



MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO PRODUCTIVITY COMMISSION: WORKPLACE RELATIONS FRAMEWORK DRAFT REPORT

OCTOBER 2015

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EXECUTIVE SUMMARY

The Productivity Commission *Workplace Relations Framework* draft report makes a number of useful recommendations which the Minerals Council of Australia (MCA) supports. However, it is too sanguine about the performance of Australia's labour market institutions and the workplace foundations for future national prosperity.

The overall conclusion – that the current framework based on the *Fair Work Act 2009* (Cth) (FW Act) is 'not systematically dysfunctional' – is hardly a ringing endorsement. The unfortunate implication is 'near enough is good enough'.

A period of protracted below-average growth, weak productivity, declining competitiveness and rising unemployment in Australia demands a more searching consideration of the microeconomic foundations of future national prosperity. The MCA urges the Productivity Commission to undertake a more forward-looking analysis of these challenges in terms of Australia's growth prospects, the jobs of tomorrow, productivity drivers and national competitiveness.

The inquiry's terms of reference noted that a 'key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy'. The Productivity Commission draft report and the associated recommendations fail to grapple sufficiently with this very important consideration.

By its nature, Australia's minerals industry is heavily exposed to global economic developments, more so than most other industries. The industry needs to compete with diverse and increasingly sophisticated rivals, often with highly competitive cost structures. It is highly exposed to shifts in commodity markets and financial variables. Its capital, people and technology are globally mobile.

International competitiveness, productivity, agility and flexibility in the face of changing global market conditions form the critical lens through which policy frameworks are evaluated. Through this lens the shortcomings of Australia's workplace relations framework are significant.

A stronger focus on the contemporary needs and expectations of Australian employers and employees would bring to the fore how economic and social developments continue to transform the nature of workplaces, their composition, when and where work is performed and what constitutes bargaining power within modern workplaces.

The MCA notes the importance the Productivity Commission places on what is seen as the inherent imbalance in bargaining power between employers and employees and on the role of regulation in correcting that imbalance. Economic research into Australian labour market institutions by Castalia Strategic Advisors, commissioned by the MCA and released in August 2015, does not support a simplistic view that labour markets are defined by a differential in bargaining power.

A survey of MCA members finds the industrial relations framework as second only to approval processes and 'green tape' as requiring government policy attention. The survey included specific questions on the operation of the FW Act. Respondents were asked how current framework unnecessarily impedes productivity growth. The main areas identified were:

- Delays in reaching agreements
- Restrictions on flexibility in work arrangements
- Lack of productivity offsets in agreements.

The experience of the minerals industry is that the current workplace relations regime has encouraged unreasonable claims, compromised workplace harmony and productivity, increased business costs unnecessarily, delayed adjustments to altered conditions and put at risk current and future high-wage jobs in mining.

Bargaining matters and agreement making

The MCA supports the following draft recommendations by the Productivity Commission on bargaining matters and agreement making (but with qualifications in some cases):

- The FWC should have wider discretion to approve an agreement without amendment or undertakings if satisfied that employees were not disadvantaged by an unmet requirement; the FWC should be able to extend this discretion to include any unmet requirements relating to a notice of employee representational rights (draft recommendation 15.1)
- Terms that restrict or regulate the engagement of independent contractors, labour hire and casual workers should be unlawful (draft recommendation 20.1)
- Enterprises should be able to nominate agreement lifespans longer than four years (draft recommendation 15.3)

The MCA is deeply disappointed the Productivity Commission has not recommended a more discriminating and productivity-focused framework for permitted matters in enterprise agreements. The FW Act should make clear that permitted matters are matters that pertain only to the employment relationship between employers and employees. They should not include items which pertain to relations between an employer and a union or between an employee and a union.

The issue of permitted matters in agreements lies at the heart of the system's functionality and performance. It has been nominated by MCA members as among the current regime's biggest impediments to productivity improvement. At a minimum, the Productivity Commission's final report should outline principles that would govern consideration of whether specific matters or types of agreement clauses should be deemed permitted matters.

The MCA considers there are net benefits to be secured from the agreement-making process actively promoting improved productivity. The FW Act should require the FWC to be satisfied that improvements to productivity were discussed and given genuine consideration as part of the agreement certification process. The MCA does not support draft finding 15.1 and suggests that the concerns expressed by the Productivity Commission in this context are overblown.

The Productivity Commission has identified a real and persistent problem in the application of the better off overall test (BOOT). The BOOT has lent itself to a 'line by line' approach, contrary to its original intent as a 'global' test which takes into account all the benefits of an agreement and tests against the overall benefits. The MCA supports a revised and flexibility no-disadvantage test (NDT) applicable over the life of the instrument, not just at the outset.

In response to a Productivity Commission information request on pattern bargaining, the MCA recommends the FW Act be clarified so as to:

- better achieve the legislated prohibition in sections 409(4) and 412 on protected industrial action in support of pattern bargaining, and
- prevent trade unions from including pay parity clauses in enterprise agreements to restrict employers' use of independent contractors and using the pursuit of such clauses as a basis for protected industrial action under the Act.

Protected industrial action and industrial disputes

The MCA supports the following draft recommendations by the Productivity Commission on protected industrial action and industrial disputes (but with qualifications in some cases):

- The FWC should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced (draft recommendation 19.1)

- The FWC should be able to suspend or terminate industrial action that is causing, or threatening to cause, significant economic harm to employers or employees (draft recommendation 19.2)
- Employers should be able to stand down employees without pay, where those employees have withdrawn notice of industrial action and employers have implemented a reasonable contingency plan in response to that notice (draft recommendation 19.3)
- The FWC should have discretion to withhold a protected action ballot for up to 90 days, where it is satisfied that a group of employees has repeatedly used unilateral withdrawals of protected action as an industrial tactic (draft recommendation 19.4)
- In cases of work stoppages that are shorter than the smallest payroll increment, employers should be able either to deduct the full duration of the increment from wages, or else pay employees for the brief period of industrial action (draft recommendation 19.5)

There is an imbalance in the current regime between the rights of those undertaking industrial action and the options facing businesses when they are the targets of such action. Protected industrial action is often taken prematurely and in a way that imposes significant costs on businesses. This issue has been identified as equal highest among factors under the current regime that have impeded productivity growth.

The MCA recommends legislative reform to ensure that section 426 operates as intended. The bar for suspending protected industrial action because of harm being done to a third party is too high (response to Productivity Commission information request).

Stronger provisions are needed in cases of selective or partial work bans. It is simplistic and inherently arbitrary to approach this issue based on the duration of any work ban. A banned activity may take only a small amount of time but, if not performed, may stop all production (response to a Productivity Commission information request).

The minerals industry has a consistent focus on protecting the health and safety of its people with the goal of 'zero harm'. The MCA does not support any proposal that would allow industrial action to proceed based on an assessment that the threat to life, personal safety, health or welfare is 'acceptably low' (response to Productivity Commission information request).

The MCA has proposed additional measures in line with the Productivity Commission request for feedback on more graduate employer responses to industrial action.

The MCA supports the removal of Sections 45DD(1) and 45DD(2) from the *Competition and Consumer Act 2010* and the granting to Fair Work Building and Construction of a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry (response to Productivity Commission information request).

