the FW Amendment Bill 2014)	Employer greenfields agreements (i.e. a new area of reform proposed by AMMA)
union-negotiated greenfields agreements.	type of greenfields agreement which is negotiated with a union up until the point at which the three-month or one-month negotiation deadline is up.	
Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.	Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.	Undertakings The character and quantity of undertakings the FWC can seek from employers in the process of approving greenfields agreements in this stream should be limited.
Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.	Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.	Delayed activation All types of greenfields agreements should be able to have delayed activation on the understanding that work may not commence under the agreement as soon as it is certified. The employer would trigger the activation of the agreement based on business needs and mobilisation deadlines.

3.5 COLLECTIVE AGREEMENTS

Greater options for collective agreement making

Recommendation 3.5.1

Introduce different types of registered collective agreements, which operate in parallel with registered individual statutory agreements, to provide choices to employers and employees in workplaces.

There should be an option to make the following different types of collective-based enterprise agreements (plus an option or options for useable individual agreements):

- Registered collective agreements (with a union)
- Registered collective agreements (with employees)
- Registered greenfields agreements (with a union or determined by the FWC)
- Registered greenfields 'major project' and 'project proponent' greenfields agreements (see Chapter 3.4 for further details).

Statutory approval tests

Recommendation 3.5.2

Collective agreements would need to be approved by a valid majority of employees. The agreement would need to satisfy a no-disadvantage test against the relevant safety net. It would have a nominal expiry date of up to 5 years. Where an agreement does not specify a nominal expiry date, it is taken to be 5 years. There should be an option to "roll over" the agreement up to a further 24 months subject to any additional statutory safeguards (the agreement continues to meet the no-disadvantage test).

Content of agreements

Recommendation 3.5.3

Matters in a proposed statutory agreement must only pertain to the relationship between an employer and employee (see Chapter 3.6 for details). Matters which are codified in the legislation (such as union right of entry) should not be able to be included in collective agreements (see Chapter 5 for details). A list should specify what is and is not permitted content to ensure litigation over clauses is minimised to the extent possible.

Fast track approval for high income employees

Recommendation 3.5.4

Where all employees subject to a collective agreement are above a high income threshold (i.e. the current unfair dismissal high-income threshold of \$133,000 a year) the agreement process would be subject to a fast track system.

Statutory declarations would be lodged with the agreement to either the FWC or FWO and the agreement would be subject to audit by the FWO. Agreements would come into operation upon receipt of lodgement or acknowledgement from either the FWC or FWO.

3.6 AGREEMENT CONTENT

Recommendation 3.6.1

Restrict the 'matters pertaining to the employment relationship' test under s.172 to matters pertaining to the employment relationship between the employer and its employees and do not extend this to the employer's relationship with the employees' unions as is currently the case. The *Electrolux* definition of "matters pertaining" should ground the new definition.

Recommendation 3.6.2

There be a list of prohibited content applying under the FW Act that includes the matters AMMA outlines in this submission.

Recommendation 3.6.3

Ensure there is a regulation making power for the minister of the day to add to or clarify the prohibited content that is included in the legislation as per AMMA's recommendations.

Recommendation 3.6.4

Remove the current provision that allows unions to apply for and obtain protected action ballot orders on the assertion they believe they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement", and therefore able to take protected industrial action, should rely on a union actually bargaining for permitted content, not asserting it is.

Recommendation 3.6.5

If some clauses are deemed compulsory for inclusion in FW Act agreements, as is currently the case for mandatory flexibility, dispute resolution and consultation clauses, consideration could be given to developing a "model" form of those clauses where one does not currently exist. Consideration could then be given to mandating the inclusion of the model form of the clause in agreements, with no scope to depart from it. However, it would need to be ensured that the model version of the clause was fair to all parties.

Recommendation 3.6.6

Limit the undertakings that the FWC can ask of employers in terms of agreement content when submitting agreements for approval.

Recommendation 3.6.7

Remove the ability to incorporate external documents such as awards into agreements.

3.7 AGREEMENT APPROVAL

Approval by the industrial tribunal

Recommendation 3.7.1

All registered agreements should be approved by the FWC (or its successor) against statutory tests and criteria before they commence.

Recommendation 3.7.2

A performance standard should see agreements approved within 28 days of lodgement and no more than 3 months in exceptional circumstances. Where an agreement will take more than 28 days there should be a requirement for employers to be kept informed on the approval process⁵⁵⁰.

Recommendation 3.7.3

The Government conduct an independent review of agreement approval 12 months after the commencement of any new system. If within the first 12 months of operation of a new scheme, agreements take longer than 28 days (on average) to be assessed, an alternative system should be considered.

Recommendation 3.7.4

Suitable arrangements be put in place to allow the commencement of employment of an employee on an individual agreement, pending approval of that agreement within 28 days of lodgement.

Fast track approval process for high income employees

Recommendation 3.7.5

For registered statutory enterprise agreements and individual statutory agreements, there should be a recognition that high-income employees and their employers should have the benefit of fast-tracked approval.

For collective agreements, where all employees are high-income employees, the agreement is lodged with the industrial tribunal or FWO and upon receipt of lodgement or acknowledgement the agreement commences. The agreement would be subject to audit by the FWO. This would be a similar process for registered individual statutory agreements.

