



# IMPROVING LABOUR PRODUCTIVITY: A REGULATORY REFORM AGENDA

the voice of australia's oil and gas industry



appea

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oil and gas industry

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## KEY POINTS

- The major challenge to the industry's continued growth is maintaining Australia's international competitiveness in the face of growing global competition. Forecast global demand for liquefied natural gas (LNG) is 470 million tonnes per annum by 2030. More than 200 million tonnes in new capacity will be needed. However, across the world, there are plans for more than double the number of LNG projects needed to meet this demand.
- Australian costs for delivering LNG to Japan can be up to 30 per cent higher than competing projects in Canada and Mozambique. Rising costs in Australia means that Australia risks pricing itself out of the global LNG market.
- The perception of Australia as a welcoming destination for investment is under challenge. Australia has benefited and will continue to benefit significantly from LNG investments underway.
- The potential for further investment in LNG exceeds \$180 billion. Realising this potential would benefit the entire nation.
- It is now more important than ever for Australia to address the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. It is vital that Australia gets the labour market policy settings right to facilitate developing a flexible and mobile workforce.

## RECOMMENDATIONS

- Amend the *Fair Work Act 2009* in the areas of greenfields agreements, union rights of entry, protected industrial action and allowable matters under EBA agreements. In particular, amend the *Fair Work Act 2009* to introduce a new category of agreements (Major Project Agreements) that would apply specifically to major capital projects.
- A co-ordinated social and economic infrastructure plan for Northern Australia to reduce unnecessary duplication and optimise resources.
- National occupational licensing, based on a strategy that includes genuine industry engagement and takes into account labour mobility, productivity and, critically, safety considerations is needed.
- Repeal the relevant sections of the *Migration Act 1958* requiring labour market testing (inserted into the Act by the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*) for subclass 457 visas, and remove engineering occupations and qualifications from the 'protected experience and 'protected qualification' category.
- The Department of Immigration and Border Protection work with industry to ensure that the subclass 457 visa program operates with maximum flexibility and speed, and is genuinely responsive to and supportive of industry's need for skilled migrants.
- Abolish the additional regulatory obligations placed on project developers that were introduced as part of the *Australian Jobs Act 2013*.

## INTRODUCTION

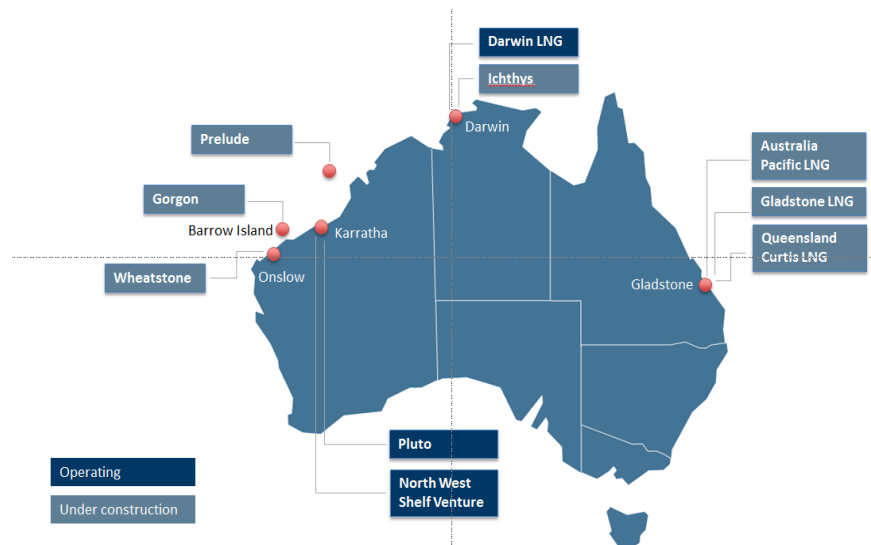
Reliable, secure and competitively priced energy is crucial to our everyday lives in Australia. Oil and gas play a key role in meeting many of our energy needs.

Australia's abundant natural gas resources place it in an enviable position to maintain long-term, cleaner energy security domestically and internationally. Natural gas makes it possible for Australia to meet the world's growing energy needs over the coming decades.

Just as importantly, the industry creates significant wealth for the country, including through the employment of many Australians, underpinning the revenue collections of governments and generating valuable export revenue for the Australian economy.

Almost \$200 billion is currently being invested in oil and gas projects, including seven major liquefied natural gas (LNG) export projects.<sup>1</sup> According to economic modelling commissioned by APPEA and conducted by Deloitte Access Economics<sup>2</sup>, this will increase Australian GDP by up to 2.2 per cent a year. Over the investment phase this has created about 103,000 (full-time equivalent) jobs across the Australian economy. The industry's workforce lives in many different parts of Australia, and companies from all over Australia are supplying goods and services to the oil and gas industry. Therefore, the benefits of the industry are spread across Australia.

**Figure 1. Australia's oil and gas facilities, 2014**



Source: Bureau of Resources and Energy Economics (2013).

<sup>1</sup> See Bureau of Resources and Energy Economics (2013), *Resources and Energy Major Projects*, for a listing of upstream oil and gas projects (available at [www.bree.gov.au/node/49](http://www.bree.gov.au/node/49)).

<sup>2</sup> See Deloitte Access Economics (2012), *Advancing Australia: Harnessing our comparative energy advantage*, 25 June (available at [www.appea.com.au/wp-content/uploads/2013/04/120625\\_DAEreportAPPEAfinal.pdf](http://www.appea.com.au/wp-content/uploads/2013/04/120625_DAEreportAPPEAfinal.pdf)).



By 2020, the sector's economic contribution to the national economy will more than double to \$65 billion and taxation paid will rise from \$8.8 billion (an estimated \$4.9 billion in corporate taxes and \$3.8 billion in production taxes) to reach almost \$13 billion.

It is important to note that forecast global demand for LNG is 470 million tonnes per annum by 2030. More than 200 million tonnes in new capacity will be needed. However, across the world, plans exist for more than double the number of LNG projects needed to meet this demand.

Australia's high-cost local environment and the emergence of new LNG competitors in East Africa, North America and other locations have increased the level of competition Australia faces as it seeks to win market share and attract investment.

The industry and governments must do everything possible to ensure the \$200 billion in projects under construction start production in a timely manner and that Australia secures future oil and gas investment opportunities.

Industry cannot influence some factors affecting current and future investment, such as the high Australian dollar. However, other key challenges must be addressed. In particular, the industry and its suppliers must work harder at constraining cost growth and to meeting skilled labour requirements. Industry is investing in technology and undertaking various business initiatives to reduce costs.

While the Australian economy has benefited and will continue to benefit significantly from LNG investments committed in the past, there are even more projects under consideration, representing a potential additional investment exceeding \$180 billion. Realising these would benefit the entire nation. Analysis by McKinsey & Co<sup>3</sup> shows GDP would increase by 1.5 per cent, about 150,000 jobs would be created across the Australian economy, and tax revenues created would be equivalent to nearly half the total federal debt. The benefits of improving productivity would also flow to other sectors.

This report also showed that Australian costs for delivering LNG to Japan are up to 30 per cent higher than competing projects in Canada and Mozambique. Rising costs in Australia mean this country risks pricing itself out of the global LNG market. Improving productivity in the industry is an essential part of closing the competitive gap.

It is now more important than ever that Australia addresses the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. It is vital that Australia gets the labour market policy settings right today to facilitate developing a flexible and mobile workforce tomorrow.

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<sup>3</sup> McKinsey & Co (2013), *Extending the LNG boom: Improving Australian LNG productivity and competitiveness*, 28 May (available at [www.mckinsey.com/global\\_locations/pacific/australia/en/latest\\_thinking/extending\\_the\\_lng\\_boom](http://www.mckinsey.com/global_locations/pacific/australia/en/latest_thinking/extending_the_lng_boom)).



## WHAT IS INDUSTRY DOING?

The industry is working towards alleviating the productivity challenge of rising business costs and labour market pressures. Many companies are internally striving to decrease costs across their business and investing a significant amount of time and money to overcome the productivity challenge. One significant measure is through training a skilled workforce, developing industry wide safety training and technical in-house training.

### Training a skilled workforce

The Australian oil and gas industry invests heavily in training and up-skilling local workforces, improving the broader skills base of the economy while also meeting the particular demands of LNG producers.

For example, Woodside's academy delivers technical training to safety critical operations and maintenance roles across onshore and offshore production facilities while Santos's training centre developed Australia's first specialised natural gas from coal seams and gas transmission pipeline training facility.

These training programs play a major role in improving the broader skills base of the economy, imparting a positive legacy impact especially given the massive pipeline of energy investments.

Other innovative approaches adopted by the industry to addressing the skills shortage include employing mature workers and exploring alternative working arrangements for people who require greater flexibility, rather than a one-size-fits-all model of employment. Chevron Australia has also partnered with Challenger Institute's Australian Centre for Energy and Process Training to provide women with the skills to transition into an engineering career pathway in the energy sector through its Women in Engineering program. This partnership has supported a 50 per cent growth in women participating in engineering pathways at Challenger Institute since 2009.

More must be done to increase the number of young people studying science, technology, engineering and mathematics subjects at school in order to provide better pathways into the range of professional, technical and trades occupations in the sector. The industry is doing its part to attract more people into the industry and developing the skills required.

### Removing inefficiencies by developing industry-wide standards

The industry also recognised that across Australia there were a wide range of safety induction training programs of varying quality. This led to the development of two innovative programs – the Common Safety Training Program (CSTP) and the Safe Supervisor Competence Program (SSCP). These provide standardised outcomes across the industry and have improved productivity by eliminating duplicated safety training effort across the various operators and contractors.

### World-class oil and gas training and research

The Australian Centre for Energy and Process Training (ACEPT) was developed in collaboration between industry and governments. ACEPT comprises a closed loop processing facility, which has the capacity to provide quality training for its current and future employees.

The Australian oil and gas industry is building its capacity and capability to continue leading the globe in cutting-edge research. The North Australian Centre for Oil and Gas (NACOG) based in Darwin will provide people living in northern Australia with vocational and higher education skills necessary to participate in the Territory's rapidly expanding oil and gas industry.





## SETTING THE LEGISLATIVE FRAMEWORK

Currently, the cost of business in Australia is too high. Ensuring that policies and regulations promote a flexible and mobile workforce is of the utmost importance to all Australians. The following sections highlight the improvements that need to be made.

### THE FAIR WORK ACT 2009

#### MAJOR PROJECT CONSTRUCTION AND GREENFIELDS ENTERPRISE AGREEMENTS

##### Introduction

The current regulatory framework governing enterprise bargaining is inflating labour costs and reducing productivity outcomes on major project construction in Australia. This increases the cost of constructing major oil and gas projects and impairs the ability of the oil and gas sector to attract further investment. By contrast, a successfully functioning workplace relations system on major projects should support:

- Australia's overriding need to build internationally competitive projects.
- Greater price certainty and control over cost increases over the life of the project.
- Confidence that budget and schedule commitments can be met.
- Wage rates and conditions that are reflective of labour market conditions and the broader economic and industry climate.

Project owners need to be more confident about the cost of labour over the full life-span of construction of any given project. Typically, as part of the investment decision-making process, the head contractor provides to the client an estimate of overall construction cost of the project. This is the aggregate of estimates of man-hours by work type for all project components. The hourly rate for labour is based on wage rates under similar agreements that effectively set the benchmark for the project. In addition, an estimate of a premium to be paid for the new project is often included. However, the estimate is provided before the actual enterprise agreement for the project has been negotiated. Further, where one or more key agreements expire during the project life, the aggregate cost estimate becomes more difficult due to arrive at given the uncertainty of outlook for labour costs and how the renegotiation process will ultimately play out.

Along with greater certainty on project cost, the regulatory framework needs to promote greater competition between those bidding for the "work". As described below, the leverage exercised by parties supplying inputs into projects (both labour and equipment) has an impact through the entire chain of client contractor relationships on major projects. It leads to less competition and higher price outcomes. These practices persist despite the high stakes involved.