Agreement options

The MCA supports the following draft recommendations by the Productivity Commission on agreement options (but with qualifications in some cases):

- The flexibility term in a modern award or enterprise agreement should permit written notice of termination of an individual flexibility arrangement by the employer or the employee of up to one year (draft recommendation 16.1)
- Individual flexibility arrangements should be assessed by a new no-disadvantage test (with additional guidance from the Fair Work Ombudsman), and guidance on implementing the no-disadvantage test should extend to collective agreements (draft recommendation 16.2)
- The Fair Work Ombudsman should develop an information package on individual flexibility arrangements (draft recommendation 16.3)

The ideology of the FW Act is that statutory individual employment agreements 'can never be part of a fair workplace relations system'. The Productivity Commission should examine this ideological premise explicitly in its final report.

There is ample evidence from within the minerals industry that this is not correct. These agreements should be permitted as an agreement making option, subject to a robust NDT.

The restriction on offering Individual Flexibility Arrangements (IFAs) at the time of employment undermines the attractiveness of IFAs and is not justified given the range of statutory protections in place under the FW Act.

Adverse actions and general protections

The MCA supports the following draft recommendations by the Productivity Commission on adverse actions and general protections (but with qualifications in some cases):

- The discovery processes used in general protection cases should be aligned with those provided in the Federal Court's Rules and Practice Note 5 CM5 (draft recommendation 6.1)
- The meaning and application of a workplace right should be clarified where the complaint or injury is indirectly related to the person's employment; and the FWC should require that complaints are made in good faith and assess this by interviewing the complainant before convening both parties (draft recommendation 6.2)
- The FW Act should be amended to exclude frivolous and vexatious claims (draft recommendation 6.3)
- The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the FW Act (draft recommendation 6.4)

The general protections provisions of the FW Act have opened the door to unmeritorious claims. The MCA is disappointed the Productivity Commission has not addressed the adverse and unfair consequences of the current reverse onus of proof on employers.

The current general protections allow for multiple reasons for taking action to be considered as material, with contravention if one or more of the reasons are proscribed. The MCA urges the Productivity Commission to reconsider its position against returning to a 'sole or dominant' reason given the specific context that gave rise to that test in the previous legislative framework.

Unfair dismissal and redundancy provisions

The MCA supports the following draft recommendations by the Productivity Commission on unfair dismissal (but with qualifications in some cases):

- Either the FWC should be granted greater discretion to consider unfair dismissal applications 'on the papers', prior to conciliation; or alternatively, more merit focused conciliation processes should be introduced (draft recommendation 5.1)
- The penalty regime for unfair dismissal cases should be changed so that employees can only receive compensation where there was no reasonable evidence of persistent underperformance or serious misconduct and procedural errors by an employer do not automatically lead to reinstatement or compensation (draft recommendation 5.2)
- Reinstatement should not be the primary goal of unfair dismissal provisions under the FW Act (draft recommendation 5.3)

Reforms are needed due to insufficient checks and balances in the unfair dismissals regime.

The MCA recommends further consideration by the Productivity Commission of redundancy provisions that are too broad in their extension to associated entities, especially in an industry where groups operated many different operations as separate businesses.

Union entry rules

The MCA supports the following draft recommendations by the Productivity Commission on union entry rules (but with qualifications in some cases):

- The FWC should be able to deal with a dispute about the frequency of union entry without the requirement that critical resources are being unreasonably diverted; it should be required to take account of the combined impact of entries on operations, the likely benefit of further entries, and the union's reasons for frequency of entries (draft recommendation 19.7)
- Unions that do not have members employed at the workplace, and are not covered by an agreement or currently negotiating one, should only have the right to enter workplaces for discussion purposes on two occasions every 90 days (draft recommendation 19.8)

The arrangements that applied prior to the FW Act better reflect balanced union entry rules that allow union access to workplaces for valid reasons, where visits are conducted in a safe and orderly way and with appropriate checks on costs and complexities.

In relation to recruitment of union members and location of discussions with employees, the Productivity Commission appears to have bent over backwards to accommodate some of the changes in recent years. If a union wishes to market its industrial representation capacity to potential members, it is free to do so but this should not attract statutory rights of entry. The Productivity Commission has been selective (at best) in its treatment of 'choice' in a bargaining context.

Greenfields agreements

The MCA supports the following draft recommendations by the Productivity Commission on greenfields agreements (but with qualifications in some cases):

- Bargaining representatives for greenfields agreements should be subject to the good faith bargaining requirements (draft recommendation 15.6)
- If an employer and a union have not negotiated a greenfields agreement after three months, the employer should be able to: continue negotiating; or request that the Fair Work Commission arbitrate by choosing the last offers made by the employer and the union; or submit the employer's proposal for approval with a 12-month expiry date (draft recommendation 15.7)

The Productivity Commission accepts that unions wield excessive bargaining power under current arrangements on greenfields negotiations and there is a pressing need for the rules to be changed.

The decline in mining investment in Australia underlines the need for a more positive investment environment that provides some measure of certainty on project economics for large, capital-intensive investments where construction time-frames take many years.

Transfer of business provisions

The MCA supports the following draft recommendations by the Productivity Commission on transfer of business provisions (but with qualifications in some cases):

- When an employee instigates a change of employment, his or her conditions of employment should not be transferred to that new employment (draft recommendation 22.1).

The broad range of scenarios captured under the current transfer of business provisions is having damaging and perverse effects on mining businesses and on employment outcomes. A new employer may be forced to inherit and apply terms and conditions of employment which are uncommercial or inconsistent with the new employer's existing arrangements.

The Productivity Commission's draft response is inadequate. An employer with an existing framework (including under an enterprise agreement or employment contract) which is compliant with the National Employment Standards and which passes a well-structured NDT against the applicable modern award should not have to take on a previous employer's terms and conditions of employment.

1. INTRODUCTION

The Productivity Commission *Workplace Relations Framework* draft report makes a number of useful recommendations which the Minerals Council of Australia (MCA) supports. However, it is too sanguine about the performance of Australia's labour market institutions and the workplace foundations for future national prosperity.

The overall conclusion – that the current framework based on the *Fair Work Act 2009* (Cth) (FW Act) is 'not systematically dysfunctional' – is hardly a ringing endorsement. The unfortunate implication is 'near enough is good enough'.

The Commission itself acknowledges that the existing regime is arcane, skewed towards 'insiders' and subject to procedural defects, inconsistencies and rigidities that add to costs and complexity. It has identified fundamental shortcomings in the Fair Work Commission (FWC), including appointment qualifications, selection processes and inconsistent decision-making.

The MCA contends that the evidence cited in the draft report on the improvement in Australia's labour market performance relative to earlier periods – periods marked by rigid and centralised regulation, high levels of industrial disputation and periodic wage break-outs – sets the bar for the policy framework in 2015 far too low. The relevant benchmark is not the past. The only meaningful benchmark is whether or not policy-driven costs are above those necessary to achieve policy objectives of efficiency and equity.

The FW Act is a long way from optimal in that light, given structural changes taking place in the global economy, the 'creative destruction' of business models, new patterns of work and employee preference and the scale of Australia's contemporary economic challenges. The MCA urges the Productivity Commission to undertake a more forward-looking analysis of these challenges in terms of Australia's growth prospects, the jobs of tomorrow, productivity drivers and national competitiveness.

A period of protracted below-average growth, weak productivity, declining competitiveness and rising unemployment in Australia demands a more searching consideration of the microeconomic foundations of future national prosperity. This has always been the Productivity Commission's core strength.