Publication of agreements

Recommendation 3.7.6

Collective enterprise agreements submitted for approval not be published until they have been approved. Individual statutory agreements should remain confidential to the parties at all times and not be published.

⁵⁵⁰ This is not proposed to create any new requirement on the employer to inform employees. A delay in the tribunal should not create any additional regulatory requirement on the employer.

3.8 GOOD FAITH BARGAINING

External bargaining assistance

Recommendation 3.8.1

There should be greater options for employers and employees to access independent dispute resolution services. Voluntary and external bargaining assistance should be made available outside of the tribunal, including by the proposed AECAS (see Part 8 of this submission). This could include mediation, conciliation and even private arbitration of agreed claims before an appointed dispute resolution service provider.

Majority support determinations

Recommendation 3.8.2

Remove requirements that a "majority support determination" trigger compulsory bargaining. If the existing concept is retained, a majority support determination triggering compulsory bargaining must be conducted via a secret ballot at the request of the employer, which should be performed on all occasions by an independent third party such as the Australian Electoral Commission (AEC).

Default bargaining representation

Recommendation 3.8.3

Employees and employers should have to actively appoint bargaining representatives in writing to represent them in agreement negotiations. This active appointment would trigger the code of conduct that would apply to both the employer and the employee bargaining representative (see below).

Employees could appoint a trade union, a third party or themselves to represent them in bargaining. Consideration could be given to providing an upper limit on the number of bargaining representatives based on how many employees are in an enterprise.

Current rules pertaining to default bargaining representation for employees, which deem trade unions to be automatic bargaining representatives of employees should be removed.

Code of conduct for bargaining representatives

Recommendation 3.8.4

There should be a simple and objective code of conduct for all bargaining representatives which clearly sets out expectations for the conduct of bargaining representatives.

Bargaining and genuinely trying to reach an agreement

Recommendation 3.8.5

The lack of a required nexus between the current GFB obligations and "genuinely trying to reach an agreement" provisions under the FW Act should be addressed. That is, there should not be two entirely distinct tests for those areas and there should be an established nexus.

Review good faith bargaining obligationsRecommendation 3.8.6

The PC should carefully review the impact of the good faith bargaining requirements and to what extent they have impacted on protracted bargaining, disputation and costs.

4. INDUSTRIAL ACTION AND DISPUTES

4.1 INDUSTRIAL ACTION

Limit protected industrial action to the direct employment relationshipRecommendation 4.1.1

Limiting the claims that can be subject to protected industrial action to those of the employer-employee relationship.

No protected industrial action if contrary to the public interestRecommendation 4.1.2

Requiring a new test which would require a bargaining representative seeking a protected action ballot order to demonstrate that the industrial action is not contrary to the public interest. This should allow a potentially affected direct or third party the opportunity to make submissions as to whether they are affected by potential industrial action and to what extent before a protected action ballot order is made.

More certainty around duration of forms of authorised industrial actionRecommendation 4.1.3

Protected action ballot forms should require greater precision of the type and duration of specific industrial action. The ability to take unlimited forms of industrial action for an indefinite duration should be changed. There should be consideration of a maximum number and duration of specific forms of industrial action to provide greater certainty to employers.

Genuinely trying to reach agreement further defined and expandedRecommendation 4.1.4

The current requirement on a bargaining representative to show that it is “*genuinely trying to reach agreement*” with an employer should be amended to reflect the principles outlined in *Total Maritime Services P/L v Maritime Union of Australia* [2009] FWAFB 368 in line with the Australian Government’s FW Amendment (Bargaining Processes) Bill 2014.

Moreover, the requirements that a bargaining representative is genuinely trying to reach agreement should also require clear demonstration that a bargaining representative has met all good faith bargaining requirements.

No protected industrial action if claims excessiveRecommendation 4.1.5

The tribunal should not authorise protected industrial action if the bargaining claims are manifestly excessive, having regard to the conditions at the workplace/relevant industry or would have a significant adverse impact on productivity at the workplace in line with the Australian Government's FW Amendment (Bargaining Processes) Bill 2014.

High income exemption for taking protected industrial actionRecommendation 4.1.6

There should be an exemption for high income employees from taking protected industrial action given the bargaining power they inherently possess over other employees. This threshold could be set at the current high income unfair dismissal threshold of \$133,000.

4.2 DISPUTE RESOLUTION

Alternative dispute resolution providersRecommendation 4.2.1

There should be greater choice in the ability of users of the system to obtain professional expert assistance from other alternative dispute resolution providers such as a new body AMMA is recommending be created called the Australian Employment Conciliation and Arbitration Service (AECAS).

Disputes arising from an agreementRecommendation 4.2.2

The legislation should allow parties to choose an alternative dispute resolution provider, which could be the industrial tribunal or another provider to assist parties resolve disputes about an agreement.

No compulsory arbitration powersRecommendation 4.2.3

The PC should not accept calls to create new forms of compulsory arbitration over individual or collective disputes.

Model dispute resolution clauseRecommendation 4.2.4

A new model dispute resolution clause should be developed which parties can include in registered agreements. Best practice guides should be developed to assist parties in resolving disputes.