Industrial relations regulation has long been regarded as exempt from the usual strictures of competition law. As the then Chairman of the Productivity Commission, Gary Banks AO, said in a speech to the 2012 ACCC Regulatory Conference:

*Industrial relations regulation has generally been regarded as falling outside the purview of competition policy altogether and, secondary boycotts aside, union activities are largely exempt from the anti-competitive conduct provisions of the Competition and Consumer Act. The basis for this has been that labour markets are more complex than product markets and involve a significant human dimension. And these points are correct. But are they good reasons for foregoing scrutiny of whether the benefits of particular restrictions*



*on competition and other regulatory measures in the labour market exceed the costs and, where they do, whether they are the best way of achieving those benefits?*

*This question is significant because of the pervasiveness of these regulations across the economy and their influence on the ability of enterprises to innovate and adapt to market opportunities and pressures. Also, the industrial landscape today is considerably evolved from what it was a few decades ago — and far removed from the ‘dark satanic mills’ of the early industrial era. Competition among firms is much greater, most production is technologically more sophisticated and ‘human capital’ is generally seen as key to competitive performance. Moreover, general social safety nets and government support mechanisms have become well developed.<sup>4</sup>*

It is essential to ask the same question of the provisions of the *Fair Work Act 2009* (FW Act). The impacts on productivity and competitiveness for major projects are such that government must carefully reconsider and re-assess the FW Act. After all, productivity gains provide the only sustainable source of higher wages and job security for employees.

### The issues

Several problematic provisions in the FW Act contribute to higher project costs and productivity issues. They may be divided into issues related to setting terms and conditions (the front-end) and issues once the agreement has been negotiated (the back-end).

Front-end issues include the effective monopoly position unions have been granted in setting the price of labour, as well as the pattern of short-term project exigencies that drive outcomes for terms and conditions that may ultimately threaten long-term project sustainability. Back-end issues include risks to project performance and competitiveness that arise despite one or more enterprise agreements being in place. On major projects, these risks are often experienced in construction and ancillary services, with the timing of renewal of agreements and union right of entry provisions posing particular challenges for predictability and productivity.

The front-end issues on major construction sites are largely a reflection of the greenfields agreement provisions within the FW Act.<sup>5</sup>

A greenfields agreement is a type of enterprise agreement between the project (typically the head contractor) and employee organisations (unions). Its purpose is to provide projects with greater “certainty” around terms and conditions and allows estimates to be made of projected labour costs as part of determining project viability/profitability.

A number of issues associated with these provisions have been identified in previous reviews of the legislation. For example, the former Government’s own commissioned review into the FW Act reached the following conclusion:

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<sup>4</sup> Banks, G (2012), *Competition Policy’s regulatory innovations: quo vadis?*, July (available at [www.pc.gov.au/speeches/gary-banks/competition-quo-vadis](http://www.pc.gov.au/speeches/gary-banks/competition-quo-vadis)).

<sup>5</sup> *Fair Work Act 2009* (Cth) s 172(4).





*However, based on the evidence we have received in submissions and consultations, and a review of the data associated with Greenfields agreements ... we consider that there is a significant risk that some bargaining practices and outcomes associated with Greenfields agreements potentially threaten future investment in major projects in Australia.<sup>6</sup>*

The new Government has acknowledged that there are significant issues associated with greenfields negotiations in both its pre-election policy and its proposed first tranche of amendments to the FW Act. As the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* notes:

*Greenfields bargaining practices mean that the commencement of projects can be delayed or possibly abandoned. Alternatively, employers may be forced to agree to claims that are economically unsustainable ... An employer may proceed with a new project without a greenfields agreement in place and negotiate an enterprise agreement when employees commence working on the project. This alternative ... may result in protected industrial action early in the life of the enterprise, leading to scheduling and cost blowouts.<sup>7</sup>*

The potential impacts of project delays associated with the process for making greenfields agreements has been the subject of a study by the Department of Employment. Based on data from the Bureau of Resources and Energy Economics (BREE), the Department of Employment estimated the possible savings if delays in greenfields negotiations were reduced. The Department modelled the impact of delays on project cash flows, measured by present net value. It concluded that:

- Each year on average 16 major resource and energy projects with a total investment of around \$700 million move from the 'Feasibility' to 'Committed' stages, and around 10 of these are new projects requiring greenfields agreements.
- On average, around 40 greenfields agreements are in operation at each major project.
- For such a project, shortening delays due to greenfields negotiations by two months would save \$4.6 million in net present value.
- Given current numbers of projects and working from a conservative estimate that half of all projects are delayed by greenfields negotiations, this equates to total delay cost reduction of \$23 million a year spread across five projects.<sup>8</sup>

While the impact of project delays is significant enough, the real impacts are enduring high cost wage outcomes and productivity issues that persist through the life of the agreement. Furthermore, once an agreement is in place, productivity is impaired by a range of factors that are described below.

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<sup>6</sup> Fair Work Act Review (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, 2 August, p. 171 (available at [www.employment.gov.au/fair-work-act-review](http://www.employment.gov.au/fair-work-act-review)).

<sup>7</sup> Explanatory Memorandum to the *Fair Work Amendment Bill 2014*, p. ix.

<sup>8</sup> Ibid, pp. xiii-xvi.

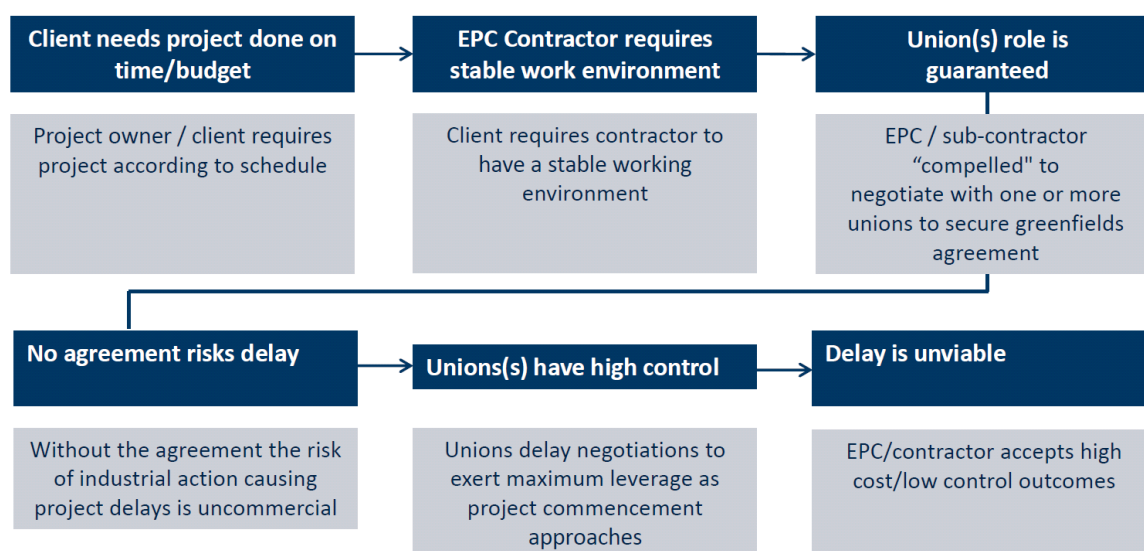
## HOW THE LEGAL FRAMEWORK DRIVES HIGHER COST OUTCOMES

### Front-end issues

An overview of the way in which the agreement-making regime under the FW Act drives high cost outcomes on major projects is represented below.

A combination of factors drives high cost/low control outcomes – from the pressures on the project owner to commence construction in a timely way to meet schedule/market commitments through to the need for the Head Contractor or Engineering and Procurement Contractor (EPC) to have a stable industrial environment in order to meet contractual obligations. At the heart of the issue though, is the effective “monopoly” power conferred to employee organisations (unions) to negotiate greenfields agreements under the Act. This power plus relatively easy recourse to protected industrial action by unions facilitates the exercise of maximum negotiating power during the negotiation process.

**Figure 2. The (front-end) problem: delay and cost**



Source: Seyfarth Shaw Australia (2014).

## LEGISLATIVE DRIVERS

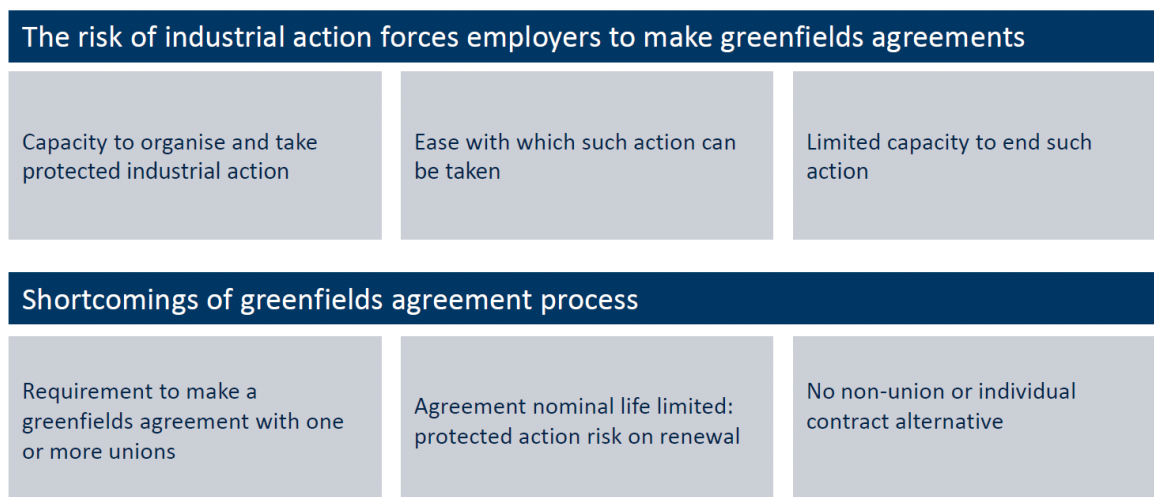
### Capacity to organise and take protected industrial action

Greenfields agreements need to be made *prior* to project commencement. This is the only real option under the legislation. Such an agreement must be made with one or more unions but before any employees are engaged on the site. The alternative is for an employer to commence the project without an agreement in place, risking the prospect of industrial action in support of bargaining for a new agreement. The risk is heightened by the relative ease with which such action can be taken.

In certain circumstances, industrial action may be “protected” under the legislation – protected in the sense that it is immune from legal redress. To secure this protected status, organising and taking industrial action requires certain important administrative steps. The first step is to secure a protected action ballot – a ballot of employees who may approve a “suite” of potential

industrial action. Unions may apply for such an order from the Fair Work Commission (FWC). The ballot occurs after the granting of such an order.

**Figure 3. Legislative drivers**



Source: Seyfarth Shaw Australia (2014).

When a union applies to the FWC for a “protected action ballot order”, the FWC is required to deal with the application urgently. In practice there are few grounds on which employers can object to the making of a ballot order. The main requirement is that the union be “genuinely trying to reach an agreement” with the employer.<sup>9</sup> This is a low threshold, and employers rarely succeed in arguing that unions are not genuinely trying to reach an agreement. Bargaining need not actually have begun for the “genuinely trying” threshold to be reached.<sup>10</sup>

#### Ease with which such action can be taken

Once a ballot is conducted and a majority votes in favour of approving certain industrial action, unions have 30 days (which can be extended by the FWC) to commence the industrial action. They are required to give the employer notice of the actual action to be taken.<sup>11</sup> An employer may not know what kind of action is coming until a formal notice is given. The legislative requirement is three clear days’ notice (subject to exceptional circumstances when up to seven days is provided). Further, while the identification of the industrial action in the notice calls for a degree of precision, it is often insufficient in identifying what will occur.

Having given notice, employees are not actually obliged to take the action described. Unions can therefore use notifications as a tactic to force employers to repeatedly prepare for industrial action, without action actually being taken (which would result in the loss of pay for employees). In this way, significant damage can be inflicted on employers without financial loss to workers.

<sup>9</sup> Fair Work Act 2009 (Cth) s 443(1)(b).

<sup>10</sup> See *J J Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297.

<sup>11</sup> Fair Work Act 2009 (Cth) s 414(1)-(2).



### Limited capacity to end such action

Upon such action being taken there are very limited grounds for employers or other affected parties to end or suspend it.

The FWC may suspend or terminate industrial action where it is or is threatening to:

- Cause significant economic harm to both the employer and employees involved, but only where the dispute and industrial action are already protracted and there is no prospect of resolution in the reasonably foreseeable future,<sup>12</sup> or
- Endanger the life, personal safety or health or welfare of a part of the population, or else cause significant damage to the Australian economy or an important part of it.<sup>13</sup>

The FWC can also suspend (but not terminate) industrial action where:

- It considers that it would be beneficial for the bargaining parties to have a 'cooling off' period,<sup>14</sup> or
- Where the action is both adversely affecting the employer or employees involved, *and* causing significant harm to a third party.<sup>15</sup>

As the Case Study – Pluto (Woodside) below demonstrates, in practice these triggers are rarely available.

### Requirement to make a greenfield agreement with one or more union

An agreement with one (or more) unions is the only option available to an employer seeking a greenfields agreement. Even when an agreement is made, a different union that is not bound by the agreement might seek to subsequently assert a role for itself on the project. The combination of the right of entry laws (which allow unions on site having regard to their coverage of potential members under their rules) together with the limited capacity to resolve demarcation disputes (through a FWC process) fosters this practice.