The National Reform Summit held in August 2015 put particular emphasis on Australia's productivity challenge. The summit communique concluded that: 'Australia's productivity performance in recent years has been weaker than it was in the 1990s and early 2000s. Persistently poor multifactor productivity growth is a serious concern and must be the focus of reform.'¹

It is true that no single reform holds the key to productivity growth and improved living standards. Yet, as a number of Australia's most distinguished economic advisers have pointed out repeatedly, few areas of legislative and regulatory design are more important to economy-wide prosperity than Australia's workplace relations framework. The point was made forcefully at the National Reform Summit by the Governor of the Reserve Bank of Australia, Glenn Stevens, when he noted that:

[T]here is no avoiding the need to have the right labour market arrangements. The question is how to have suitable rules that offer basic fairness, but with minimum adverse effects on enterprise, employment, and the scope for free agents to come together in ways that mutually suit them – and that grow the economy.²

A key point stressed in the MCA's March submission to this inquiry is that the adverse consequences of the Fair Work Act (unintended or otherwise) are greater than the sum of its problematic parts. Individual elements of the Act present discrete and specific problems. But the full adverse impact of current workplace settings – on enterprise, employment and the scope for free agents to come

¹ [Statement from the National Reform Summit](#), hosted by *The Australian*, the *Australian Financial Review* and KPMG, 26 August 2015.

² Glenn Stevens, ['Reform' and economic growth](#), Remarks to the National Reform Summit, Sydney, 26 August 2015.

together in ways that mutually suit them – can be gauged only by analysing the interaction of various provisions and their cumulative effect.

The inquiry's terms of reference called on the Productivity Commission to 'identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ'. It noted that: 'A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy'.³ The Productivity Commission draft report and the associated recommendations fail to grapple sufficiently with this very important consideration.

By its nature, Australia's minerals industry is heavily exposed to global economic developments, more so than most other industries. The industry needs to compete with diverse and increasingly sophisticated rivals, often with highly competitive cost structures. It is highly exposed to shifts in commodity markets and financial variables. Its capital, people and technology are globally mobile.

International competitiveness, productivity, agility and flexibility in the face of changing global market conditions form the critical lens through which policy frameworks are evaluated. The MCA contends that through this lens the shortcomings of Australia's workplace relations framework are significant.

More than minor changes and tinkering are required if the system is to provide future growth, jobs and opportunities for Australians. Australia's workplace relations system should actively promote productivity improvement; not in a mechanical or bureaucratic way or as an end in itself, but because 'productivity gains provide the only sustainable source of higher wages and job security for workers'.⁴

Key principles restated

At a micro-level, a well-functioning workplace relations framework should allow for close alignment between effort and reward at an individual level and foster workplace collaboration and teamwork. At a macro-level, it should support jobs, investment and productivity growth as essential underpinnings for improvements in living standards and as foundations of a fair and compassionate society. These important goals can only be achieved if businesses are strong and profitable.

The minerals industry supports a national workplace relations framework that:

- Promotes direct relationships between employers and employees as the foundation for safe, cooperative, productive and equitable workplaces
- Provides a foundation for employment growth and sustainable businesses by fostering improvements in productivity
- Caters for operational diversity, as well as to increased diversity within the industry's workforce (including gender and cultural diversity)
- Offers choice and flexibility in workplace arrangements, including in agreement options
- Includes a balanced, fair and sustainable safety net of wages and conditions
- Upholds freedom of association and choice with respect to bargaining representation (including the choice whether to belong, or not to belong, to a trade union)
- Balances rights with obligations, while recognising that the ultimate responsibility and right to run businesses in accordance with operational success should rest with management
- Is relatively simple and understandable to those with a direct stake in workplace success.

The MCA acknowledges a point made by the Productivity Commission that positive workplace relations outcomes are ultimately the responsibility of firms and their employees, and cannot be

³ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. iv.

⁴ G. Banks, [Competition Policy's regulatory innovations: quo vadis?](#) Presented at the Economists Conference Business Symposium, 12 July 2012, Productivity Commission, Canberra, p. 8.

obtained merely through attempts to regulate behaviour via legislation.⁵ Yet institutional frameworks clearly matter to the incentives that individuals and institutions face and to the economic outcomes that result. Australia would not have undertaken difficult policy reforms aimed at improving the economy's competitiveness and flexibility (including labour market reform) were this not the case.

Bargaining power and labour market outcomes: Relevant evidence

A stronger focus on the contemporary needs and expectations of Australian employers and employees would bring to the fore how economic and social developments continue to transform the nature of workplaces, their composition, when and where work is performed and what constitutes bargaining power within modern workplaces.

The MCA notes the importance the Productivity Commission places on what is seen as the inherent imbalance in bargaining power between employers and employees and on the role of regulation in correcting that imbalance. However, this point seems to have been elevated to an assumption, rather than a proposition to be tested and analysed. It also seems a curiously outdated starting point.

The MCA considers that more detailed analysis of Australia's labour markets would be useful in this context. The Commission's own findings at various points in the draft report appear at odds with such an all-encompassing assumption. For example, the Commission notes that 'it is not clear that employers always possess a strong advantage over employees with respect to industrial action'. This point was made in response to the assertion by the ACTU that: 'Employers by their very nature have all the cards stacked in their favour'.⁶

Economic research into Australian labour market institutions by Castalia Strategic Advisors, commissioned by the MCA and released in August 2015, does **not** support a simplistic view that labour markets are defined by a differential in bargaining power. Were this proposition correct, weak bargaining power would mean that with weaker intervention workers would capture a lower share of the economic pie (proportion of GDP). However, the available evidence does not show any sustained relationship. In fact, it shows that:

- Employee share of national income has not changed materially over time, despite changes in industrial laws and declines in union membership. Periods of supposed 'pro employer' policies did not enable employers to increase their share; similarly, periods of claimed 'pro worker' policies had no effect
- At the industry level, employee share of income bears no relationship with union membership. The division of the pie does differ between industries, but is more likely to be explained by capital intensity, risk and skill shortages
- Enterprise agreements do not consistently yield better earnings than individual agreements
- Pay rises are similar across both union and non-union members.⁷

Based on this evidence, Alex Sundakov and Michael Schur of Castalia Strategic Advisors conclude:

Labour markets perform as you would expect markets to perform: wages over time balance the supply and demand for skills and provide compensation for inconvenience and other forms of commitment required of workers. Both workers' and employers' bargaining positions depend on the alternative options available to them and the investments they have sunk. There is no inherent battle for the sharing of some fixed economic pie that requires interventions to preserve workers' bargaining position.

Does this mean that the workplace relations framework plays no role? Not at all! This is because the primary effect of collective bargaining organisations and processes is not on dividing the pie but on increasing the 'size of the pie'. This is where the Australian framework falls short. By focusing on wage flexibility as a

⁵ Productivity Commission, [Workplace relations framework](#), Volume 2, Canberra, 4 August 2015, p. 702.

⁶ Productivity Commission, [Workplace relations framework](#), Volume 2, Canberra, 4 August 2015, p. 697.

⁷ Castalia Strategic Advisors, [Australia's workplace relations framework: institutional considerations](#), Policy paper commissioned by the Minerals Council of Australia, August 2015 (provided as supplementary information).

measure of success, the Productivity Commission appears to be ignoring (or at least downplaying) the effect of bargaining arrangements on productivity and on the value of choice.