Dispute resolution best practice

Recommendation 4.2.5

The Australian Employment Conciliation and Arbitration Service (AECAS) proposed by AMMA should establish a suite of modern tools and resources. This could include online tools and resources. AECAS should develop a series of best practice guides to assist with the resolution of disputes (whether individual or collective). The AECAS could be a leading independent and impartial centre for excellence in the provision of advice, information and alternative dispute resolution services for workplace disputes.

5. UNION ENTRY INTO WORKPLACES

Basis of entry for discussion purposes

Recommendation 5.1

Where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site for discussion purposes unless it is covered by an agreement operating on that site or is in the process of negotiating one. Entry to agreement-covered sites by non-agreement covered unions for discussion purposes should be prohibited.

Recommendation 5.2

The system of "invitation certificates" proposed in the FW Amendment Bill 2014 should only be used to gain entry to non-agreement covered sites where the invitation of a member is in doubt. Invitation certificates should not be able to be applied for to gain entry onto sites for discussion purposes where agreements with other unions are in place.

Recommendation 5.3

If union site access for discussion purposes continues to be based on union eligibility rules in whole or in part, unions should be required to first obtain a certificate from the FWC confirming they have the right to represent workers before they are able to enter that site for discussion purposes.

Recommendation 5.4

Union officials are only entitled to hold discussions with employees who are eligible to be members of their union. The presence of persons at those discussions who are not eligible should void that particular right of entry visit.

Proof a union has members onsite

Recommendation 5.5

The FWC should be required to confirm the existence of a member onsite that has requested the union's presence to investigate a suspected contravention, with the employer entitled to know the specifics.

Recommendation 5.6

There must be strict rules for when unions meet with workers they are not entitled to meet with. In cases where this occurs, automatic suspension or revocation of an entry permit is warranted, along with the voiding of that particular visit.

Appropriate checks on permit holders' eligibility

Recommendation 5.7

Applicants for an entry permit should be required to provide sufficient evidence to the FWC that not only are they a "fit and proper person" but that they are authorised to represent the union named in the application.

Recommendation 5.8

Union officials should be required to carry photo identification at all times in order to enter a worksite under right of entry laws, consistent with the Coalition's Policy to improve the FW laws. That ID must not be able to be tampered with in any way. It must be required to be produced on attendance at the site, not merely upon request.

Misrepresentation of entry rights

Recommendation 5.9

The caveat should be removed from the FW Act which states the requirement for union permit holders not to misrepresent their entry rights does not apply if the permit holder "reasonably believes" their activities are authorised.

Obeying lawful instructions

Recommendation 5.10

The FW Act should be amended to explicitly state the consequences for non-compliance with a reasonable request. The requirement should include complying with the reasonable requests of not only the occupier but any other employer onsite with regard to health and safety. Consequences of a failure to comply should include automatic suspension or revocation of an entry permit.

Automatic suspension or revocation

Recommendation 5.11

The FW Act should be amended to remove the FWC's discretion not to revoke or suspend an entry permit for misuse if to do so would be "harsh or unreasonable". If any of the acts specified under s.510 have occurred, there should be automatic suspension or revocation of an entry permit.

Recommendation 5.12

The FW Act should be amended so that if a permit holder is found to have breached that section, i.e. they have intentionally hindered or obstructed while onsite, their entry permit is automatically suspended or revoked.

More detailed information about entry permits

Recommendation 5.13

There should be a requirement that any suspension or revocation or conditions imposed on an entry permit is publicly posted to the FWC website, along with all revocations of permits by holder name, for a period of up to 10 years.

Recommendation 5.14

There should be an explicit requirement for the publication of all applications for right of entry permits in advance of the applications being granted, giving all interested parties the chance to be heard in relation to an application.

The fit and proper person test

Recommendation 5.15

If any of the circumstances described in s.513 are enlivened, the permit holder should not be deemed to be a "fit and proper person" to hold an entry permit. If that person already has a permit, it should be automatically suspended or revoked.

Recommendation 5.16

In addition to a more rigorous application of the existing "fit and proper person" test, union permit holders should be required to comply with a code of conduct based on treating others at the workplace with dignity and respect.

Recommendation 5.17

When a union official submits a right of entry notice containing false information, such as asserting that they are a permit holder when that is not true, that should be prima facie evidence that he or she is not a fit and proper person.

Notification requirements

Recommendation 5.18

There should be a requirement that all employers, occupiers, contractors and sub-contractors on a site are notified of an impending union visit. This would mean amending s.487 which currently only requires a union official when entering for discussion purposes to notify the "occupier", and when entering for investigation purposes to notify the "occupier and any affected employers".

Recommendation 5.19

Notices of entry must contain enough specificity to enable businesses to run their operations with a degree of certainty. Open-ended entry notices or those spanning days or weeks should not be a feature of the system. Notices must specify a particular date and time and those times should be adhered to.

Recommendation 5.20

The legislation should confirm that a single entry notice covers the entry of one union official, not multiple officials.

Use and disclosure of informationRecommendation 5.21

The FW Act should be amended to make not only tribunal consent a requirement but to explicitly require the consent of an employee to whom a record applies before a union is given access. This would overcome the shortfalls arising from the current employee records exemption under the Privacy Act 1988.