#### Case Study: The West Gate Bridge Expansion

Beginning in 2009, the widening of the west gate bridge was a major part of the Victorian Government's 'Victorian Transport Plan'. The west gate bridge is the major link between Melbourne's city centre and western suburbs, and the expansion added an extra lane in each direction. The estimated cost of the project was \$240 million, with a scheduled completion date of October 2010.

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<sup>12</sup> Ibid s 423.

<sup>13</sup> Ibid s 424.

<sup>14</sup> Ibid s 425.

<sup>15</sup> Ibid ss 426. See *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360, where a Full Bench of FWA held that delays to a project that cost a third party \$3.5 million per day to run did not constitute significant economic harm. 'Significant' was interpreted to mean 'exceptional'.



The project manager, John Holland Pty Ltd, contracted with a labour hire company called Civil Pacific Services (Vic) Pty Ltd to perform work on the bridge. John Holland and Civil Pacific each employed workers for the project under collective agreements made with the AWU.

The Construction, Forestry, Mining and Energy Union (CFMEU) and the Automotive, Food, Metals Engineering, Printing and Kindred Industries Union (the Australian Manufacturing Workers' Union, AMWU) became concerned that they would not have any involvement in representing workers on the project. Under pressure from the CFMEU and the AMWU, Civil Pacific signed a new agreement with the unions containing higher wage rates than under the pre-existing AWU agreements. John Holland refused to increase the contract rates agreed between itself and Civil Pacific to reflect the wage rates in the new Civil Pacific agreement. As a result Civil Pacific could not afford the new rates, and dismissed its workforce. John Holland invited former Civil Pacific employees to apply for direct employment, but did not commit to employ them.

Between February and April 2009, under the leadership of CFMEU and AMWU officials, union members picketed John Holland's project offices, parking vehicles across driveways to prevent deliveries and engaging in repeated and sustained verbal abuse of John Holland staff and workers who tried to perform work on the project. On several occasions only an overwhelming police presence enabled John Holland to move busses of workers from site to site. These activities continued despite a series of interim orders by the Federal Court that bound the main union officials involved.

Eventually Justice Jessup of the Federal Court imposed a total of over \$1 million in penalties on the two unions and three of their officials, under now-repealed provisions. The full ten lanes of the bridge were opened in June 2011, nine months late. Even after other aspects of the project were scaled back the final cost was \$347 million, \$107 million more than originally planned.<sup>16</sup>

There is no effective alternative to the requirement to make a greenfields agreement with a union or unions. In the case of ordinary single- or multi-employer agreements, once an employer commences bargaining with its employees, the FW Act automatically makes the relevant unions the bargaining representatives for their members. Unions can also force employers to bargain by obtaining a majority support declaration and then bargaining orders from the FWC, or by using industrial action as leverage. While the agreement is ultimately made with employees, the FW Act effectively guarantees the place of unions in the process.

The guaranteed involvement of unions in the agreement-making process is a relatively recent development. As far back as the *Industrial Relations Reform Act 1993*, introduced by the Keating Government, there have been provisions for negotiation of non-union collective agreements. The 1993 Act provided for non-union agreements in the form of Enterprise Flexibility Agreements (EFA's).

Subsequently, the *Workplace Relations Act 1996* was put into effect under the Howard Government. One of its objectives was to strengthen the non-union bargaining stream.

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<sup>16</sup> See *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2010) 196 IR 365.

Non-union agreements became subject to the same compliance tests as union agreements.<sup>17</sup> In addition, the Australian Workplace Agreement – an individual agreement with statutory force – was introduced.

The FW Act does not provide for any statutory individual agreements. Indeed, one of the seven overall objects of the Act is to prevent the existence of such instruments. The relevant object asserts that these instruments can never be part of a fair workplace relations system.<sup>18</sup> Further, as of 1 January 2013, the FW Act explicitly provides that an enterprise agreement's coverage clause may not allow employees to 'opt out', and that enterprise agreements cannot be made with one employee.<sup>19</sup>

#### Impacts on Client-Contractor Relationships

The leverage unions enjoy at the bargaining table has implications for the entire chain of client-contractor relationships. It means that the critical players in the contract chain require (or effectively require) the terms negotiated at the top of the chain to apply throughout. The impacts are shown in Figure 4 below.

**Figure 4. Anatomy of a typical major project**



Source: Seyfarth Shaw Australia (2014).

<sup>17</sup> S 170 LK *Workplace Relations Act 1996* (the non-union bargaining stream).

<sup>18</sup> *Ibid* s 3(c).

<sup>19</sup> *Ibid* ss 172(6), 194(ba).



### High-cost outcomes permeate the entire project

It is unviable for a project owner (client) to allow project works to start without an in-term enterprise agreement. As noted above, without such an agreement in place, unions can take protected industrial action. Industrial action imposes a high risk of delay on the project with large cost consequences for the project owner.

In practice, the client through the EPC manager or head contractor requires an enterprise agreement to be in place which will cover much of the civil/mechanical and constructions works. However, major projects typically have a variety of sub-contractors who may in turn have their own agreements in place. Those sub-contractors will effectively be required to adopt the terms of the project greenfields agreement. As a result, an element of sub-contractor competition for the works is removed (to the extent that the workplace arrangements provide a point of competitive tension). Were a sub-contractor to use an existing agreement with terms less beneficial than other agreements on the project, that sub-contractor could be expected to be subject to significant union pressure and the prospect of industrial action.

Unions know of the pressure on clients to commence project works. Any delay in reaching terms results in lengthy negotiations with a looming commencement date. This provides a critical additional point of leverage.

#### **Case study: BHP Billiton and the Kipper-Tuna and Turrum projects**

BHP Billiton is a co-venturer with Esso Australia in a long-standing oil and gas production venture in Bass Strait. The Kipper-Tuna and Turrum projects are current major expansion projects in this joint venture. The projects require the building and deployment of expensive special-purpose vessels and facilities that are sourced outside Australia. These structures' inflexible sailing schedules to Australia are easily discernable to Australian construction unions. The deployment of many other vessels and operations turned on the timely delivery and deployment of these special-purpose vessels and facilities. The Australian construction unions took advantage of this situation to hold out for unreasonable demands for wages and the employment of favoured individuals, banking that the operator would ultimately have no practical alternative but to submit. This wholly unbalanced situation is causing huge cost blowouts and great damage to industry around Australia.<sup>20</sup>

The Productivity Commission in its recent Draft Report on *Public Infrastructure* analysed this issue in the context of the broader public infrastructure building construction industry.<sup>21</sup> The Commission found:

*Most recently, there has been concern that head contractors and unions find it expedient to secure certainty through negotiation of greenfields agreements incorporating excessive wages and conditions before tenders. A major issue is that such agreements have limited*

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<sup>20</sup> BHP Billiton (2012), *Submission to the Fair Work Act Review*, 17 February, p 30. See also pp. 31-33 (available at [submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/BHPBilliton.pdf](https://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/BHPBilliton.pdf)).

<sup>21</sup> Productivity Commission (2014), *Public Infrastructure, Draft Report: Volume 2*, 13 March, p. 438 (available at [www.pc.gov.au/projects/inquiry/infrastructure/draft](http://www.pc.gov.au/projects/inquiry/infrastructure/draft)).



*the capacity of subcontractors to form their own enterprise agreements with their own employees, and that such agreements have set the standard for subsequent agreements, inflating costs.*

#### Impact on other industries

As well as affecting the contracting chain, high-cost construction may hurt other industries and jobs. Increasing Australian labour costs can make full assembly and construction of plant onsite commercially unviable leading to the development of other solutions – sometimes to the detriment of the local manufacturing sector.

Historically, a processing plant may have been constructed onsite in a predominantly 'stick-built' approach – with a significant amount of the steel fabrication and small modular assemblies being undertaken offsite by local fabrication firms.

Many large-scale critical items for major oil and gas projects need to be manufactured offshore (modularisation). However, options for local fabrication and fit-out diminish as Australian labour becomes less competitive. Offshore firms undertake work for delivery in large sections to the construction site, at the cost of some local manufacturers, workshops and fabrication firms. This reduces opportunities for the development of skilled tradespeople like welders and boilermakers.

Even the National Secretary of the CFMEU, David Noonan, has conceded higher wage rates would drive employers to look for alternatives to labour such as greater mechanisation and prefabrication, costing the jobs of his members in the long-run:

*Higher wage rates and higher safety standards will drive investment in capital as substitution for labour. That is borne out by the fact if you look at a Melbourne construction site the level of technology of the contractors is the highest in Australia...*<sup>22</sup>

#### Agreement content is too broad

The current broad "permitted matters" construct has enabled unions to require employers to agree to union 'control' clauses – such as those limiting the capacity to sub-contract work. These clauses may have an adverse and powerful impact on the employer's capacity to manage thereby impacting productivity. They include matters such as limitations on contracting-out, enhanced rights on entry, union control over inductions and the rights of delegates to training and paid time on union matters. Such limitations would generally not be permitted in the dealings between companies.

The potential for protected industrial action is enhanced by virtue of there being more matters which are the subject of bargaining.

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<sup>22</sup> Dunkley, M (2014), "Australian construction crews enjoy the best conditions in the world", *The Australian Financial Review*, 25 February, p. 1 (available at [www.afr.com/p/national/australian\\_construction\\_crews\\_enjoy\\_6jJZjrOtuhSRoXhsd6kNdL](http://www.afr.com/p/national/australian_construction_crews_enjoy_6jJZjrOtuhSRoXhsd6kNdL)).

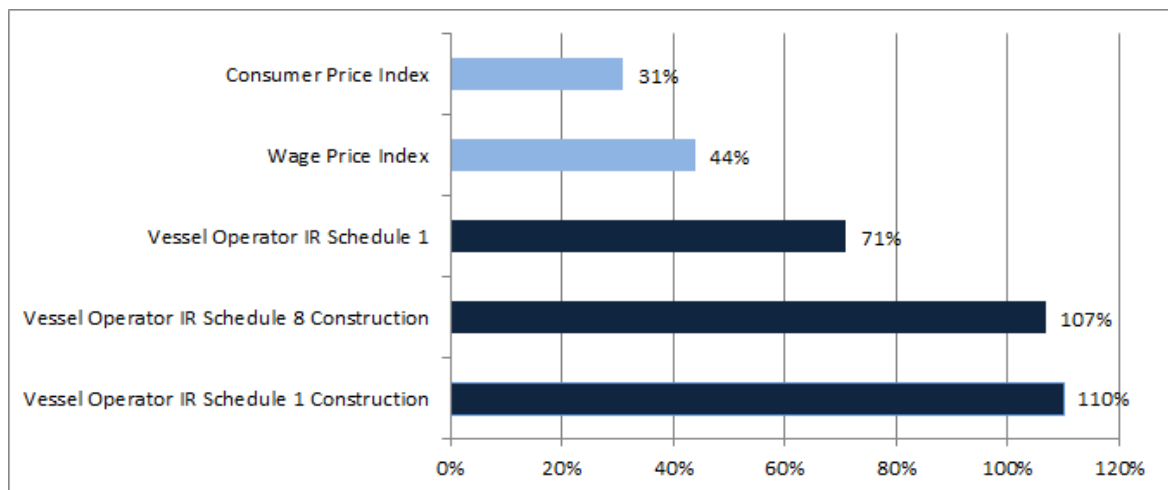


## Unions set the price of labour using previous 'best of kind' deals as the minimum benchmark

Unions use the benchmark set on a previous project as the starting point for negotiations over the next agreement. This inflates project construction cost beyond what would otherwise be needed to meet the demand for labour. That benchmark may include not only a generous base rate of pay, but other favourable working conditions such as hours of work and the project 'allowance'. Very few input costs for major projects, other than the 'price' of labour, exhibit this type of rigidity.

To some extent, the price may reflect certain regional considerations and particular demands that arise from workers working (and living) in remote localities. However, it is also fair to say that the terms and conditions reached are well in excess of those needed to secure a sufficient supply of labour – reflecting the power imbalance in the negotiation between unions and those responsible for agreeing to the terms and conditions.