Our analysis shows that the key issue in the labour market is not an imbalance of bargaining power, but rather the presence of what economists call the 'principal-agent problem': ensuring that organisations perform for the benefit of the intended beneficiaries and resist capture by self-interested insiders. The entrenchment of insiders in Australia's labour market operates primarily through the granting of various default rights in the *Fair Work Act* to trade unions, including that of acting as a bargaining agent, negotiating an award or governing default superannuation funds. The Royal Commission into Trade Union Governance and Corruption has highlighted some of the unintended consequences of protecting collective bargaining organisations from competitive pressures.⁸

The MCA urges the Productivity Commission to re-examine the institutional underpinnings of the Fair Work laws, and the incentive structure thereby created, in light of these considerations.

Workplace relations and the productivity challenge

The MCA submits that the Productivity Commission's final report should take greater account of structural rigidities in the current system that are impeding the efficiency of workplaces, the scope for businesses to create jobs and the productivity of the Australian economy.

A forthcoming report for the MCA by economists Dean Parham and John Zeitsch explores in detail mining productivity trends in Australia. A survey of MCA members conducted for this work finds the industrial relations framework as second only to approval processes and 'green tape' as requiring government policy attention.

On the broad question as to what government should work on to improve productivity, 45 per cent of respondents cite industrial relations as 'very important' and 35 per cent regard it as 'important'. Overall, 85 per cent of respondents considered the current framework had a negative impact on productivity. The survey included specific questions on the operation of the FW Act. Respondents were asked how current framework unnecessarily impedes productivity growth. The main areas identified were:

- Delays in reaching agreements
- Restrictions on flexibility in work arrangements
- Lack of productivity offsets in agreements (Figure 1).

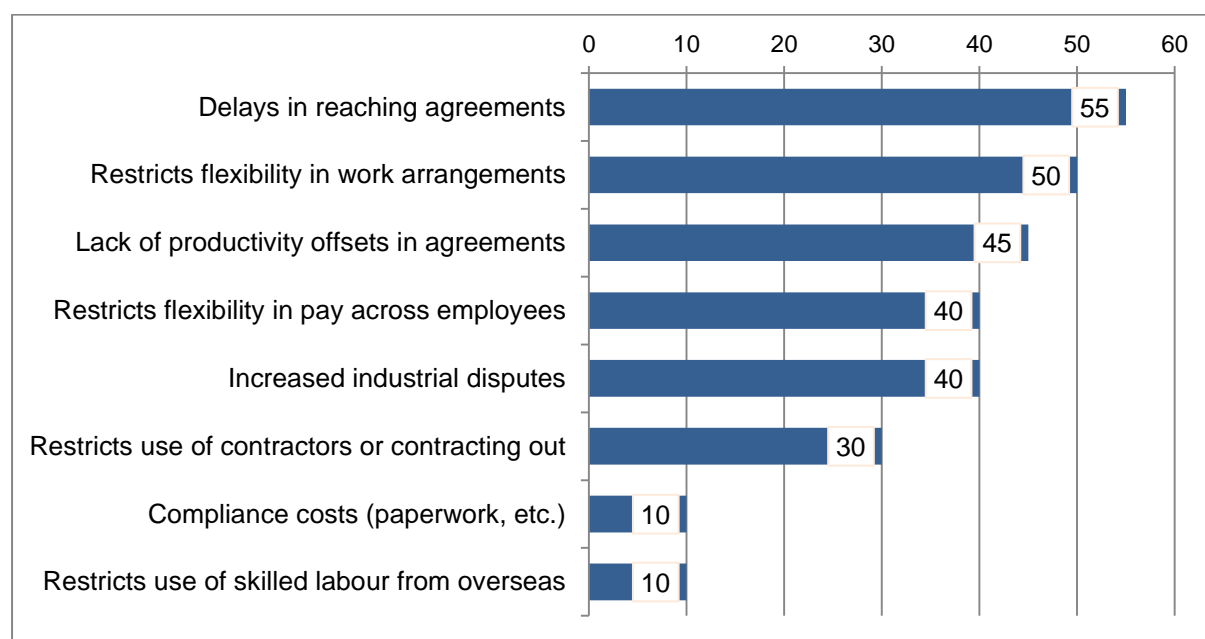
Respondents were asked to signal the relative importance of various factors that have contributed to unnecessary productivity impediments. The strongest responses concerned:

- Too much union involvement in negotiation of agreements (50 per cent of respondents)
- Insufficient protection against industrial disputes (50 per cent of respondents)
- Insufficient provision for individual flexibility in agreements (45 per cent of respondents)
- Scope of permitted matters in agreements too broad (40 per cent of respondents) and
- Union right of access to sites too freely available (35 per cent of respondents).

The experience of the minerals industry is that the current workplace relations regime has encouraged unreasonable claims, compromised workplace harmony and productivity, increased business costs unnecessarily, delayed adjustments to altered conditions and put at risk current and future high-wage jobs in mining. The adverse consequences of this institutional failure may have been masked through a period of boom-driven economic buoyancy. Now that commodity prices have fallen markedly from peak levels, neither the mining industry nor the nation as a whole can afford to brush such matters aside lightly.

⁸ Alex Sundakov and Michael Schur, '[Cut union privileges for better outcomes for workers](#)', *Australian Financial Review*, 10 August 2015.

Figure 1: How does the current industrial relations framework unnecessarily impede productivity growth? (% of respondents, multiple responses)



Source: Survey of MCA member companies

Box 1: Selected comments from MCA member companies on workplace relations challenges

On impediments to innovation and productivity:

Processes prevent the business from reacting quickly. Unions follow dispute resolution clauses to delay changes and needlessly involve the Fair Work Commission. This happens for roster changes, restructures, redundancies, etc. The 'default' position in the Fair Work Act strongly favours the union. The Act has barriers that complicate direct engagement with employees ...

On bargaining matters and agreement making:

The scope for 'permitted matters' in enterprise agreements is too broad; [it] should be limited to employee entitlements/terms of employment only.

On unfair dismissals and performance management:

The Fair Work Act adds bureaucracy and uncertainty to certain processes, in particular to performance management. Regardless of the process followed prior to termination, many choose to Fair Work with an unfair dismissal claim purely to see if they can extract more money from the former employer.

On transfer of business provisions:

The transfer of business provisions have limited our ability to respond quickly and appropriately to changing economic circumstances. To avoid being bound by agreements we did not make and were not a party to, we have chosen suboptimal solutions.

On system complexity:

The Act is very complex and legalistic and requires most companies to rely on internal and external legal advice. This has resulted in significant increases in compliance and advisory costs. Recent negotiations and approval of enterprise agreements are legally complex – even when there is overall agreement. In situations where there are disputes, costs can escalate quickly ...

The complexity of award coverage means that different rights and entitlements can apply to employees working side by side in the same team. For example, while non-award employees can cash out their annual leave (as provided by National Employment Standards) an engineer covered by the Professional Employees Award cannot.

2. REFORM PRIORITIES

Bargaining matters and agreement making

The MCA supports the emphasis the Productivity Commission places on ‘substance’ over ‘form’ in relation to bargaining and agreement making in the draft report. The primary example cited – where Peabody Moorvale successfully concluded an agreement only to have it overturned by the FWC due to a procedural technicality – was highlighted in the MCA’s March 2015 submission to illustrate the way in which procedural ‘trip wires’ can add considerable costs and delays to the enterprise bargaining process.⁹

Procedural requirements for agreement making should be simplified to ensure they operate as intended, with a focus on cases of genuine deception or unfairness. Accordingly, the MCA supports draft recommendation 15.1.