Allowable matters in enterprise agreementsRecommendation 5.22

Enterprise agreement clauses relating to union right of entry should be expressly included in the list of unlawful terms (prohibited content) as was the case under the Workplace Relations Regulations 2006.

Union access to remote sitesRecommendation 5.23

The provisions implemented on 1 January 2014 requiring employers to facilitate union officials' transport and accommodation to remote sites should be removed in their entirety.

Appropriate meeting places and timesRecommendation 5.24

The provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location should be removed. The pre-1 January 2014 provisions that allowed employers to designate reasonable meeting locations and routes to and from them should be re-legislated.

Recommendation 5.25

Union right of entry should not be extended to private accommodations. Existing employee protections in that regard must remain.

6. THE SAFETY NET

6.2 EMPLOYMENT STANDARDS AND AWARDS

Recommendation 6.2.1

Awards should be abolished in favour of a solely statutory safety net, based on the existing NES, expanded to include a number of matters currently in awards, plus Long Service Leave. This should be subject to not extending additional safety net obligations to currently non-award covered employment.

Alternatively:
Recommendation 6.2.2

If this is not progressed and awards are to be retained:

- Existing award content should be rationalised into the NES where appropriate and in particular where there is replication and overlap, moving towards single community rather than industry-specific standards on a greater range of safety net issues,
- Awards should address only matters that it is determined require industry specific regulation. This may see awards (for example) address only wages, classifications, hours and some payments.

Recommendation 6.2.3

It should be made clear that the National Employment Standards provisions do not override modern awards in relation to leave loading to be paid upon termination if those awards are silent on the issue or state explicitly or implicitly that leave loading should not be paid on termination.

Recommendation 6.2.4

The NES be clarified on capacities to cash out leave entitlements, and revisited with a view to ensuring that what employers and employees are able to agree on as it relates to paying out employees' leave entitlements, is able to be translated into practice without breaching the NES.

Recommendation 6.2.5

The Office of the FW Ombudsman's advice to parties about workplace relations matters must be legally binding and act as protection against prosecution when parties rely on it.

Recommendation 6.2.6

In the alternative, parties who rely on FWO advice that is later found to be in error should be immune from prosecution.

Recommendation 6.2.7

Any requirement for the Fair Work Information Statement to be provided to employees be removed from the NES.

Recommendation 6.2.8

As set out in Chapter 6.3, Long Service Leave should (subject to transitional considerations being resolved) provide suitable scope for flexibility and no widespread increase in labour costs. This should become part of the NES as a single national, uniform national standard.

Recommendation 6.2.9

If the NES is expanded to codify current award matters there needs to be a mechanism to ensure that traditionally award only entitlements only apply to those employees who traditionally enjoyed them.

Recommendation 6.2.10

If awards are to remain part of the system, the scope and prescription of awards should be reduced considerably. Awards should be restricted to solely address those matters which must be set on an industry specific level and that cannot be subject to a community wide entitlement through an expanded NES.

Recommendation 6.2.11

Safety net standards should be set in the NES or awards, not both.

Recommendation 6.2.12

Superannuation should cease to be an award matter entirely and superannuation clauses should be excised from all modern awards.

Superannuation should be regulated solely by the established body of superannuation legislation and regulation centred on the Superannuation Guarantee Act.

Recommendation 6.2.13

Remove any requirement for scheduled reviews of all modern awards from the FW Act or any successor legislation.

Recommendation 6.2.14

There should no longer be a specific modern awards objective, rather there should be clearer overall objectives for legislation as a whole, and a tighter prescription of the matters that can be included in awards (if awards are retained).

Recommendation 6.2.15

Consistent with AMMA's wider recommendations for structural change to the institutions of the current FW system, the award functions of the current FWC should become the responsibility of a new Australian Employment Safety Net Commission.

Recommendation 6.2.16

In its interim report, the Commission should identify options or recommendations for an improved safety net which better delivers on the terms of reference and the role the safety net should play in a modernised workplace relations system.

The Commission should then, also in its interim report, invite further submissions not only on what it proposed, but also how to transition to the new safety net it is canvassing and to resolve any practical concerns it may identify.

6.3 OTHER ISSUES

Recommendation 6.3.1

Australia should move towards a far simpler structure of minimum wages, significantly reducing the overall numbers of minimum wage rates by moving towards removing minimum wage differentials between industries (horizontal proliferation) and setting only genuine minimum rates for the lower paid and lower skilled in need of a minimum wage safety net (reducing vertical proliferation).

Recommendation 6.3.2

Consideration should be given to setting a single national set of ratios of apprentice, trainee and junior minimum wage rates to adult rates (expressed as percentages), which would be applied to a designated trade rate of pay or adult rate to derive standardised minimum wages for apprentices, trainees and juniors working in all industries.

Recommendation 6.3.3

The minimum wage functions currently exercised by the Expert Panel of the FWC should be transferred to a new body specialising in minimum wage setting / making recommendations to government on other parts of the safety net. Under AMMA's model for revised institutions (Chapter 8) this would become the Australian Employment Safety Net Tribunal.

NES

Recommendation 6.3.4

There should be a national standard for LSL, and it should in time become part of the NES, provided there should be greater flexibility in the application of an NES on LSL than there are on other existing NES standards.