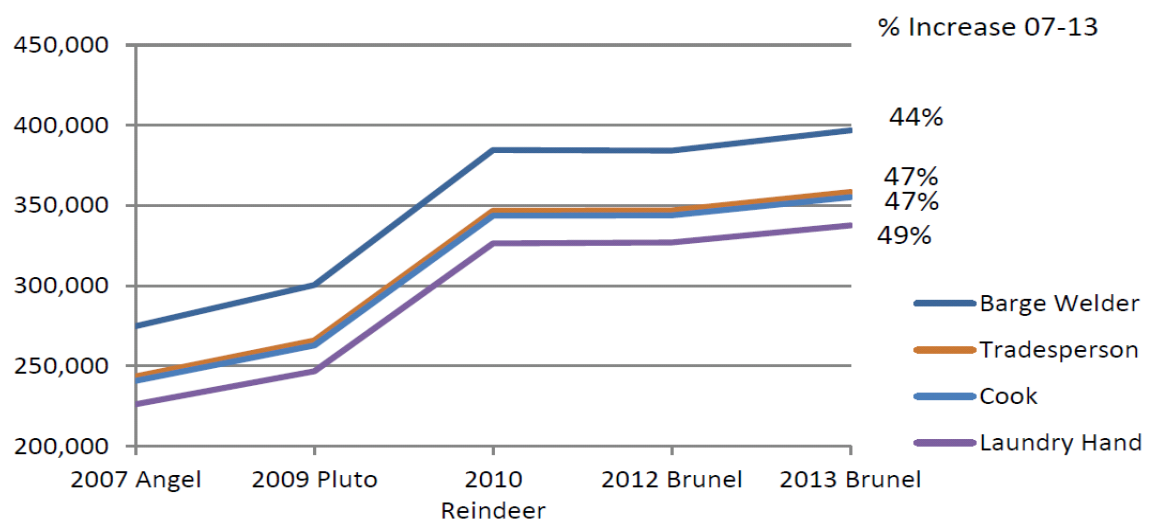
**Chart 1. Integrated rating wage growth, 2002-12**



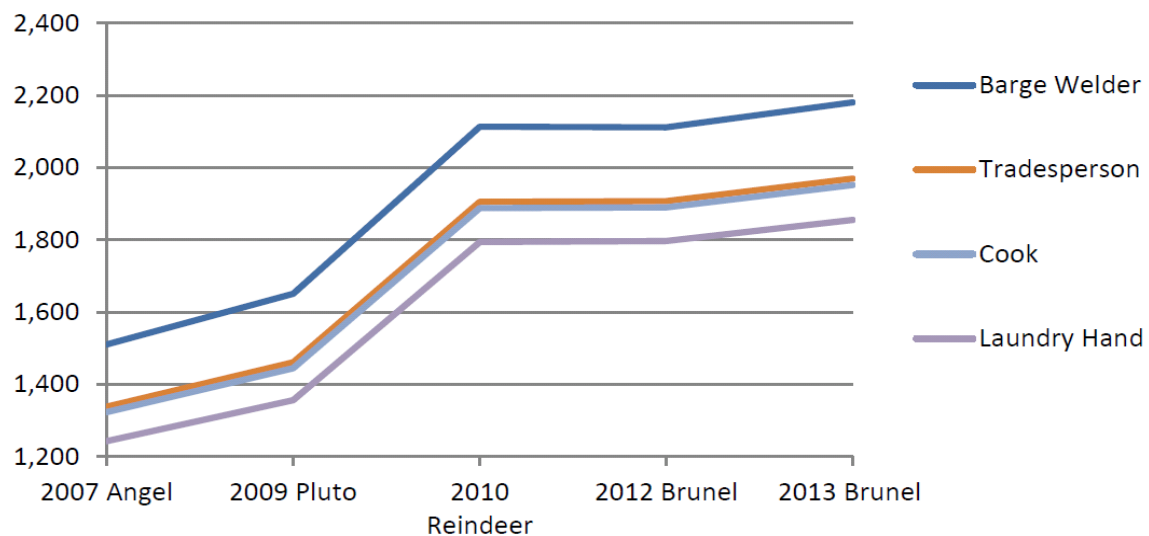
Source: Deloitte Access Economics (2013).

Note: IR is an abbreviation of integrated rating

**Chart 2. Offshore construction annual salary, including superannuation (\$)**



Source: Association of Mines and Metals (2013).

**Chart 3. Offshore construction day rate, including superannuation (\$)**

Source: Association of Mines and Metals (2013).

#### Agreement nominal life limited

Enterprise agreements (including greenfields agreements) have a “nominal life”, being a maximum of four years from their approval by the FWC. The life is “nominal” in the sense that once the expiry date is passed, the agreement continues to exist. This is so until it is terminated (in rare circumstances), or more usually, replaced by another agreement.<sup>23</sup> Critically the passing of the nominal life means protected industrial action can be taken in support of a new (replacement) agreement. The risk is that this may coincide with a critical point in the project life, being the near-completion phase.

#### SUMMARY

The net effect is that the labour market for building major oil and gas projects is not responsive to external economic conditions or changes in the labour market. Wages and conditions agreed during the broader resources boom are “locked in” as the starting point for any further negotiations for further projects. The “floor” of the price of labour is fixed without regard for conditions in the wider employment market or the need for Australia to be globally competitive in attracting further capital investment – whether for ‘brownfields’ expansions or new “greenfields” developments.

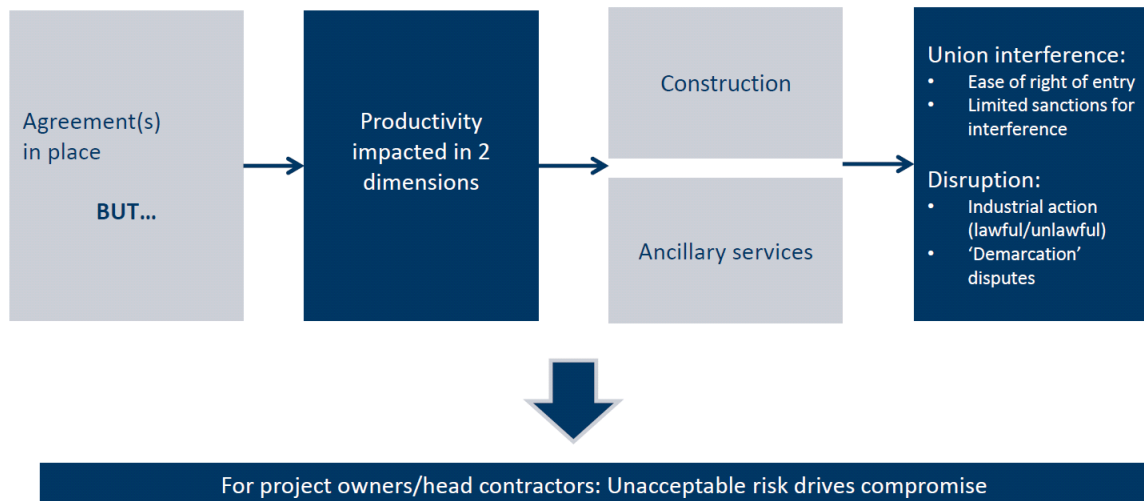
#### Back-end issues

Once the agreement is in place, resort to industrial action is prevented by the legislation. However, several key issues have ramifications for productivity and cost structures on a major project despite the major greenfields agreement(s) being in place:

<sup>23</sup> Fair Work Act 2009 (Cth) s 54.

- The re-negotiation of expired greenfields agreements (or other agreements relating directly to project construction) giving rise to the risk of protected industrial action.
- The re-negotiation of agreements of ancillary service providers giving rise to the risk of protected industrial action.
- The broad scope of 'permitted matters' over which bargaining can take place.
- The exploitation of union Right of Entry.
- The risk and impact of unprotected industrial action.

**Figure 4. The (back-end) problem: productivity**



Source: Seyfarth Shaw Australia (2014).

## LEGISLATIVE DRIVERS

### Risk of protected industrial action

As noted above, agreements relating directly to project construction and agreements relating to the provision of ancillary services create the risk of protected industrial action. In cases where greenfields agreements subsist for the life of a project, the risk is often highest in the provision of ancillary services to the project. In the oil and gas industry, maritime services – whether offshore vessel operations supplying services from the mainland to the project site or wharf stevedoring and loading services – provide a particularly good case study.

The Maritime Union of Australia's (MUA) critical role in the onshore and offshore supply chain exposes several major projects to risk. For example, there have been a number of publicised disputes relating to the Gorgon LNG Project. This is ironic as the large bulk of WA's 2,800 maritime worker jobs have been created by the Gorgon and Wheatstone LNG Projects.

The MUA has coverage of critical roles such as tug operators, stevedores (loading and unloading), seafarers and crane operators. Construction workers in offshore areas are heavily dependent on reliable and efficient stevedoring and maritime operations. Crane operators are able to exert a high degree of influence over the level of productivity ultimately achieved through control of a vessel's load/unload rate. The outcome is that the action of unions can directly impact on the way a project is managed and therefore the way commercial operations are undertaken.

The risk of industrial action is enhanced by virtue of the broad scope of matters over which bargaining can take place.

### Broad scope of permitted matters – MUA example

The broad scope of “permitted matters” on which bargaining can take place under the FW Act has been exploited fully by the MUA.

The provisions have enabled unions to insist that contractors agree to certain ‘control’ clauses, which are aimed at protecting the position of the union. These clauses include “job security” clauses that limit the capacity of project operators to sub-contract work or restrict the use of foreign workers, contracted and non-union personnel. Control over recruitment practices, the perpetuation of a ‘closed shop’ in the workplace and a high degree of influence over the manner in which projects are managed is the unfortunate result. The other result is impediments to productivity, restrictions on the flexibility with which firms can operate, reduced competitiveness and the further exacerbation of an already high cost environment.

The MUA is currently in negotiation with 22 vessel operators servicing the WA oil and gas industry. These negotiations have been underway for about 12 months, prior to the lapsing of the previous agreement in June 2013. Since 3 January 2014, the negotiations have been conducted under the potential threat of protected strike action. When similar industrial action took place in 2009-10, some vessel operator companies lost \$500,000 in revenue per day and ultimately accepted the union’s demands for a 30 per cent pay increase over four years.

The MUA is now seeking, among other things, a 22 per cent pay rise over four years. The wage claims are not linked in any way to productivity gains, and compare with an ABS annual wage growth of 2.6 per cent – the weakest pace for at least 16 years.<sup>24</sup>

### Right of Entry provisions

Right of Entry provisions have been exploited by a number of unions to gain access to projects at significant cost to contractors and ultimately operating companies – in furtherance of membership recruitment or union demarcation issues.

Under the FW Act union officials have the right to enter premises if they hold a valid and current right of entry permit issued by the FWC. The permit is intended to allow the official to investigate suspected breaches of the FW Act and other instruments, meet with employees and/or exercise rights under occupational health and safety laws.

In practice, however, the current Right of Entry provisions allow access to sites to individuals from any union *“that has the right to represent the industrial interests of members or potential members”*, regardless of whether it has members on that site or an existing enterprise agreement in place at that site. This low threshold access to permits encourages recruitment campaigns and leads in many cases to demarcation conflict.

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<sup>24</sup> Australian Bureau of Statistics (2014), *Wage Price Index, Australia* (cat. no. 6345.0), February.



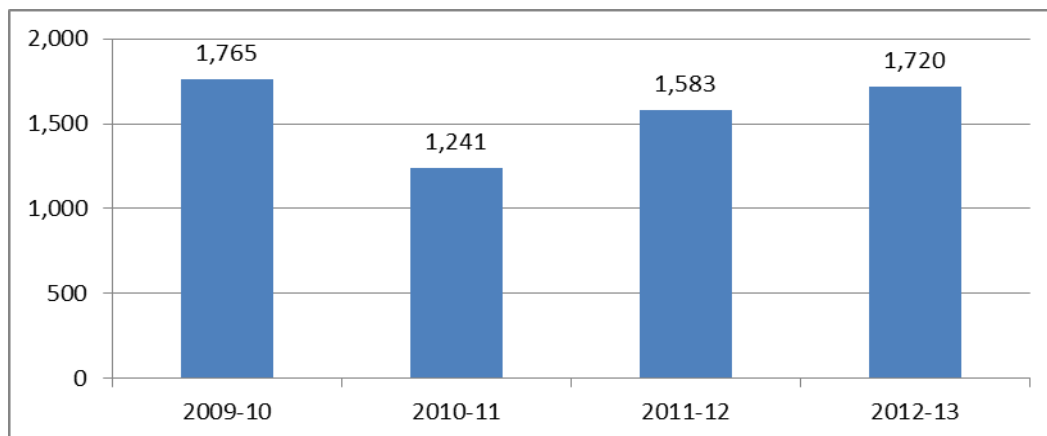


#### Right of Entry – Pluto Project<sup>25</sup>

Prior to the commencement of the *Fair Work Act 2009* on 1 July 2009, there were no union Rights of Entry at the Pluto LNG project. From 1 July 2009 to 27 October 2009 the four major construction unions, eligible to cover workers – namely the CFMEU, the Communications Union (CEPU), AMWU and the AWU – entered the site 217 times. By May 2010, that number had increased to 450.