DRAFT RECOMMENDATION 15.1

The Australian Government should amend Division 4 of Part 2-4 of the Fair Work Act 2009 (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement.*
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.¹⁰*

The MCA is deeply disappointed the Productivity Commission has not recommended a more discriminating and productivity-focused framework for permitted matters in enterprise agreements. These are matters, it should be stressed, that find their way into agreements over and above the baseline set out by relevant awards and safety net provisions.

The current architecture of the Fair Work laws actively encourages matters unrelated to the direct relationship between employers and employees to be loaded into a bargaining context at the behest of third parties. As noted in the MCA’s March 2015 submission, these matters may be of interest to union insiders but they are of little or no relevance to the employment relationship between the enterprise and its employees.

The FW Act has provided cover for a wide variety of union-friendly clauses to be included in enterprise agreements. It has opened the door to an even wider variety of claims during bargaining aimed at promoting union rights and privileges, claims which go well beyond any reasonable definition of entitlements of employees in respect of wages and conditions. Such claims have included:

- Payroll deductions for union fees and special provisions (e.g. paid time off work) for union delegates
- Clauses which require employers to encourage union membership
- Last-in-first-out provisions which limit management’s ability to take merit-based staffing decisions
- Union attendance at induction sessions for new employees
- Requirements to show a union all Individual Flexibility Arrangements after they have been made
- Trade union training leave and provision of on-site facilities for union delegates.

⁹ A trade union was able to challenge and delay a successful agreement to which it was not a party by virtue of the fact that the employer had stapled a benign nomination form to the bargaining representative notice.

¹⁰ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 53.

The Productivity Commission has chosen to focus narrowly on limiting the capacity of agreements to regulate the use of contractors and labour hire, noting that such an outcome is contrary (at least in 'spirit') to the *Competition and Consumer Act 2010 (Cth)*.

As this point was identified in the earlier submission, the MCA supports draft recommendation 20.1.

DRAFT RECOMMENDATION 20.1

*Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).*¹¹

Beyond this recommendation, the Productivity Commission has pointed to the difficulty of prescription when it comes to permitted matters, arguing that 'further evidence is required to assess whether particular sorts of terms should or should not be permitted'.¹²

It is not obvious that this issue is any more difficult than others where the Productivity Commission has chosen to be prescriptive in its recommendations. For example, it has chosen on a number of issues to make highly-specific recommendations in order to strike a 'balance' within the system. The MCA contends that this approach could have been adopted to ensure a more balanced approach to permitted matters than is currently the case. The MCA notes also that the Productivity Commission in other inquiries has raised concerns about a wide variety of provisions in enterprise agreements that diminish workplace flexibility on a range of operational matters as a result of excessive rights for some union officials.¹³

Whereas some aspects of the workplace relations framework may be considered of marginal relevance to the productivity, agility and competitiveness of firms, the issue of permitted matters in enterprise agreements lies at the very heart of the system's functionality and performance. The expanded range of bargaining matters under the FW Act has directly impinged on operational matters and meant expanded scope for disputes and delays in reaching agreements with large associated costs. This problem has been nominated by MCA members as among the current regime's biggest impediments to productivity improvement (see chapter 1).

The MCA holds that the legitimate sphere of enterprise agreements is entitlements for employees in respect of their wages and conditions of employment (over and above safety net provisions). Section 172 of the Act should make clear that permitted matters are matters that pertain only to the employment relationship between employers and employees. They should not include items which pertain to relations between an employer and a union or between an employee and a union.

The MCA recommends that, at a minimum, the Productivity Commission's final report should outline a set of principles that would govern consideration of whether specific matters or types of agreement clauses should be deemed permitted matters.

The Productivity Commission has recommended more flexibility around the duration of enterprise agreements so as to allow parties to negotiate agreements of up to five years, with greenfields agreements allowed to exceed five years and match the life of the construction phase of a project.

¹¹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 60.

¹² Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 34.

¹³ See, for example, Productivity Commission inquiry reports on [Australia's Automotive Manufacturing Industry](#), 31 March 2014, released on 26 August 2014 and [Public Infrastructure](#), Volume 2, 27 May 2014, released 14 July 2014.

DRAFT RECOMMENDATION 15.3

The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or*
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.¹⁴*

The MCA supports this recommendation but submits that there should be an option to further extend enterprise agreements for up to 24 months, provided statutory safeguards continue to be met.

This recommendation is important because the renewal of enterprise agreements poses a key risk to meeting project deadlines and containing costs. Negotiations around the renewal period tend to be protracted and employees have the right to take protected industrial action during the agreement-making process. Extending the nominal expiry date for agreements from four years to five – with an additional 24-month rollover option – would reduce the incidence of risks pertaining to industrial action, delays and cost overruns.

The Productivity Commission has identified a real and persistent problem in the application of the better off overall test (BOOT), one that accords with the experience of MCA member companies. There is genuine uncertainty during the bargaining process and at the agreement approval stage surrounding the BOOT based on the fact that ‘in practice it has sometimes lent itself to a “line by line” approach, which involves assessing whether the relevant class of employees are made better off or worse off by each individual term in the agreement when compared with the relevant term in the award’.¹⁵

As the Productivity Commission has noted, this is contrary to the original intent of the BOOT as a ‘global test’ which takes into account all the benefits of an agreement and tests against the overall benefits. A no-disadvantage test (NDT) would more closely reflect the intent of the measure.

INFORMATION REQUEST

What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?¹⁶

The key principle underpinning the successful operation of the NDT in the past (1993-2005) was that it was a global test against relevant safety net provisions. A new NDT should be applied flexibly against the relevant statutory safety net – the relevant modern award, the NES or a combination of both. The MCA submits that a revised NDT could be applicable over the life of the instrument, not just at the outset.

INFORMATION REQUEST

The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:

- where it is imposed through excessive leverage or is likely to be anticompetitive*
- while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.¹⁷*

¹⁴ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 53.

¹⁵ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 32.

¹⁶ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 54.

¹⁷ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 53.

The MCA recommends that the FW Act be clarified so as to:

- (a) better achieve the legislated prohibition in sections 409(4) and 412 on protected industrial action in support of pattern bargaining and
- (b) prevent trade unions from: (i) including pay parity clauses in enterprise agreements to restrict employers' use of independent contractors and (ii) using the pursuit of such clauses as a basis for protected industrial action under the Act.

The MCA notes that pattern and industry bargaining have become entrenched features of collective bargaining, along with demands for real wage increases without any efficiency trade-offs. One MCA member company entered into industry bargaining with the Maritime Union of Australia (MUA) in line with established practice. However, the MUA then claimed to abandon this industry-wide approach, engaging instead in individual enterprise bargaining with marginally different paper claims on different vessel operators. Industrial action was then moved against individual employers, who were pressured to agree to pay rises of more than 30 per cent, plus construction industry allowances of \$200 per day.

The MUA's separate claims on the different operators were identical in substance. Yet because these claims were not identical in every way, the MUA avoided breaching sections 409(4) and 412 of the FW Act.

In addition, the FW Act allows unions to pursue pay parity clauses in enterprise agreements. These clauses require that independent contractors be paid the same as an employee who would be covered by the enterprise agreement. A 2012 decision of the Full Federal Court paved the way for unions to pursue industry-wide agreements that restrict the use of independent contractors by employers.