Non-LSL employment

Recommendation 6.3.5

It should be possible to employ in future on a specifically non-LSL contract, provided that:

- The employee and employer specifically agree to employment on such terms.
- The employee receives appropriate additional consideration (i.e. proportionately higher wages) from the commencement of their employment to compensate for LSL not being payable or leave being available should the employee reach the accrual threshold (e.g. 7 or 10 years).

Flexible accrual, payment, cashing out and taking of LSL

Recommendation 6.3.6

There should be greater scope for employers and employees to agree on an individual or collective basis how LSL will be accrued, paid, cashed out and taken.

A wide range of options should be available to employees to use this entitlement flexibly, provided the employee freely enters into such an arrangement and receives pay or leave no less favourable than their accrued or accruing LSL entitlement.

Recommendation 6.3.7

The right of an employee to determine what they would like to do with their accrual of LSL, or how they would like to take their accrued LSL, or indeed whether they would like to cash it out in whole or part, should at all times be an individual one, as agreed between the individual employee and his or her employer.

No collective agreement should override or remove scope for an employee to agree with their employer how they would like accrue, take or cash out LSL.

Recommendation 6.3.8

Whilst LSL does not rank amongst the highest priorities of resource employers for workplace reform, on balance Australia should start to move towards a single, uniform national standard for LSL, noting AMMA's other recommendations for this to be a flexible and customisable employment benefit.

Recommendation 6.3.9

The Commission should recommend the creation of a panel or taskforce to take submissions and recommend options to transition to a single, uniform LSL standard.

The taskforce's recommendations should then be considered by the National Workplace Relations Consultative Council (NWRCC) and Workplace Relations Ministers Council (WRMC) with a view to cooperatively approach to this transition.

If this does not deliver arrangements for a national standard rapidly, the Commonwealth should legislate for a uniform LSL standard for national system employees, covered by the federal workplace relations statute (currently the FW Act).

Recommendation 6.3.10

Any uniform national standard on LSL cannot simply be achieved by imposing the highest common denominator, swings and roundabouts may need to apply, and standardisation should be about an appropriate standard for the future, and making full use of transitional periods in and out of any increased entitlements.

Recommendation 6.3.11

There should be no extension of portability or continuity of LSL between employers, beyond the limited and exceptional areas in which it has currently and historically been applied in

particular industries, including current statutory schemes administered at the state and level.

Recommendation 6.3.12

There should be no impediment to employers and employees, on either a collective or individual basis, agreeing to employment in any industry without portable LSL, provided alternative generic LSL is provided or an equivalent alternative benefit provided. This would mean that existing portable LSL schemes or entitlements would no longer be compulsory and could be excluded by express agreement/alternative LSL arrangements.

Recommendation 6.3.13

Breakdowns or service outages of ICT (Information and Communications Technologies) and specifically network and internet breakdowns should be expressly added to the circumstances that give rise to stand down, provided this would remain subject to the test of stand down only being applicable in situations in which the employer cannot reasonably be held responsible.

Recommendation 6.3.14

Agreements should not be able to be used to place conditions and processes around the standing down of employees which have the effect of denying employers what should be a safety net right to not incur labour costs in circumstances beyond their control.

Recommendation 6.3.15

A union should only be able to dispute a stand down where:

- It has members being stood down/wanting leave to avoid being stood down; and
- Those members have requested the union represent them in relation to the specific stand down being disputed; and
- The union is party to an agreement covering the employment of the employees to be stood down and there is not an extant or prior agreement with another trade union or directly with employees on an individual or collective basis.

7. EMPLOYEE PROTECTIONS

7.1 INTRODUCTION

Recommendation 7.1.1

A specific provision of the FW Act⁵⁵¹ should allow an employer party to an agreement to make proposals to its workforce under prescribed circumstances (relating to incapacity to pay and the threat of redundancies), to revise previously-agreed agreement terms. Where agreed, this should become a variation to the agreement, according to its terms, which is simply recorded by the FWC

⁵⁵¹ Or its successor.

with no scope to undo or contest the agreed outcome, particularly from a union which has not represented the employees in relation to the most recent discussions.

Where employer and employees seek the assistance of the FWC it should be made available, but should not be mandatory.

Recommendation 7.1.2

There should be some additional safety net mechanism to protect jobs by foregoing scheduled safety net increases or cost changes where this would threaten jobs or business viability. An employer should be able to apply to one of the institutions in a revised framework for temporary or ongoing relief from safety net wage increases where they can meet appropriate prescribed tests / requirements.

Recommendation 7.1.3

There be scope to apply to the FWC⁵⁵² for relief from redundancy payments under agreements where the employer is unable or incapable of paying the rates previously agreed. This could be by way of a reduction or capping in payment levels which is not provided for in an agreement. This should be subject to suitable tests and evidentiary requirements.

7.2 UNFAIR DISMISSAL

Recommendation 7.2.1

The question of whether an employer had a valid reason to dismiss someone should be the primary consideration for the FWC.

Recommendation 7.2.2

In all such cases where a valid reason for termination exists, the FWC should be prevented from ordering the reinstatement of the employee.

Recommendation 7.2.3

At the very least, the FWC should not be empowered under the legislation to reinstate employees who were dismissed for breaches of work health and safety procedures; sexual harassment; bullying conduct; serious misconduct; or acts of violence.