The increase in the number of Right of Entry requests granted by the FWC since 2010-11 is demonstrated by FW Act statistics showing the total number of requests granted annually since 2009-10.

**Chart 4. Total Right of Entry permit requests granted by the Fair Work Commission, 2009-13**



Source: Fair Work Commission Annual Report 2012-13.

Contractor companies report that the Right of Entry provisions are being exploited by unions under the guise of investigating (primarily) safety concerns, at significant cost to contractors and ultimately operating companies. Each request results in companies having to initiate the appropriate internal processes to manage the requests to ensure compliance with the applicable legislation. An example of the type of processes required to administer or oversee just one Right of Entry request is described below.

#### Right of Entry permit procedure – a company view

All entries to a project whether by a union official or visitor must be conducted in strict compliance with the rights and obligations contained in the FW Act and the *Work Health and Safety Act 2011*. Accordingly, where a Project Manager receives notice of a Right of Entry they must immediately notify relevant personnel within the business who have the technical expertise and knowledge to assist.

<sup>25</sup> Association of Mines and Metals (2012), *Submission to the Fair Work Act Review Panel*, February (available at [submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/AustralianMinesandMetalsAssociation.pdf](http://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/AustralianMinesandMetalsAssociation.pdf)).



In some cases, a number of union officials seek entry together and, once onsite, separate in order to cover different areas within a large project. Companies must therefore ensure that a sufficient number of people are on hand to manage the entry – requiring a diversion of personnel and resources.

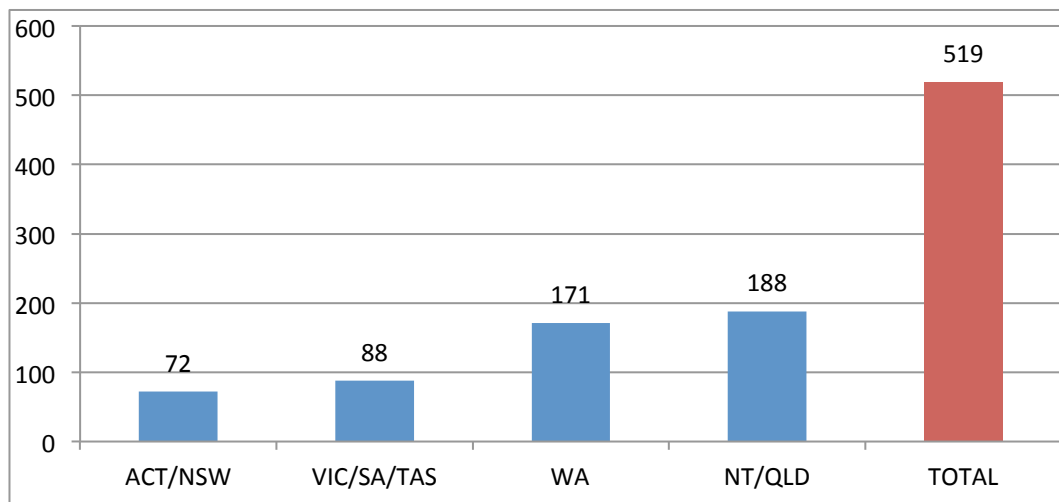
All relevant details and events during the entry must be accurately recorded at the time of the entry in case of later disputes after the entry has occurred.

This process can be even more protracted the entries are for remote or offshore sites and carried out over multiple days.

Companies may also have reporting obligations with regards to entries which have not been conducted in accordance with the applicable legislation or “unlawful entries”. In order to manage these reporting obligations, records of entry must be prepared and submitted to relevant authorities for investigation including the Fair Work Building and Construction Inspectorate (FWBC) or an applicable state government authority.

The burden of managing various Right of Entry requests can be quite onerous. One construction contractor recorded 519 requests for sites across the country<sup>26</sup> in one 12 month period. This is clearly disproportionate attention to one contractor’s business when the total number of Right of Entry permits granted by the FWC over a (similar) time frame was 1,720.

**Chart 5. Right of Entry permit requests granted by the Fair Work Commission for one company in 2013**



Source: Information provided to APPEA (anonymous).

<sup>26</sup> Not all were oil and gas major project sites.

## Unprotected industrial action

While unprotected industrial action is unlawful, it does not prevent unions from taking such action in major project construction because for some unions, the leverage that can be extracted may often outweigh the cost/penalty of taking such action.

While not strictly a category of industrial action, there is also the risk of unlawful picketing aimed at preventing the movement of people/goods/raw materials/services to and from a project. While such conduct is unlawful and amenable to injunctive relief and claims for damages in common law courts, the challenges associated with the seeking of a quick remedy mean that great leverage can be extracted very quickly. Again, some unions also know that many employers will compromise on seeking damages as part of a negotiated outcome to the underlying dispute usually arising out of an additional union driven claim.

## FW ACT REFORM EFFORTS TO DATE

The previous Australian Government ordered a review of the FW Act and related legislation after two years of operation.<sup>27</sup> The Review Panel received over 250 submissions from various stakeholders, including major groups representing employers in the construction and resources industries.

As noted above, the Panel acknowledged the risk to further investment posed by the FW Act greenfields agreement provisions and made four salient recommendations:

*Recommendation 27: The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications ...*

*Recommendation 28: The Panel recommends that the FW Act be amended to 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 ...*

*Recommendation 29: The Panel recommends that the FW Act be amended so that s. 240 (as with our Recommendation 22) applies to the negotiation of an s. 172(2) (b) greenfields agreement ...*

*Recommendation 30: The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2) (b) greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA 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.<sup>28</sup>*

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<sup>27</sup> Fair Work Act Review (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, 2 August (available at [www.employment.gov.au/fair-work-act-review](http://www.employment.gov.au/fair-work-act-review)).

<sup>28</sup> Fair Work Act Review, above n 5, pp. 172-3.

There is a strong case to suggest that the recommendations do not go far enough to address the negative impact on employers and Australia's ability to compete in global markets. In any event, the recommendations were not acted upon by the previous Government.

Prior to the 2013 Federal Election, the then Opposition released its policy to improve the operation of the FW legislation.<sup>29</sup> The policy specifically addresses greenfields agreements for new projects. Indeed, recommendations 27 and 30 arising from the FW Act review are, to some extent, reflected in the Coalition's policy.

On 27 February 2014, the Australian Government introduced the *Fair Work Amendment Bill 2014* (the Bill) into the Australian Parliament. The Bill would amend the FW Act in several significant respects, including in relation to greenfields agreement negotiations.

The amendments to greenfields provisions set out in the Bill operate essentially as set out in the *Coalition's Policy to Improve the Fair Work Laws*:

- Employer negotiation with one (or more unions) that are able to represent a majority of the employees.
- Good faith bargaining requirements will apply to greenfields negotiations.
- Employers can set a three month "negotiation period" in which an agreement is to be concluded.
- If agreement has not been reached within three months, the employer may unilaterally apply to the FWC for approval. 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*". Regard may be had to the prevailing pay and conditions in the relevant geographic area for this purpose.<sup>30</sup>

In addition, the amendments potentially create greater control and limitations on Right of Entry.

#### Why the Government's solution needs to go further

While the Government's proposed solution is a step in the right direction, there is a need for it to go further to address the concerns that are identified above.

- Resort to an approval process that relies on '*pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry*' risks an outcome whereby the most recent deal is the minimum benchmark for the next. This is what typically happens today albeit through a re-negotiation process. While the criteria to be applied, in assessing 'prevailing industry standards' remains to be seen, a solution which ignores commercial realities will only lead to further increases in costs.
- The FWC approval process is likely to see an arbitrated "highest" common denominator approach. The following issues will be the subject of litigation and testing of the legislative intent:
  - What is meant by "prevailing" pay and conditions?

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<sup>29</sup> *The Coalition's Policy to Improve the Fair Work Laws*, May 2013, p. 8 (available at [www.liberal.org.au/improving-fair-work-laws](http://www.liberal.org.au/improving-fair-work-laws)).

<sup>30</sup> *Fair Work Amendment Bill 2014* (Cth), s 27-33.



- What is meant by “overall basis”? What elements are relevant having regard for instance to variable rostering arrangements making a “like for like” comparison difficult?
- What is meant by “relevant industry for equivalent work”? Is that the work of a fitter in project construction or a fitter in oil and gas where the work is construction for an oil and gas client?
- How will the “relevant geographic area” be relied upon? Will the geographic area be “relevant” if there is no local benchmark?

#### Required considerations

A more desirable solution which has a fairer weighting for both employers and employees would see consideration of the particular circumstances of the employer and of the project including (Collectively referred to as “Project Economic Circumstances”):

- Prevailing economic circumstances as they relate to the industry that relates to the project.
- The impact on project cost, international competitiveness and the need to attract future investment in the industry that relates to the project.
- Any prevailing terms and conditions of the employer for comparable work along with prevailing terms and conditions for comparable work generally.

A four year maximum life is not sufficient because of the risks associated with the renegotiation process and length of construction lives on projects in the oil and gas industry.

#### DEVELOPING A REFORM AGENDA

To be effective, reform of the FWA Act provisions that relate to the construction of major projects must address issues at the front-end (setting terms and conditions) and the back-end (protecting project performance from workplace relations risk notwithstanding that one or more agreements are in place).

This report puts forward recommendations for workplace changes which build on reforms proposed by the Australian Government but takes them significantly further by acknowledging that more change is required in order to develop the competitive labour market regulatory arrangements needed to attract further investment in major projects.

APPEA acknowledges that the reforms proposed in this report will not, of themselves, address all of the workplace productivity challenges confronting major projects in Australia.

APPEA will continue to develop a workplace reform agenda that encourages investment and jobs in Australia's oil and gas industry and will be making further recommendations to government.

In any case, Australia should not be afraid to have a reform debate. The stakes are too high for investment, competitiveness and jobs. APPEA puts forward these recommendations in the interests of informed debate over the next essential stage of reform of labour market regulation.

#### Major Project Agreements (MPA's)

This report proposes amendments that would introduce a new category of agreements into the FW Act. This category of agreement (MPAs) would apply specifically to major capital projects.

This would require developing dimensions for defining major projects. The Productivity Commission's November 2013 report, *Major Project Development Assessment Processes*,

described various criteria for defining “major projects”<sup>31</sup>. One approach is that used by BREE which determines a resource project as a major project if it involves \$50 million or more in capital expenditure. Mega projects are resource projects that cost more than \$5 billion. As a starting point, the BREE definitions could be used.

There are international precedents for special provisions that apply to major projects. For example, section 7 of the Canada Labour Code permits establishing agreements for major projects and provides for an expedited collective bargaining process in such circumstances.<sup>32</sup>

The special provisions for MPA’s would build on the changes being introduced by the current Government Bill – but with some major enhancements to reflect the need for Australia to be internationally competitive for major project construction.

Section 3(a) of the Act currently references the need for “... productivity and economic growth for Australia’s future economic prosperity.” However, the objectives of the Act would need to be amended and strengthened in relation to MPA’s to ensure that the agreement making process reflected the particular needs of the major project (Project Economic Circumstances):

- The need to respond to prevailing economic circumstances as they relate to the industry that relates to the project.
- The impact on project cost, international competitiveness and the need to attract future investment in the industry that relates to the project.
- Any prevailing terms and conditions of the employer for comparable work along with prevailing terms and conditions for comparable work generally.

Section 3(g) of the Act current acknowledges the special circumstance of small and medium-sized business but says nothing of the needs of future major projects.

**Figure 5. The front-end solution: Major Project Agreements (MPA’s)**

Current Government Bill			Term	Renewal
3 month negotiation with union(s)	→	FWC approval	4 years	By negotiation – with protected action risk
“considered on an overall basis, provides for pay and conditions that are consistent with prevailing pay and conditions within the relevant industry for equivalent work” (geographic area relevant)				
New Category of Agreement			Term	Renewal
3 month negotiation with union(s)	→	FWC approval	5 years	• 3 month negotiation
Amend legislative objects	→	and	[or]	• no protected action during 3 months
			project life	• after 3 months, employer submits for approval (arbitration); or faces protected action
“... provides for pay and conditions that are consistent with prevailing pay and conditions for the work performed in similar circumstances but taking into account the particular circumstances and needs of the employer and the project.”				• arbitration factors in project performance and union role in it

Source: Seyfarth Shaw Australia (2014).

<sup>31</sup> Productivity Commission (2013), *Major Project Development Assessment Processes*, November, pp. 51-52 (available at [www.pc.gov.au/projects/study/major-projects](http://www.pc.gov.au/projects/study/major-projects)).