DRAFT FINDING 15.1

The case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects

The MCA considers there are net benefits to be secured from the agreement-making process actively promoting improved productivity. The MCA has supported a modest proposal in this context – that the FW Act be changed to ensure that the FWC be satisfied that improvements to productivity were discussed and given genuine consideration as part of the agreement certification process.

The Productivity Commission's concerns in this area appear overblown. In reality, almost any regulatory requirement (including most of those supported by the Productivity Commission) can have 'perverse effects'. What is proposed is not some mechanical attempt to legislate productivity improvement or mandate certain clauses; merely to 'nudge' the existing system towards taking additional account of what is a core object of the FW Act. There may be scope for a new pro-productivity provision to be reviewed in, say, two years to assess if perverse effects arise.

The MCA does not support draft finding 15.1.

Protected industrial action and industrial disputes

The MCA's March 2015 submission noted that the relevant industrial dispute provisions of the FW Act have been interpreted loosely such that protected industrial action is often taken prematurely and in a way that imposes significant costs on businesses. This issue has been identified in a survey of MCA members as equal highest among factors under the current regime that have impeded productivity growth (chapter 1).

There is an imbalance in the current regime between the rights of those undertaking industrial action and the options facing businesses when they are the targets of such action. There is a need to

remove enablers to industrial disputation during enterprise bargaining and to provide employers with more capacity to take early action in some cases.

Currently, whereas the threshold for employees taking protected industrial action is relatively low, the threshold for employers proving significant economic harm from such action is relatively high, particularly for third parties harmed by industrial action in their supply chains, contractors or markets.

The Productivity Commission has focused in its draft report on cases of 'excessive strategic use of industrial action', where one party or another is lawfully permitted to undertake industrial action that involves few penalties for themselves, while imposing high costs on the other.¹⁸ It has identified problems where:

- Protected industrial action is taken prior to bargaining
- The use of aborted strikes and brief stoppages imposes disproportionate costs on employers
- Employers are effectively prevented from taking more 'graduated' options for retaliatory industrial action short of a lock-out.

The MCA agrees there is a strong case for amending the FW Act to ensure that a protected action order should not be granted unless bargaining has commenced, or employees had exhausted all available avenues to compel the employer to bargain (such as through a majority support determination). Accordingly, the MCA supports draft recommendation 19.1.

DRAFT RECOMMENDATION 19.1

The Australian Government should amend s.443 of the Fair Work Act 2009 (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.¹⁹

The MCA considers that the bar for 'significant economic harm' under the Act is too high, with the current definition of 'significant' seemingly unworkable in all but the most egregious of circumstances. The Productivity Commission has sought further input on how 'significant harm' should be defined when the FWC is deciding whether to exercise its powers under s.423 and s.426 of the Act.

The MCA agrees that s.432 in its current form is flawed in that in order for the FWC to suspend or terminate industrial action initiated by employees, the action must cause significant economic harm to *both* the employees and the employer. Accordingly, the MCA supports draft recommendation 19.2.

DRAFT RECOMMENDATION 19.2

*The Australian Government should amend s. 423(2) of the Fair Work Act 2009 (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer **or** the employees who will be covered by the agreement, rather than both parties (as is currently the case).²⁰*

Mineral resource companies have pointed consistently to the economic damage caused by deliberate use of aborted strike action as a tactic in industrial disputes. The Productivity Commission has noted in this context the submission made by BHP Billiton in relation to the BHP Billiton Mitsubishi Alliance (BMA) dispute. It is worth reaffirming this example as it establishes the 'gaming' of the current system and why reforms are needed in this area, as against hyperbolic claims made by the union movement.

In this example:

... [T]he economic impact of industrial action was enhanced by threatening action with the prescribed three days' notice, but withdrawing the notice at the last minute.

¹⁸ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 40.

¹⁹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 57.

²⁰ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

The statutory purpose of the notice of intention to take industrial action is to enable minimise economic damage – BMA ceased plant and equipment, supplier deliveries and service providers in line with these notices. The late withdrawal of notices or failure to carry through became a weapon in itself, and created significant loss and damage for BMA with no direct impact on employee earnings.²¹

As the Productivity Commission observes, aborted strikes allow employees to impose costs on their employers while bearing little or no costs to themselves. Moreover, there is likely to be an asymmetry of information and risk that can make aborted strikes an effective industrial tactic. Accordingly, the MCA supports draft recommendations 19.3, 19.4 and 19.5 (subject to what may be deemed a 'reasonable contingency plan').

DRAFT RECOMMENDATION 19.3

*The Australian Government should amend the Fair Work Act 2009 (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response.*²²

DRAFT RECOMMENDATION 19.4

*The Australian Government should amend the Fair Work Act 2009 (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.*²³

DRAFT RECOMMENDATION 19.5

The Australian Government should amend the Fair Work Act 2009 (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either:

- *deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or*
- *pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.*²⁴

INFORMATION REQUEST

*The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth).*²⁵

Where protected industrial action is suspended because of harm being done to a third party, legislative reform is needed to overcome the ruling in *CFMEU v Woodside Burrup*. In that case, the bar to intervention was set so high that affected third parties were not able to obtain relief even though damage to a third party was 'significant' based on any ordinary meaning of the word. If retained, the word 'significant' should attract its ordinary meaning; in any case, reform is needed to ensure section 426 operates in line with Parliament's purpose.

²¹ BHP Billiton, [Australian Workplace Relations Framework](#), Submission to the Productivity Commission, March 2015, p. 14.

²² Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

²³ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

²⁴ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 59.

²⁵ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

Stronger provisions are also required in cases of selective or partial work bans. Such bans can result in significant economic harm to business operations (for example, shutting down a critical production process) but without any material impact on those imposing the ban.

The Productivity Commission suggests a *prima facie* case exists for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties and requests feedback about the risks of such a change.

INFORMATION REQUEST

While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail.²⁶

The MCA regards it is both simplistic and inherently arbitrary to approach this issue based on the duration of any work ban, especially in the mining industry. A banned activity may take only a small amount of time but, if not performed, may stop all production. Immunity for industrial action in the form of partial work bans should not be granted. Indeed, the current situation exemplifies the imbalance whereby a partial work ban can cause considerable economic damage to a mining operation with little or no impact on those imposing the ban.

If partial work bans are to remain permissible, steps should be taken to enable an employer to remove or to reduce pay to nil and remove benefits where the consequence of the work ban to the employer is profound.

The Productivity Commission has sought further input on whether the FW Act should be amended to allow industrial action to proceed where the FWC is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.²⁷

INFORMATION REQUEST

The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.²⁸

The minerals industry has a consistent focus on protecting the health and safety of its people with the goal of 'zero harm'. The MCA does not support any proposal that would weaken considerations of health and safety, especially as they relate to the mining industry. Moreover, whether as an institution the FWC is equipped to make risk-based judgements on health and safety matters is open to question.

The MCA does not support lowering the threshold to make it harder to suspend or terminate industrial action. There is no acceptably low level of risk.

The MCA has emphasised the systemic asymmetry whereby the rights and options afforded employers against premature and damaging industrial action are much more circumscribed compared with those of employees and their bargaining representatives.

As the Productivity Commission notes, at present protected industrial action by employers is limited to a lockout in response to protected industrial action by employees, without the opportunity for more graduated options. It has sought further feedback from participants on whether more graduated employer response actions should be explicitly defined as lawful in the FW Act, and if so how such response actions could be defined.