Recommendation 7.2.4

The Small Business Fair Dismissal Code, or a suitably modified form of it, should apply to all national system employers, not just those with fewer than 15 employees, and should provide a valid exemption from unfair dismissal claims.

Recommendation 7.2.5

Issues related to the impact of the dismissal on the applicant and their family in deciding whether it was harsh, unjust or unreasonable should have no bearing on the tribunal's decision and each application should rest on its merits.

⁵⁵² Or its successor with the new title under a reformed institutional structure.

Recommendation 7.2.6

The only redeployment options an employer should be required to canvas as part of a genuine redundancy are options within its own direct enterprise, not with associated entities.

Recommendation 7.2.7

There must be a "true" high-income threshold, above which there are absolutely no unfair dismissal rights for those earning higher than, at present, \$133,000 a year, regardless of whether they are covered by an award or not.

Recommendation 7.2.8

Applicants should have to pay an unfair dismissal application fee that is commensurate with their salary. Salary levels could be broken up into bands with application fees applicable to each band.

Recommendation 7.2.9

If an unfair dismissal matter proceeds to a hearing, the applicant should be required to pay a hearing fee to the FWC in order for the matter to be listed for hearing.

7.3 ANTI-BULLYING LAWS

Recommendation 7.3.1

Repeal the FW Act's anti-bullying provisions that took effect on 1 January 2014 on the understanding there were already numerous other avenues in place, including under work health and safety laws.

Recommendation 7.3.2

In the event the jurisdiction remains, require anti-bullying applications to be dealt with by AMMA's proposed Australian Employment Conciliation and Advice Service (AECAS) but only after applicants have raised their bullying allegations internally with their employers and followed internal company processes first.

Recommendation 7.3.3

Any changes to the FWC's anti-bullying jurisdiction to hold union-related bullying more to account will require supporting changes to the FW Act's general protections provisions. It should be made explicitly clear that bullying in relation to individuals' participation or non-participation in the union and its businesses, support or non-support for a proposed workplace agreement and participation and non-participation in protected industrial action is not protected. This should include a statutory note or clarification that this expressly extends to verbal, written or online abuse.

Recommendation 7.3.4

At a minimum, it should be clarified in the legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected from any adverse action. It remains actionable against the perpetrator. Following on from that, unions should be held accountable for the bullying actions of their officials, delegates and members taken on the union's behalf.

7.4 GENERAL PROTECTIONS / ADVERSE ACTION

Defence for genuine reasons

Recommendation 7.4.1

It should be a complete defence to a claim of adverse action where:

- d. An employer had genuine reasons/grounds to take the action it took (even if that is "adverse action"); and
- e. The dominant purpose of the action was not related to a workplace right but for a legitimate ground / reason (i.e. significant safety breaches, physical violence against co-workers, theft, poor performance, etc.).

Complaints about a workplace right

Recommendation 7.4.2

Section 341(1) should be amended to make clear that an individual can only make a complaint about "*the terms and conditions of his or her employment*" and that is the only aspect that will be protected as a workplace right (and then they still should have to prove the employer took the adverse action because of that complaint, not aside from it). The aim is to be clear that generalised complaints about employment do not fall within the definition of a workplace right.

Overlapping anti-discrimination jurisdiction

Recommendation 7.4.3

Repeal s.351 of the FW Act. There are existing protections for employees against discrimination at a federal and state/territory level and it is unclear why there needs to be another layer of duplication.

Capping compensation / high income threshold

Recommendation 7.4.4

The unlimited nature of the jurisdiction should be re-examined as should the fact that high income employees who are not able to access unfair dismissal, are able to pursue an adverse action remedy.

Reverse onus of proof

Recommendation 7.4.5

AMMA can see no reason that employers must prove they did not take adverse action because of a workplace right. It should be up to the applicant to prove that nexus from the outset.

FWC conciliation processes

Recommendation 7.4.6

The FWC should review its KPIs in relation to the conciliation of adverse action claims such that employers are not encouraged to settle claims that are without merit.

Anti-bullying laws

Recommendation 7.4.7

As highlighted in the separate chapter on Bullying, any changes to the FWC's anti-bullying jurisdiction to hold union-related bullying more to account will require supporting changes to the FW Act's general protections provisions. It should be made explicitly clear that bullying in relation to individuals' participation or non-participation in the union and its businesses, support or non-support for a proposed workplace agreement and participation and non-participation in protected industrial action is not protected. This should include a statutory note or clarification that this expressly extends to verbal, written or online abuse.

Recommendation 7.4.8

At a minimum, it should be clarified in the legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected from any adverse action by the employer. It remains actionable against the perpetrator. Following on from that, unions should be held accountable for the bullying actions of their officials, delegates and members taken on the union's behalf (see chapter 7.3 on Bullying for further details).

7.5 TRANSFER OF BUSINESS

Recommendation 7.5.1

Return the test for transfer of business under the FW Act to the transmission of business rules under the preceding WR Act and clarify (in line with previous case law) that outsourcing arrangements are excluded from the definition of a transfer.

Recommendation 7.5.2

Following adoption of the recommendation above, reduce the duration that a transferring industrial instrument applies to a new business under the former WR Act (12 months) to 6 months.