<sup>32</sup> S. 7 Canada Labour Code (available at [laws-lois.justice.gc.ca/eng/acts/L-2/page-3.html#h-6](http://laws-lois.justice.gc.ca/eng/acts/L-2/page-3.html#h-6)).



The employer would set a three-month negotiation period within which agreement is to be concluded (as per the *Fair Work Amendment Bill 2014*). If agreement is not reached in that three month period, it would be submitted by the employer for approval by the FWC.

The employer ought be able to make an agreement with any union having coverage of the work. To avoid the risk of another union imposing itself on a project in adverse ways (see the the West Gate Bridge case study at page 11 above), greater protections in respect of right of entry, unlawful industrial action and picketing are required (see page 27-29 below).

To provide for greater certainty through the life of the agreement, MPA's would ordinarily apply for the project life – from construction commencement through to completion of commissioning and handover to client. This would mean agreement duration of five years or longer with provisions inserted to allow for updates and/or cost of living adjustments.

#### Renewal by agreement or limited arbitration

For the renewal of an MPA (assuming it did not cover the project life), there would be a three month re-negotiation with one or more unions that cover the work. Following the three month re-negotiation, it would be open to a union to organise protected industrial action but not where the employer chooses the renewal to be arbitrated.

The scope of any such arbitration ought to be confined to matters that directly relate to the employer and employee. This is in contrast to both the current broad “permitted” content formulation which encourages union control clauses and previous formulations that placed restrictions on contracting out. The legislative drafting ought to be squarely aimed at avoiding, for instance, clauses that restrict contracting out.

The arbitral body ought to have strict criteria against which the determination be made – but which take into account the need to respond to prevailing economic and industry circumstances and international competitiveness.

#### Protecting the project and ancillary services (the back-end)

Setting terms and conditions are the start but not the end of the story. Maximising the potential for optimal project construction performance requires changes to the provisions that apply once an agreement has been put in place. Such performance is greatly affected by what occurs on direct construction activity and ancillary services (such as offshore vessel operations supplying services from the mainland to the project site).

A suite of reforms is required to better protect major project investment to maximise productivity. They would include:

- Right of Entry – Interim orders ought to readily be available to prevent site access where evidence suggests that a permit-holder has been disruptive or has caused disruption or has otherwise behaved improperly in relation to a major project. Site access should be confined only to those unions with whom an agreement has been made. The conduct of union officials



on major projects whether pursuant to a Right of Entry under the FW Act or otherwise needs improved scrutiny and sanction. The current tests provide too much latitude for vexatious misbehaviour.<sup>33</sup> The attitude of FWC appears to favour the “right to represent” over the right of the occupier to go about its business. The seeking and renewal of permits ought to be open to public scrutiny. The “fit and proper” test ought to be tightened. The proposed Australian Building and Construction Commission (ABCC) ought to be aware of any such application so that it may be heard on any application or renewal.

- Industrial action: Unlawful – The most effective deterrent against unlawful industrial action is the threat of a meaningful pecuniary penalty against parties to organise such action and those who take it (as was the case under the *Building and Construction Industry Improvement Act 2005*).<sup>34</sup>
- Industrial action: Lawful – One of the biggest project risks is the re-negotiation of enterprise agreements relating directly to project construction and operations. However, the issue also arises in respect of ancillary suppliers, such as offshore vessel operators. The threshold for taking industrial action needs to be higher and the capacity to end it greater where such action directly impairs (or threatens to impair) project performance.

#### Case study: Woodside Pluto LNG Project

Woodside Energy and its contractors were open to unions being involved in agreement making on the project. Attempts were made by contractor representatives to establish a highly competitive set of terms and conditions of employment for the project that could form the basis for negotiations between unions and individual contractors. However, the relevant construction unions did not agree to the proposals.

One such example was Mammoet Australia Pty Ltd, a contractor engaged by Woodside to carry out heavy lift and transportation operations and provide transportation and crane services for the Pluto LNG Project's onshore component. The work Mammoet was contracted to perform was crucial for the performance of work by most other contractors on the project, and for the completion of the project generally.

Mammoet had made an employer greenfields agreement under the former *Workplace Relations Act 1996* with a term limited to 12 months (to September 2009). The Mammoet agreement was in terms consistent with market leading terms and conditions of employment set out in other industrial agreements applying to other contractors working on the project. Mammoet's work on the project was not completed within the 12 month period, and the CFMEU, acting as bargaining representative for a group of 12 of Mammoet's employees engaged as crane and forklift drivers, sought to bargain with Mammoet for a new agreement.

<sup>33</sup> Examples can be found in Woodside (2012), *Submission to the Fair Work Act Review Panel*, 17 February, pp.7-8 (available at [submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/WoodsideEnergyLtd.pdf](https://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/WoodsideEnergyLtd.pdf)).

<sup>34</sup> Immediately prior to its repeal, the Act provided a maximum civil penalty of \$110,000 per contravention for unlawful industrial action.



An outline of the conduct of bargaining and significant periods of disruptive industrial action is set out in reasons for decision issued by Fair Work Australia (FWA) in *Mammoet Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4389, *Woodside Burrup Pty Ltd & Kentz E & C Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA 4880, and *CFMEU v Woodside and Kentz E&C Pty Ltd* [2010] FWA 6021.

Ultimately, after about two months of industrial action and with the prospect of continuing industrial action (in circumstances where the CFMEU was seeking terms and conditions of employment significantly in advance of the terms and conditions of employment set out in industrial agreements applying to other contractors on the project), Woodside made an application to FWA for orders suspending protected industrial action. The basis of the application was that third parties were being significantly harmed by the industrial action. At the time of the application, it was estimated that Mammoet had approximately four to six weeks of work left on the project.

Evidence before FWA showed the industrial action had the following impacts:

- Delay in the commencement of the revenue stream from LNG sales estimated to be in the order of millions of dollars per day.
- An increase in the number of days it would take to complete the project and consequent costs to Woodside of \$3.5 million per day to run the project and site-based services costs from the extension of time to contractors and associated delays, and
- Costs of additional resources brought in to finish the work within the allocated contract dates.

Ultimately, Woodside's application was refused by a Full Bench of FWA (following an appeal by the CFMEU).

The Full Bench in overturning the decision of a single commissioner in first instance, found that the industrial action of Mammoet employees did not threaten to cause "significant harm" to Woodside. The Full Bench did not consider \$3.5 million per day as constituting 'significant' economic harm in a project costing 'billions'.

It found that *"...those amounts are not significant in the relevant sense when considered in the context of the project unless the further delays on account of the projected industrial action became very protracted."*<sup>35</sup>

The test applied by FWA to set the threshold for establishing "significant harm" for the purpose of obtaining a suspension of industrial action was clearly too high. Ultimately, there was no utility in appealing the decision as Mammoet reached agreement with its employees shortly after the decision and the industrial action ceased. The agreement reached did not include the "premium conditions" originally sought by the CFMEU.<sup>36</sup>

<sup>35</sup> *CFMEU v Woodside Burrup Pty Ltd and Kentz E&C Pty Ltd* [2010] FWA 6021, 6 August 2010.

<sup>36</sup> Woodside (2012), *Submission to the Fair Work Act Review Panel*, 17 February, pp. 5-6 (available at [submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/WoodsideEnergyLtd.pdf](http://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/WoodsideEnergyLtd.pdf)).



- ABCC Resourcing – Improved resourcing for the proposed ABCC so it can be more effective on major project construction would help maintain a ‘compliance culture’.
- Anti-picketing laws – One of the most potent tactics that can be utilised to pressure project stakeholders is the organisation of intimidatory or unlawful pickets. While such conduct is amenable to legal redress in common law courts, access to the remedy is often slow and ineffective to the extent that it relies upon the identification of those responsible for organising/maintaining the picket. A statutory provision which improves speed for legal redress and provides for a breach amenable to a penalty including against individuals needs to be considered.

#### **CASE STUDY – Chevron targeted by MUA**

The Maritime Union of Australia (MUA) has a history of disruptive public behavior.

To further its industrial claims in 2011, the union launched a public campaign against resources companies, especially targeting Chevron Australia, as operator of the Gorgon and Wheatstone Projects. This was despite the fact that the Gorgon Project alone has been responsible for providing more than 2,000 jobs in marine classifications including seafarers, stevedores, masters, deck officer, engineers and catering jobs.

The campaign against resource companies included city rallies supported by other unions. The first held on 29 November 2011 with the MUA's Western Australian Secretary Chris Cain being reported as saying the rally would “shut down St George's Terrace.”<sup>37</sup>

In January 2012, the MUA supported by other unions protested outside Chevron offices in the QV1 building and Dynon's Plaza in Perth. According to Chevron employees, the behaviour of the protestors was threatening and intimidating. On 31 January 2012, the protestors forcibly gained access to the foyer at Dynon's Plaza and refused to leave when directed to do so by security.

Chevron's response was that while it respected the rights of individuals or groups to protest, when the protest stepped over the line and had the potential to impact the health and safety its employees and contractors, the action could not be tolerated. Chevron immediately sought legal recourse.

*“A writ against the maritime (MUA) and construction (CFMEU) unions claimed the protestors had unlawfully obstructed staff from entering the building. It said the unions had intended to cause a nuisance to Chevron in a bid to coerce and intimidate it into meeting its demands.”<sup>38</sup>*

<sup>37</sup> Australian Financial Review, 22 November 2011, p11.

<sup>38</sup> The West Australian, 10 February 2012, p41.



The following month, the Western Australian Supreme Court granted an injunction preventing union protestors coming within 100m of its offices.<sup>39</sup> In June 2012, The MUA used similar tactics of intimidation against DB Schenker, a contractor to the Gorgon Project, over the use of a project contracted vessel with a foreign crew. The vessel had all the necessary permits and there was no suitable Australian-crewed vessel available. According to a media report the MUA threatened an industrial dispute over the use of the vessel being used to remove a backlog of equipment at Henderson south of Perth, urgently needed on Barrow Island.<sup>40</sup>

The MUA subsequently protested at a number of DB Schenker's offices around Australia. The union's actions were totally unjustified, disruptive and irresponsible.

## CONCLUSION

Anti-competitive restrictions in the labour arena, as elsewhere, can be difficult to justify on public interest grounds. Opening up particular arrangements sanctioned by the FW Act would enhance competitiveness and attract more investment, which would create more jobs.

Ultimately, debate over a broader range of choices through a mix of collective and individual agreement options is required.

The proposition advanced under Section 3(c) of the FW Act to the effect that statutory individual agreements "can never be part of a fair workplace relations system" is open to question in a modern, globally competitive economy. Many workplaces in Australia now have a mix of collective and individual agreement arrangements. In the oil and gas industry as well as the broader mining sector, a number of operating projects have arrangements with employees based on individual agreements which provide attractive salaries and working conditions. Other projects have more traditional collective arrangements with unions and the employer as parties to the agreement.

Even senior union officials have begun to acknowledge the case for more flexibility in the economy and the labour market. As AWU National Secretary, Paul Howes, put it recently:

*The union movement has been strong on tying workers to their jobs. Do young people want that?... We need to ask, how do we use our collective power to empower individuals?*<sup>41</sup>

While this sort of flexibility seems a long way from the current position, there is no obvious reason why we should not strive for the same flexibility during the construction phase of major projects. How it could be achieved should be the subject of further debate.

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<sup>39</sup> Ibid.

<sup>40</sup> The West Australia, 23 June 2012, p83.

<sup>41</sup> Patrick, A and Dunckley, M (2014), "Job losses turned Howes into a free-market unionist", *The Australian Financial Review*, 28 March.

**Recommendation:**

Amend the *Fair Work Act 2009* in the areas of greenfields agreements, union rights of entry, protected industrial action and allowable matters under EBA agreements. In particular, amend the *Fair Work Act 2009* to introduce a new category of agreements (Major Project Agreements) that would apply specifically to major capital projects.

**A MOBILE AND SKILLED WORKFORCE****LABOUR MOBILITY**

Geographic mobility is critical to a well-functioning labour market, and has been an important mechanism for adjusting to the demographic, structural and technological forces shaping the Australian economy. By enabling labour to move across different regions of Australia, labour shortages and regional disparities in labour market conditions can be alleviated. Economic benefits can be spread across the country and the use of skills can be optimised. There is something of a divide between where people live and where the new jobs are, at least in the oil and gas industry. Most oil and gas reserves are in remote locations, but most of Australia's population (and therefore its skills base) is in capital cities and other major centres that are, in the main, distant from oil and gas facilities.

As local resident populations generally cannot meet all the skills required for either building or operating oil and gas projects, so employees and contractors are usually must commute or relocate to perform their work. The need for a large, temporary workforce during construction of mega-projects places greater onus on labour mobility to deliver projects on time and budget. However, residential employment remains a significant component of the industry's workforce practices and is usually the preferred alternative when a local workforce is available.