²⁶ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 59.

²⁷ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

²⁸ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 58.

The MCA proposes the following additional measures:

1. Following the conclusion of a defined bargaining period and with appropriate notice (e.g. 12 weeks), it should be possible for an employer to terminate an expired enterprise agreement. In such circumstances, the employer could be required to maintain base pay rates, but would be enabled to move away from inefficient work practices and non-productivity related payments or allowances, subject to maintaining conditions in the NES and modern award.
2. Unions that engage in repeated submission and withdrawal of protected action notices would be prevented from giving further notices for a specified period (e.g. 90 days), unless the FWC has certified that the withdrawal was reasonable based on appropriate tests or the employer has specifically agreed to the withdrawal (consistent with draft recommendation 19.4).
3. An increase in the maximum ceiling of penalties for unlawful industrial action (consistent with draft recommendation 19.6).

INFORMATION REQUEST

The Productivity Commission seeks further input from inquiry participants on whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) should be amended to:

- amend or remove s. 45DD(1) and s. 45DD(2)
- grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry.²⁹

It is uncontroversial that labour markets are unique because the sellers of labour cannot be separated from their capacity to work. However, it does not follow that labour markets can – or should be – exempt from the competitive pressures that drive modern economies and enhance their performance.

Australia's workplace relations framework bestows a default bargaining status on trade unions and gives members little opportunity to withdraw or take up alternative options for representation. Accordingly, it does not discipline those unions that underperform or put their own interests ahead of their members' interests.³⁰

Consistent with this logic, and the experience of our member companies, the MCA does not consider that workplace relations should be excised from competition law. In particular, trade unions should not be free to pursue secondary boycotts or indirect industrial action on suppliers or customers who are not party to industrial disputes or agreement negotiations. The MCA therefore supports the removal of Sections 45DD(1) and 45DD(2) from the *Competition and Consumer Act 2010* and the granting to Fair Work Building and Construction of a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry.

Agreement options

The observation has been made by the Productivity Commission Chairman that the Commission does not have an 'ideology'.³¹ Unquestionably, however, the FW Act, as the focal point of this inquiry, *does* embody an ideology, at least in select areas. It is important these areas be identified explicitly and be subject to detailed examination by the Productivity Commission in its final report.

The object of the FW Act states clearly that statutory individual employment agreements 'can never be part of a fair workplace relations system'.³² In short, the Act reflects an ideology that individual choice in agreement making must be rigidly constrained in favour of collective agreements and, in particular, union-negotiated collective agreements. The position that an individual statutory agreement

²⁹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 61.

³⁰ Castalia Strategic Advisors, [Australia's workplace relations framework: institutional considerations](#), Policy paper commissioned by the Minerals Council of Australia, August 2015, Chapter 4.

³¹ P. Harris, 'CEDA, Workplace Relations', speech to the Committee for Economic Development of Australia, 14 August 2015.

³² [Fair Work Act 2009 \(Cth\)](#), Section 3.

can never be part of a productive, cooperative and equitable workplace relations framework is pure ideology.

As the MCA has argued previously, there is ample evidence from within the minerals industry that this ideological premise is incorrect. The minerals industry has utilised individual statutory agreements successfully in the past, consistent with its commitment to direct employer-employee relationships. These agreements have provided attractive salaries and working conditions for employees, while facilitating flexible and productive workplaces. Earnings from individual arrangements in the mining industry are higher than those from collective agreements.

Many employees have a strong interest in remaining under an agreement that is personal to them and that directly reflects their relationship with the business. MCA companies respect the right of a group of employees to be represented by a union representative in a bargaining context where a majority of the relevant employee group wishes to do so. Equally, a modern workplace relations framework should accommodate a form of agreement, backed by a strong safety net, which allows an employee to agree employment arrangements directly with his or her employer. Limiting agreement options is out of step with the needs and aspirations of a diverse and changing industry workforce and a modern workplace relations framework.

Accordingly, the MCA recommends that individual statutory agreements be permitted as an agreement making option, subject to a robust NDT.

Individual Flexibility Arrangements (IFAs) are the sanctioned form of direct contractual agreement within the existing system. The Productivity Commission has identified impediments to the utilisation of IFAs and accepted that certain impediments should be addressed.

The MCA has noted previously that employers have found flexibility clauses very difficult to negotiate for anything other than relatively minor matters. More specifically, the value of IFAs has been diminished by stipulations that they cannot be offered as a condition of employment and can be terminated on just 28 days' notice.

The Productivity Commission has recognised the impediment associated with short minimum termination period. In line with the recommendations of the 2012 review, it has recommended that the FW Act be amended to allow for a default termination period of 13 weeks, with the capacity for employers and employees to agree at the formation of the agreement to a one year minimum period.

The Productivity Commission has further recommended that the Fair Work Ombudsman provide better targeted information on IFAs and the adoption of a holistic no-disadvantage test (rather than the BOOT) to determine if an IFA makes an employee worse off overall. These are useful steps.

Accordingly, the MCA supports draft recommendations 16.1, 16.2 and 16.3.

DRAFT RECOMMENDATION 16.1

The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.³³

³³ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 56.

DRAFT RECOMMENDATION 16.2

The Australian Government should amend the Fair Work Act 2009 (Cth) to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).

To encourage compliance the Fair Work Ombudsman should:

- provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements*
- examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT.³⁴*

DRAFT RECOMMENDATION 16.3

The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.³⁵

The Productivity Commission has not provided detailed reasoning as to why IFAs should not be offered at the time of employment. This restriction undermines the attractiveness of IFAs and is not justified given the range of statutory protections in place under the FW Act. An employer should be able to discuss with a potential employee the possible employment arrangements that are available to the employee, while the potential employee should be given the right to accept the employment arrangement that best meets their needs.

The Productivity Commission should reconsider its position in its final report and recommend that employers and employees have the capacity to enter an IFA at the outset of employment. That this has tangible, practical merit is clear from an example cited by one MCA member company. A workplace may have set rosters in which all must participate. Where this is the case, it makes sense both from an efficiency and fairness perspective to allow an IFA capturing this requirement to be an aspect of the arrangement at the outset.

Adverse actions and general protections

The MCA's March 2015 submission argued that current general protections provisions have opened the door to unmeritorious claims. The scope of 'workplace right' is defined too broadly and the interaction of the reverse onus of proof on employers and the uncapped nature of potential compensation claims acts as a particular encouragement to unmeritorious claims.

Claims are being used to interfere unreasonably with ordinary management decision-making and performance management processes. At the same time, Federal Court decisions have raised significant uncertainties for an employer in dealing with inappropriate behaviour in the workplace.

The Productivity Commission has made some modest reform recommendations that address select shortcomings in the existing general protections regime. It has noted scope for abuse of the current regime via discovery processes that can allow a union or court to sift through hundreds of thousands of business documents as a vehicle for establishing intent. It notes correctly that this may not only be costly in its own right, it may disclose many aspects of a business that it would be unreasonable to expose to third parties. Accordingly, the MCA supports draft recommendation 6.1.

³⁴ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 56.

³⁵ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 56.

DRAFT RECOMMENDATION 6.1

The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.³⁶

The Productivity Commission has recognised the need to define more precisely the meaning of a workplace right given the broad range of potential applications around any matter indirectly related to a person's employment. It has further identified the need for greater initial scrutiny as to the genuine basis of claims and that they are being pursued in good faith. Accordingly, the MCA supports draft recommendations 6.2 and 6.3.