Recommendation 7.5.3

Repeal the changes in the Fair Work Amendment (Transfer of Business) Act 2012 that included state public sector employees in transfer of business scenarios to new private sector employers.

Recommendation 7.5.4

If still necessary in light of AMMA's other recommendations above, implement the transfer of business provision under the FW Amendment Bill 2014 that is currently before federal parliament so that transfers between "associated entities" do not trigger the transfer of an industrial instrument.

Recommendation 7.5.5

Expressly exclude outsourcing and insourcing arrangements from the FW Act's transfer of business obligations.

Recommendation 7.5.6

Expressly allow employees to voluntarily opt out of having their old agreement cover them in their new employment with immediate or swift effect when agreed.

Recommendation 7.5.7

Clarify the rules so that no transfer of business provisions are enlivened in cases where an employee resigns from one employer and takes up work with another.

8. INSTITUTIONS

Recommendation 8.1

There be a new system of WR institutions, centred on employment, including the:

- Australian Employment Conciliation and Arbitration Service (AECAS)
- Australian Employment Tribunal (AET)
- Australian Employment Appeals Tribunal (AEAT)
- Australian Employment Safety Net Commission (AESNC)
- Australian Employment Ombudsman (AEO)

Recommendation 8.2

The proposed new AET, AEAT and AESNC share registry, front of house services, administrative services and premises to save money. Consideration should also be given to shared administrative services (HR, finance etc.) with the AECAS, however it should maintain its own front of house and premises, separate to the AET, with consideration perhaps to some shared functions with the Ombudsman.

Recommendation 8.3

Redirect non-operational funding from the FWC, presently being used for surveys and research, into both general budget savings, and into independent, commercially undertaken research on how the systems and institutions actually perform to plug any "data gaps" identified in this review.

Recommendation 8.4

The PC consider the role a new institution could play in Australia modelled on the UK's ACAS, and undertake further research into the UK body, including seeking a briefing from its Chair or Chief Executive. The New Zealand Department of Labour should also be consulted.

Recommendation 8.5

This be taken forward in the interim report, and the PC invite submissions on considerations (such as) the role an ACAS modelled institution could play in the Australian system, the pros and cons of such an approach, which matters would be referable to it, what it could determine or recommend, and how it would interact with (and modify) other parts of the system.

Recommendation 8.6

A new Australian Employment Appeal Tribunal hear all FWC appeals that would be heard by a Full Bench of the FWC.

Recommendation 8.7

A new Australian Employment Safety Net Commission (AESNC) should take over the safety net review and minimum wage setting powers of the FWC. AESNC members should be appointed for a prescribed period (perhaps 5 years) and be independent of the FWC, and not members of the FWC (or the new AEC).

Recommendation 8.8

The new Australian Employment Safety Net Commission (AESNC) would also be able to review the minimum statutory conditions in the NES, or to recommend consideration of new NES :

- This would be triggered by a referral from the Minister for Employment, just as this Commission (the PC) reviews what the Treasurer directs to it under its legislation⁵⁵³.
- Consideration could be given to requiring the Minister to consult the members of the National Workplace Relations Consultative Council (NWRCC)⁵⁵⁴.
- The AESNC would make a recommendation to government on varying, adding to, or refining the NES. This would be a public document tabled in Parliament, to which the government of the day would be required to undertake.

Recommendation 8.9

Rename the FW Ombudsman to the Australian Employment Ombudsman.

Recommendation 8.10

There not be any return to a separate Industrial Relations Court, however titled, and the existing structure and operation of the Federal Court, High Court and other Commonwealth courts retained as relevant to WR and any successor to the FW Act, albeit that what the act asks of the courts may change as the system evolves.

Recommendation 8.11

The Road Safety Remuneration Tribunal should be abolished and its functions assumed by the proposed new AESNC, as they may be relevant, or the FWC if the structure proposed in this submission is not accepted.

Recommendation 8.12

Rights of Ministerial intervention be extended to all matters before the proposed new tribunals, save those taken to the AECAS voluntarily by parties.

⁵⁵³ Productivity Commission Act 1998, s.11

⁵⁵⁴ National Workplace Relations Consultative Council Act 2002

Recommendation 8.13

Whether appeals are heard by the new AEAT (as recommended), or by the FWC, there should be a requirement for formal notification of all appeal matters to the Minister to provide her/him with an opportunity to consider intervention.

9. OTHER WORKPLACE RELATIONS ISSUES

Recommendation 9.1

The PC should be very cautious in making any recommendations on casual work, and in particular, should decline to make any recommendations that would have the effect of restricting access to casual work either directly or indirectly, or making it more complicated or costly.

Recommendation 9.2

Types of employment should be removed from awards and codified into the governing statute as standard formulation governing all industries, with a standardised definition of casual work, a standardised casual loading and a clear standard on which terms and conditions are and are not applicable to casual employment⁵⁵⁵. All industries should have access to full-time, part-time, and casual employment via a statutory provision applying to all work in Australia.

Recommendation 9.3

There should be a standard percentage loading for casual work in all industries and a standard definition of casual work in the FW Act, or its successor, and not in awards.