**SKILLED WORKFORCE**

Oil and gas companies have contributed significantly to improving education standards in the regions in which they operate and beyond. Estimates generally indicate that these companies spend tens of millions of dollars every year on workforce training for Australians. They operate trainee and apprenticeship programs in conjunction with Australia's vocational education and training sector, as well as international equipment suppliers to establish domestic specialist training facilities and programs in oil and gas processing, equipment servicing, maritime trades and in emerging areas such as floating LNG (FLNG).

Many training programs are structured to provide opportunities for under-represented groups in the oil and gas workforce, such as women and Aboriginal people, while others provide support for education, numeracy and literacy programs. Several companies offer scholarships, internships and structured vacation employment opportunities for university students in their penultimate year of study. Companies also invest heavily in regional workforce development and education. The following example, outlining Woodside's activities to provide education and training for residents in the Karratha area, is one example of many similar initiatives in place that are aimed at providing employment in the industry for the local population.





### Supporting Regional Workforce Development

Woodside is committed to the Pilbara and to recruiting and training local people. To support local participation in the oil and gas industry, it has helped establish a trade training centre that can provide 40 places at any one time, as well as an electrical and instrumentation centre of specialisation at the Karratha campus of the Pilbara Institute (TAFE).

Both training centres will help provide pathways for young people wanting to stay in the Pilbara and create rewarding and fulfilling careers. The trade training centre is a partnership between Woodside and state and federal governments. The electrical and instrumentation centre of specialisation is being developed with the financial support of Woodside and the Australian Government.

In addition to these trades-related facilities, Woodside also supports local education initiatives in the region. The flagship Karratha Education Initiative, which has been funded by the North West Shelf Project since 2008, and the Roebourne Education Initiative, established in 2013, are aimed at enhancing outcomes at local schools.

Fly-in/fly-out (FIFO) arrangements provide an alternative to permanent relocation, and are now an essential aspect of Australia's labour market, given Australia's vast geography. The findings of a KPMG report debunk several myths and anecdotal claims about the impact of the resources sectors on regional Australia. Mining activities (defined broadly by KPMG to include oil and gas) are not hollowing out the regions in which they operate, as alleged – rather, they are having a positive impact.

In 2013, APPEA and the Minerals Council of Australia commissioned research that provided analyses of both the long distance commuter workforce across Australia and of the changing resident demographic profile of Australia's resource communities.<sup>42</sup> This report compiled key standard of living measures of Australia's nine main mining/oil and gas regions, including the Pilbara, Central-West (WA), the Surat and Bowen Basins.

The report found that overall, incomes and educational attainment are higher and unemployment is lower in mining regions compared to regional Australia more generally. While fewer people owned their own homes, there were more families and working aged people in these 'mining' regions.

The report also debunked the myth that the resources industry is hollowing out the regions in which it operates. On the contrary, as the industry is boosting incomes, attracting families and reducing unemployment. In addition, the number of permanent residents in mining regions is increasing at a faster rate than in other regions. Workers are not just flying-in and flying-out, they are also moving to the resources regions, many with their families.

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<sup>42</sup> KPMG (2012), *Analysis of the changing resident demographic profile of Australia's mining communities*, November (see [www.appea.com.au/wp-content/uploads/2013/04/LDCWorkforceStudy-March-2013.pdf](http://www.appea.com.au/wp-content/uploads/2013/04/LDCWorkforceStudy-March-2013.pdf) and [www.appea.com.au/wp-content/uploads/2013/04/130204\\_APPEA-MCA-demographics-report.pdf](http://www.appea.com.au/wp-content/uploads/2013/04/130204_APPEA-MCA-demographics-report.pdf) for further information).

While there is some evidence to suggest that skilled labour is responding to market signals and moving to areas with better employment and income prospects, there are still areas of high unemployment and areas of skills shortages, demonstrating scope for more effectively matching supply with demand.<sup>43</sup> The following examples highlight the reluctance of people with skills to move where jobs are, either on a fly-in/fly-out or more permanent basis:

In 2011 BHP Billiton tried to help some of the 1,000 workers made redundant by BlueScope Steel by finding them jobs in its mines. A spokesperson for BHP Billiton said that it had offered a total 90 positions, most in Western Australia and Queensland, but only 70 of these were accepted.<sup>44</sup>

Figures on an Australian Government scheme offering cash incentives up to \$9,000 for unemployed people to move for work had just 37 people moving interstate to Western Australia in an 18-month period. In all, 452 people took up places of the 4,000 allocated.<sup>45</sup>

Research indicates that personal reasons are the key influence on an individual's or a family's decision to relocate.<sup>46</sup> Attempts to lure people to remote communities with government incentives or high salaries are usually not effective. The quality of township facilities, amenities and services are central to decisions made by workers and their families when considering opportunities to relocate and should not be underestimated as factors in determining labour mobility. Significant investments are being made by companies in these areas, but governments will have leading roles in developing regional centres.

The Australian Government is urged to collaborate with the Western Australian, Queensland and Northern Territory Governments to develop a cohesive and prioritised infrastructure plan that will accelerate the economic and social development of Northern Australia, where most oil and gas projects are located. A co-ordinated approach to social and economic infrastructure development will reduce duplication across jurisdictions and optimise the provision of the facilities, amenities and services that will help to attract and retain workers in regional centres.

## NATIONAL OCCUPATIONAL LICENSING

Harmonising national occupational licensing would also enhance labour mobility, reduce red tape and regulation, and improve national productivity. Using interstate labour through FIFO arrangements creates licensing issues, as does the movement of labour between projects across state and territory borders.

In an industry where productivity and labour mobility are essential to maintain international competitiveness, regimes need to be established that support national labour mobility. A national occupational licensing regime would also eliminate the duplication of training effort to meet various jurisdictional eligibility requirements.

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<sup>43</sup> Productivity Commission (2013), *Geographic Labour Mobility*, Draft, November, page 2 (available at [www.pc.gov.au/\\_data/assets/pdf\\_file/0020/130295/labour-mobility-draft.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0020/130295/labour-mobility-draft.pdf)).

<sup>44</sup> WorkplaceInfo (2012), *Go west? I'd rather go to Queensland!* 31 May (available at [www.workplaceinfo.com.au](http://www.workplaceinfo.com.au)).

<sup>45</sup> Ibid.

<sup>46</sup> Department of Regional Development (WA) (2013), *Living in the Regions: a survey of attitudes and perceptions about living in regional Western Australia* (available at [www.drd.wa.gov.au/publications/Documents/Living\\_in\\_the\\_Regions\\_2013\\_State\\_Report.pdf](http://www.drd.wa.gov.au/publications/Documents/Living_in_the_Regions_2013_State_Report.pdf)).

Illustrating these issues, a recent Council of Australian Governments' (COAG) National Licensing Steering Committee report<sup>47</sup>, highlights the inconsistencies around licenses for electricians and electrical fitters – two occupations that are highly valued in the oil and gas industry and are currently in shortage.<sup>48</sup> The report identifies nine different licensing requirements for electricians, and five for electrical fitters. Three jurisdictions do not require licensing for electrical fitters.

The COAG National Licensing Steering Committee recently prepared a decision regulatory impact statement (DRIS) for electrical occupations. This identified many millions of dollars in lost savings and efficiencies that could be realised through replacing the diverse state and territory licensing of electrical occupations with a system of national licensing.<sup>49</sup>

Under current arrangements, electricians wishing to work across multiple jurisdictions are required to obtain the relevant licence or licenses in each jurisdiction through a complex process of mutual recognition.

Under mutual recognition arrangements, a licensed person moving from one jurisdiction to another is entitled to a licence authorising the equivalent scope of work to that authorised by the issuing or home jurisdiction. However, they must first apply for recognition of their existing licence and pay a fee. Once an application is lodged, they are able to work to the scope of their existing licence(s), pending the decision of the 'second' jurisdiction regulator. Provided that the decision is to recognise that licence, they will be issued with the nearest equivalent licence, which may or may not have conditions imposed to achieve that equivalency. It is also sometimes necessary for the second jurisdiction to issue multiple licences to equal the scope of the first. If the licensed worker works across borders, they must renew multiple licences and pay the relevant fees. These arrangements have impaired labour mobility.<sup>50</sup>

This process imposes a significant compliance burden on individuals and businesses (quantified in the DRIS) COAG has set itself the goal of cutting excessive red tape and improving efficiency through national licensing (among other measures), but this has been unsuccessful to date.

The recent abandonment of proposals for National Occupational Licensing (NOL) under the COAG underscores the difficulties experienced in getting jurisdictions to agree to a consistent set of regulatory arrangements. States and territories have historically been unable to reach agreement on a common licensing system, and it is unlikely that they will be able to do so without federal intervention and strong leadership to gain a consensus position. The need for strong leadership cannot be underestimated. With over 230,000 electrical licensees across Australia, the prize for harmonisation is great.

<sup>47</sup> Council of Australian Governments' National Licensing Steering Committee (2013), *Decision Regulation Impact Statement – Proposal for national licensing of the electrical occupations*, p. 165 (available at [nola.gov.au/files/2013/07/DRISelectrical.pdf](http://nola.gov.au/files/2013/07/DRISelectrical.pdf)).

<sup>48</sup> Australian Workforce and Productivity Agency (2013) *Resources sector skills needs 2013*, p. 121 (available at [www.awpa.gov.au/publications/Documents/Resources%20sector%20skills%20needs%202013%20final.pdf](http://www.awpa.gov.au/publications/Documents/Resources%20sector%20skills%20needs%202013%20final.pdf)).

<sup>49</sup> Council of Australian Governments' National Licensing Steering Committee (2013), *Decision Regulation Impact Statement – Proposal for national licensing of the electrical occupations*, p. ix (available at [nola.gov.au/files/2013/07/DRISelectrical.pdf](http://nola.gov.au/files/2013/07/DRISelectrical.pdf)).

<sup>50</sup> Council of Australian Governments' National Licensing Steering Committee (2013), *Decision Regulation Impact Statement – Proposal for national licensing of the electrical occupations*, p. x (available at [nola.gov.au/files/2013/07/DRISelectrical.pdf](http://nola.gov.au/files/2013/07/DRISelectrical.pdf)).

**Recommendations:**

A co-ordinated social and economic infrastructure plan for Northern Australia to reduce unnecessary duplication and optimise resources.

National occupational licensing, based on a strategy that includes genuine industry engagement and takes into account labour mobility, productivity and, critically, safety considerations is needed.

**SKILLED MIGRATION**

The oil and gas industry is global, and has historically developed and benefited from a highly skilled, mobile international workforce. Its people move across a range of global projects, taking their experiences and skills with them, all the while gathering more expertise, using new technologies, and sharing their knowledge. Movement of the industry's human capital in and out of the country is critical in keeping Australian internationally competitive in an era when industry is global.<sup>51</sup>

While employers prefer to recruit and develop local Australian skills, they also need the reliability and flexibility provided by a well-administered skilled migration scheme. Streamlined access to skilled overseas workers allows employers to address specific shortages of skills and expertise to maximise productivity and to ensure that projects proceed on time and budget. Often, the ready availability of skilled *short-term* workers is essential if the oil and gas industry is to optimise its value to the economy and create ongoing, *permanent* jobs for local workers during the long-term operational phase of projects.

However, the large number of oil and gas projects, most of which will be under construction for some time yet, makes it difficult to develop the skilled workforce and local industry supply capability needed to operate these projects. A recent report from the Australian Workforce and Productivity Agency (AWPA) has identified skills gaps at highly technical and senior levels that will generally require a range of approaches, including access to skilled migration.

There is a high level of demand for technical personnel in oil and gas plant process operations and maintenance, and for supervisors with appropriate levels of technical and safety experience and frontline management skills, but these skills are difficult to source, especially in the domestic labour market. One estimate suggests that between 180 and 500 process operators are currently available in Australia, and this number will have to increase to between 1,500 and 3,000 over the next ten years.<sup>52</sup>

There are generally two key drivers for using temporary skilled oil and gas workers. These are:

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<sup>51</sup> Migration Council of Australia (2013), *More than temporary: Australia's 457 visa program*, 11 May (available at [www.migrationcouncil.org.au/assets/files/8168a3189.pdf](http://www.migrationcouncil.org.au/assets/files/8168a3189.pdf)).

<sup>52</sup> Australian Workforce and Productivity Agency (2013), *Resources sector skills needs 2013* (available at [www.awpa.gov.au/publications/Documents/Resources%20sector%20skills%20needs%202013%20final.pdf](http://www.awpa.gov.au/publications/Documents/Resources%20sector%20skills%20needs%202013%20final.pdf)).