Recommendation 9.4

Casual conversion provisions should be removed from awards, not appear in statute, and become a specifically non-allowable/prohibited matter in bargaining and agreements. Such clauses should not be able to be sought by unions in negotiations towards a registered agreement and should not be able to create rights to take legally protected industrial action in support of them.

Recommendation 9.5

Registered trade unions and employers' organisations should become subject to the governance, financial and reporting obligations (and penalties) that apply to corporations.

Recommendation 9.6

In the absence of full application of the *Corporations Act 2001* to unions and employer organisations, they should become subject to the revised responsibilities set out in the *FW (Registered Organisations) Amendment Bill 2014* which is currently before the federal parliament.

⁵⁵⁵ However titled in the future.

Recommendation 9.7

The PC should recognise the 457 visa system is regulated through migration law and not WR law, and should not make recommendations on the future of the WR framework based on sponsored foreign workers.

Recommendation 9.8

Clauses in enterprise agreements that seek to limit the use of skilled international workers (however framed⁵⁵⁶) should become a specifically non-allowable/prohibited matter in bargaining and agreements. Such clauses should not be able to be sought by unions in negotiations towards registered agreements, and should not be able to create rights to take legally protected industrial action.

Recommendation 9.9

If exceptional or atypical issues are raised from the public sector, deal with them exceptionally for the public sector only, and do not create rules or regulation of general application in response to public sector-driven concerns.

If necessary, the PC should recommend dedicated sections of the legislation, or appendices to the legislation, to relate to public sector employment, or dedicated institutional arrangements modelled on the old-fashioned public sector arbitrator (which is already the role largely being played by some state tribunals).

If additional "complementary measures"⁵⁵⁷ are needed to realise the benefits of reform for the public sector, put them in place for the public sector, but isolate/quarantine them from provisions of general application covering private sector work.

Recommendation 9.10

Exceptional or atypical cohorts of employment, for which special or additional regulation applies, should be subject either to separate, stand-alone legislation, or all such regulation should be excised from the principal statute into stand-alone appendices at the back of the FW Act.⁵⁵⁸

Recommendation 9.11

To the extent the PC engages with and makes recommendations on workplace relations in the building and construction industry, it should support the passage of the two Bills currently before Parliament, and the restoration of the ABCC with its previous powers and responsibilities.

⁵⁵⁶ For example as job protection or Australian worker provisions.

⁵⁵⁷ Issues Paper 5, p.9

⁵⁵⁸ This proposal is advanced with absolutely no position or submission on how such work should be regulated, the levels of regulation, or the levels of entitlements for the employees covered.

Recommendation 9.12

To the extent the PC engages with and makes recommendations on workplace relations in the building and construction industry, it should maintain/repeat the recommendations of its Public Infrastructure Inquiry on:

- The importance of building codes and guidelines in encouraging lawful workplace-relations behaviours.
- Increased penalties for unlawful conduct.
- Ensuring national harmonisation of any state-based building codes.

Recommendation 9.13

The Australian WR system should not seek to either encourage or discourage independent contracting, nor should it be able to be used to do so through bargaining. Independent contracting should arise organically from the ongoing evolution of doing business in Australia, subject to existing tests and the existing levels of regulation only.

Recommendation 9.14

Unless there is some demonstrated basis to further canvass changes in this area, the PC should err in favour of making no changes to independent contracting.

Recommendation 9.15

There should be no recommendation for a statutory definition of independent contractor/independent contracting.

Recommendation 9.16

If the PC is inclined to take any action following this inquiry, an aggressive and targeted education campaign should precede anything else. This could include educating individuals at the point of applying for Australian Business Numbers (ABN).

Individuals could be educated about their rights, entitlements and obligations under an independent contracting arrangement, as opposed to an employment relationship, to ensure they are fully informed.

Recommendation 9.17

Rather than any additional regulation around contracting or any attempt at a statutory definition, the PC should recommend government better support entrepreneurship in Australia and the greater number of Australians, especially younger Australians, aspiring to be self-employed and to carve out their own labour market opportunities through self-employment and entrepreneurship.

Recommendation 9.18

Unless some significant trigger level of concern is born out in data or evidence to the review, the PC should not treat labour hiring as any special class or part of the WR system requiring dedicated consideration, action or regulation. In the absence of such evidence coming out in initial submissions in March, this issue should not progress to the PC's interim report.

Recommendation 9.19

Anti-contracting and anti-labour hiring clauses, being clauses purporting to restrict or disparage the legitimate innate legal capacity of businesses to contract work commercially or use labour hire, should be specifically prohibited and excluded from being included in agreements or in union bargaining claims that can give rise to protected industrial action. They should become prohibited or non-allowable matters.

Recommendation 9.21

Address employment challenges through employment legislation. This review should focus on improving our employment legislation and ensuring our system of employment laws better delivers on key goals for the system, such as those in the terms of reference, now and into the future.

Recommendation 9.22

The existing clear demarcation between competition and workplace laws should remain in place and there should be no change to existing s.51 (2) of the *Competition and Consumer Act 2010*.

Recommendation 9.23

Employers strongly oppose shifting any aspect currently covered by the *Competition and Consumer Act 2010* to the *FW Act*. Secondary boycotts in particular belong in the trade practices / competition legislation and under no circumstances should they be returned to the employment statute (currently the *FW Act*).