- To access workers when the necessary skills and experience required (often in highly specialised areas) are not available locally.
- To develop the skills, experience and careers of employees within a global company who are located internationally (known in the industry as 'intra-company transfers').

Although there have been recent improvements, the subclass 457 visa program is not operating as efficiently as it might, with industry still encountering delays in processing times. In addition, recent changes to the program are making it more difficult to access the skilled and experienced overseas labour required for the LNG projects now under construction in Australia, undermining the sector's competitiveness by adding unnecessary costs and administration to a program that was designed to support industry.

#### SUBCLASS 457 VISA

The subclass 457 visa program is the main component of temporary skilled migration in Australia. It is intended to complement domestic education, training and skills development by allowing businesses to sponsor overseas workers over the short-term to address confirmed labour needs. As its purpose is to provide a quick response to fluctuations in demand for labour, subclass 457 visa holders can only work in Australia for up to four years.<sup>53</sup>

The Department of Immigration and Border Protection has made improvements in streamlining processing times, but Senior HR Managers in the oil and gas industry remain frustrated at seemingly unnecessary delays in securing temporary visas for workers:

*... we find delays in visa processing time for people in de facto relationships. It has taken approximately 10 weeks for the 457 visa from initial lodgement of the nomination in several cases.*

*... employees coming from countries considered to be 'high risk' have experienced delays in obtaining visas due to further requests for documentation to be provided. It took 5 months to obtain a 457 visa for an Egyptian national, and his family, who was already employed by the company.*

These delays are impairing the reputation of Australia as a destination for skilled workers and also contribute to delays on projects. The following example highlights the impact that delays in processing are having on even relatively small components of major projects:

#### **Subclass 457 visa program needs flexibility**

A contractor had to assemble a very large and rarely used type of crane for use on a major Project. The crane had been brought in from overseas for this specific work. It had to be assembled, moved on three separate occasions to perform lifts, and disassembled on completion of the work.

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<sup>53</sup> Department of Immigration and Border Protection (2013), *Temporary Work (Skilled) subclass 457 visa*, (available at [www.immi.gov.au/allforms/booklets/books9.pdf](http://www.immi.gov.au/allforms/booklets/books9.pdf)).



The contractor made a request to bring in its experienced workers from overseas to undertake this activity and, while they were doing the work, train Australian workers in the process.

Delays by the Department [of Immigration and Border Protection] in processing the request meant that the contractor had to utilise its inexperienced workers to perform the tasks under strict supervision in order for it to comply with its contractual obligations.

The result was that the work activity on each occasion took twice as long to perform. Each task that would normally take 10 days to perform by experienced personnel took 20 days because of the inaction to process a clear business case for use of overseas workers.

The costs associated with this inaction, included extended use of the equipment, project delays and training down-time for no ongoing purpose.

The above examples are by no means isolated occurrences. They highlight the need for improvement in processing times and in responsiveness to industry's requests for workers under the subclass 457 visa program.

### Labour Market Testing

In November 2013, labour market testing for the subclass 457 visa program was introduced into the *Migration Act 1958* by the *Migration Amendment (Temporary Sponsored Visas) Act 2013*.

This meant that all sponsors using the subclass 457 visa program would have to provide evidence of labour market testing for each nomination application (unless exempted under international trade obligations) to demonstrate that there was no suitable local candidate for a position before sourcing an applicant from overseas.

Under the new requirements, businesses must show evidence of their attempts to recruit for the nominated position in the months preceding lodgement of the application for a temporary skilled migrant.

This might include, for example, advertising and recruitment efforts relating to the nominated position, details of the outcome of the campaign, such as the number of applicants and a general explanation as to why other candidates were unsuccessful.

Prior to the 2013 amendments, formal labour market testing was not required because employers could only access migrants for certain occupations identified as being in shortage by Australian Government agencies in a process that involves both industry and union consultation.

The legal requirement for skilled migrants to receive the same pay rates and conditions as their local equivalents in the same workplace provided a further disincentive to source overseas labour if skilled local workers were available.

Contrary to popular belief, skilled migrants are not cheaper than local workers, as the following research shows.

**Skilled migration is not a low-cost option**

Research suggests that up-front relocation costs to employ a migrant worker can be around \$65,000.<sup>54</sup> In the oil and gas industry the rule of thumb is to allow a multiplier of between 2.0-2.5 times base salary to employ overseas workers. For example, if a salary was, say, \$100,000 for an Australian worker, the cost to employ an overseas worker would be around \$250,000 per annum over the life of the assignment.

These business costs generally include visa processing costs, flights, car accommodation, medical checks, shipping for transporting personal effects, insurances, expatriate allowances and so on, and these can be significantly higher if, as in many cases, spouse and children are also involved.

As a result of the above safeguards and due to the additional costs involved in bringing in subclass 457 visa workers for general vacancies, temporary skilled migrants are generally only used as a last resort to offset temporary local skills shortages. The introduction of labour market testing was an unnecessary safeguard that has increased the costs and administration of using the program. It adds yet another requirement that makes it more difficult to do business in Australia.

Companies are guided by their own workforce planning. Forcing them to test and provide evidence of testing for skilled roles that are already known to be in shortage is time-consuming and an inefficient use of resources. Ongoing attempts to recruit in an already tight market may also encourage applications from employees already working in the industry who are seeking higher wages or more favourable conditions. This can drive up costs and increase turnover, but does not grow the skill pool.

The new legislation further declared that engineering occupations were 'protected', and that labour market testing would be required for all engineering roles. Engineering skills are fundamental to many roles in the oil and gas industry, and qualifications exist at both vocational and tertiary levels. Engineers in the industry often operate in high-risk environments, and access to people with the skills and experience needed to work safely in such roles cannot be compromised. The requirement to labour market-test all engineering positions is a serious imposition that should be removed from the legislation.

In addition to meeting their short-term skills shortages, many large international oil and gas companies use subclass 457 visas to develop their global talent pool. This process involves Australians transferring to other sites and projects around the world to develop or hone their skills, while their colleagues from around the globe come to their Australian operations. As one Australian HR Manager from a global oil and gas company recently explained:

*... In terms of global talent development, we currently have sponsored approximately 230 subclass 457 visa holders, of which approximately 98% are on intra-company transfers. We also have 284 Australian employees working overseas on expatriate assignments.*

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<sup>54</sup> Bahn, S, Yap, G and Barratt-Pugh, L (2012), *457 visa workers in the Western Australian resources industry: the benefits and costs for business, migrant families, and the community* (available at [www.ecu.edu.au/\\_data/assets/pdf\\_file/0003/406353/FINAL-34028-ECU\\_Research\\_Report-Web.pdf](http://www.ecu.edu.au/_data/assets/pdf_file/0003/406353/FINAL-34028-ECU_Research_Report-Web.pdf)).



The requirement to advertise most of these positions – there are exemptions for executive level occupations – restricts the capacity for Australian-based companies and workers to participate in these arrangements, and increases the costs and administrative burden associated with recruitment. Companies can be forced to advertise positions that are essentially internal transfers, and are specifically designed to develop the skills and experience of existing employees, albeit those based in other parts of the world. As well as reducing productivity by creating unnecessary work, this mandatory advertising also wastes the time of local job seekers and potentially adds to the work of processing staff at the Department of Immigration and Border Protection.

Labour market testing will make the process of employing temporary skilled migrants significantly more difficult, and will hamper the participation for Australian employees in the international talent development and sharing programs of global oil and gas companies.

#### Recommendations:

Repeal the relevant sections of the *Migration Act 1958* requiring labour market testing (inserted into the Act by the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*) for subclass 457 visas, and remove engineering occupations and qualifications from the 'protected experience and 'protected qualification' category.

The Department of Immigration and Border Protection work with industry to ensure that the subclass 457 visa program operates with maximum flexibility and speed, and is genuinely responsive to and supportive of industry's need for skilled migrants.

#### MAXIMISING LOCAL CONTENT AFTER THE "FIRST WAVE" OF INVESTMENT

To sustainably enhance local content, Australia must increase the competitiveness and capacity of local suppliers, while also avoiding unnecessary and burdensome regulation.

Petroleum companies operating in Australia support the principle of providing full, fair and reasonable opportunity to local suppliers to win work on major projects. Maximising the contribution of competitive and capable local suppliers provides significant advantages to projects through faster turnaround of services, localised employment, improved timings and improved communication. This is why these companies invest heavily both in financial terms and in the development of collaborative relationships to address capability, capacity, skills and training gaps.

Focusing efforts on increasing supplier competitiveness and capacity is the key pre-requisite step to addressing the productivity constraints that are limiting the ability of local suppliers to participate on a global basis. Mandating or legislating prescriptive approaches to delivering local content is a step in the wrong direction. For example, the *Australian Jobs Act 2013* introduced a legal requirement for companies to produce an Australian Industry Participation Plan, despite many projects (see the Ichthys LNG Project example provided below) already following a similar process under the Enhanced Project By-law Scheme (EPBS). The Act not only duplicated existing

requirements under the EPBS but also created significant uncertainty through its prescriptive approach and distortion of local content reporting.

The priority placed on using local suppliers on major projects is evident. A 2012 report by Australian Venture Consultants<sup>55</sup> examined a sample of 59 specific separate construction phase contracts awarded to Australian businesses. It looked at 48 specific samples where the contract value disclosed totalled \$12.3 billion, or an average contract value of \$256 million. The sample demonstrated a wide range of services being provided by Australian-based businesses, including engineering, fabrication, occupational health and safety, medical, aviation, marine and FIFO accommodation services. There were also examples of contracts awarded to an offshore business, which had in-turn sub-contracted components of the work back to Australian businesses.

The Ichthys LNG Project is providing a major economic stimulus to the NT economy including through job creation. The construction workforce is expected to be more than 4,000 people during peak construction and the project is generating employment and business opportunities among NT-based suppliers. The project has committed to full, fair and reasonable opportunity for Australian industry through entering into a comprehensive Industry Participation Plan (IPP) with the NT Government. The IPP promotes participation by Territory-based and Australian companies. To date, 338 NT-based businesses have secured over 220 contracts or supplier purchase orders. The IPP is also focused on encouraging Aboriginal and Torres Strait Islander businesses and that effort is also showing positive results.

The project has also helped to fund training in the NT with a \$3 million investment in the construction of the Larrakia Trade Training Centre. A further \$3 million was provided to establish the North Australian Centre for Oil and Gas at Charles Darwin University.

Infrastructure associated with the project will provide long-term benefits for the NT well beyond the completion of the current construction phase, such as the \$22.5 million spent to date to improve community road infrastructure and safety. Over coming decades the Territory will also benefit from ongoing operational and maintenance expenditure.

The design of major oil and gas projects means that the engagement of Australian suppliers is maximised through the operational phase of a project, which lasts for decades and usually achieves very high levels of local content. Reports published by the Western Australian Government show that, for some projects, this level can be as high as 88 per cent.<sup>56</sup>

The industry encourages the participation of local suppliers in designing, constructing and operating major oil and gas projects. With several major projects starting operations in the near future, the discussion on maximising local content needs to evolve and focus on building supplier competitiveness and capability to take advantage of operational opportunities. This discussion

<sup>55</sup> Australian Venture Consultants (2012), *The wider contribution to Australia of the oil and gas industry: a selection of case studies from the development of offshore gas fields* (available at [www.appea.com.au/wp-content/uploads/2013/04/The-Wider-Contribution-to-Australia-of-the-Oil-and-Gas-Industry-A-Selection-of-Case-Studies.pdf](http://www.appea.com.au/wp-content/uploads/2013/04/The-Wider-Contribution-to-Australia-of-the-Oil-and-Gas-Industry-A-Selection-of-Case-Studies.pdf))

<sup>56</sup> Department of Commerce (2013), *Local Content Report*, May (available at [www.commerce.wa.gov.au/ScienceInnovation/PDF/Publications/LocalContentMay2013.pdf](http://www.commerce.wa.gov.au/ScienceInnovation/PDF/Publications/LocalContentMay2013.pdf)).



also needs to account for the emerging opportunities, including through innovations in floating technologies and the opportunities offered by the onshore gas sector.

**Recommendation:**

Abolish the additional regulatory obligations placed on project developers that were introduced as part of the *Australian Jobs Act 2013*.

**CONCLUSION**

The stakes are high in realising the current and potential benefits that the oil and gas industry can bring. Global demand for energy is increasing, but so too is Australia's competition.

A high-cost local environment and the emergence of new LNG rivals in East Africa, North America and other parts of the world has increased the level of competition Australia faces as it seeks to win market share and attract investment.

It is now more important than ever for Australia to address the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. It is vital that Australia gets the labour market policy settings right to facilitate developing a more flexible and mobile workforce.

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