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the Fair Work Act 2009 (Cth), which deals with the meaning and application of a workplace right.

- *Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.*
- *The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.³⁷*

DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the Fair Work Act 2009 (Cth) to introduce exclusions for complaints that are frivolous and vexatious.³⁸

While disappointed the Productivity Commission has left unaddressed the adverse consequences of the current reverse onus of proof on employers, the MCA supports the finding that the lack of a cap on compensation may encourage some employees to press claims with little or no basis for essentially speculative reasons. Accordingly, the MCA supports draft recommendation 6.4.

DRAFT RECOMMENDATION 6.4

The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth).³⁹

The current general protections allow for multiple reasons for taking action to be considered as material, with contravention if one or more of the reasons are proscribed. The Productivity Commission has concluded in its draft report that based largely on recent case law and the arguments presented to it, a return to a test based on a 'sole or dominant' reason is not required.

The MCA urges the Productivity Commission to reconsider this finding given the specific context which gave rise to the sole or dominant purpose test under the previous legislative framework; the test being whether an employer took action for a prohibited reason, and the prohibited reason is the sole or dominant reason action was taken (not just a minor part of the reason as is the case at the moment). The test was applied to the specific circumstance where the allegation was that adverse action had been taken because an employee is entitled to the benefit of a workplace instrument. The MCA recommends the Productivity Commission address directly the discussion of this issue by BHP Billiton in an earlier submission on the FW Act. It is worth quoting at some length:

It is the responsibility of an employer to make decisions about how and where to invest its capital and resources. It is consistent with the objects of the Act that the employer be guided by productivity and efficiency considerations. Such considerations will entail, directly or indirectly, labour costs which are

³⁶ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 49.

³⁷ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 49.

³⁸ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 49.

³⁹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 49.

themselves affected by industrial instruments. From time to time, therefore, investment or operational decisions will be made which has the consequence that employees will not have access to industrial instruments.

The Fair Work Act makes it unlawful to take adverse action because a person is entitled to the benefit of an industrial instrument, or for reasons which include that matter. So, too, did the predecessor legislation. However, the Fair Work Act has removed a relevant qualification. Under the predecessor legislation, such conduct was only unlawful if the sole or dominant purpose was to avoid the instrument.

This was a very important qualification because it overcame an unmanageable and unintended situation grappled with by the Full Court of the Federal Court in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* and further discussed by Justice Branson in *Maritime Union of Australia v CSL Australia Pty Ltd*. The legislation discussed in these cases required, in order to avoid absurd outcomes, an impractical distinction to be drawn between the “cause (or proximate reason)” for an employer’s conduct and the “operative (or immediate) reason” for that conduct. The problem was solved legislatively by introducing the sole or dominant purpose test. It is unfair to an employer that the need to try to draw such distinctions when going about its operational decision making has been reimposed by the Fair Work Act.

The solution is again to insert the sole or dominant purpose test in connection with this aspect of the adverse action regime, namely where the adverse action concerns an entitlement to the benefit of an industrial instrument.⁴⁰

Unfair dismissal and redundancy provisions

The MCA’s March 2015 submission pointed to insufficient checks and balances in the unfair dismissals regime and an incentive structure whereby speculative claims see employers driven towards the least-worst option of ‘go-away’ money. In short, it is often cheaper to settle claims short of arbitration proceedings. The system should make applicants more accountable to demonstrate bona fide claims.

The Productivity Commission has recommended further incremental reform to: prevent spurious cases from resulting in financial settlement, via more effective upfront filters; change the penalty regime to ensure that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a fair dismissal; and reform the governance of the FWC and some aspects of its conciliation and arbitration processes.

These are worthwhile steps. Accordingly the MCA supports draft recommendations 5.1, 5.2 (with a reservation) and 5.3. The reservation on 5.2 relates to whether it is a legitimate role for the FWC to be providing ‘counselling and education’ or financial penalties.

DRAFT RECOMMENDATION 5.1

*The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.*⁴¹

⁴⁰ BHP Billiton, [Submission to Fair Work Act Review](#), 17 February 2012, p. 17f.

⁴¹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 48.

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- *an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct*
- *procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.*⁴²

DRAFT RECOMMENDATION 5.3

*The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth).*⁴³

Under section 389 of the FW Act, a person is not unfairly dismissed where he or she has been genuinely made redundant. However, under current provisions the dismissal can be found to be unfair if it would have been 'reasonable' for the employer to deploy that person elsewhere in the employer's enterprise or within an 'associated entity'.

Though the point has not been taken up by the Productivity Commission, the MCA maintains that, as noted in its March submission, this provision is too broad – especially given the degree to which mining groups operate many different mines and plants as separate businesses or indeed across industries (e.g. mining and construction where the relevant skills are not necessarily transferable).

The extension to associated entities should be designed expressly to operate where an employer is claiming that there is genuine redundancy in spurious circumstances such as by closing a plant and immediately re-opening it with a different employing entity.

Union entry rules

The MCA's March 2015 submission stressed that the minerals industry supports balanced union entry rules that allow union access to workplaces for valid reasons, where visits are conducted in a safe and orderly way and with appropriate checks on costs and complexities.

Two examples – both noted in the Productivity Commission draft report – were used to illustrate the current lack of balance and perverse and costly outcomes possible under existing union entry rules. Between 2011 and 2013, union representatives made more than 550 'right of entry' visits to BHP Billiton's Worsley Alumina refinery work site to hold discussions with employees, resulting in work stopping and seriously reduced productivity.

The legislative changes made in 2013 have also been abused. In one case, an MCA member company received an entry request from the Construction Forestry Mining and Energy Union to hold uninvited discussions with employees in the cabin of the dragline, notwithstanding the threat such a request would pose to safe operations.

The MCA considers that provisions relating to union access to workplaces should reflect the balanced arrangements that operated prior to the FW Act, whereby a union has legitimate claims for access to a workplace where:

- The union is covered by an enterprise agreement that covers the site or be attempting to reach one
- The union can demonstrate that it has members on that site
- Those members have requested the union's presence.

⁴² Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 48.

⁴³ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 48.

As in other areas, the Productivity Commission has not sought to overturn the current arrangements, but rather recommended tweaks to the existing system.

It has (usefully) recognised abuse by unions within the regime in terms of frequency of entry and that the current the test employers are required to meet in order to obtain relief from the FWC (unreasonable diversion of ‘critical resources’) is out of proportion with any purported benefits.

Amendments to s. 505A, along with guidance as to issues the FWC would need to take account of in any determination on frequency of entry, have been recommended.

Subject to sensible implementation by the FWC, the MCA supports draft recommendation 19.7. It is nonetheless essential that additional reforms as proposed in the Fair Work Amendment Bill 2014 be passed to remove the privileged access of union officials to remote sites and the default requirement that right of entry be granted in crib rooms.

DRAFT RECOMMENDATION 19.7

The Australian Government should amend s. 505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:

- *repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier’s critical resources*
- *require the Fair Work Commission to take into account:*
 - *the combined impact on an employer’s operations of entries onto the premises*
 - *the likely benefit to employees of further entries onto the premises*
 - *the employee representative’s reason(s) for the frequency of entries.*⁴⁴

In relation to recruitment of union members and location of discussions with employees, the Productivity Commission appears to have bent over backwards to accommodate some of the (dubious) changes made to union entry rules in recent years.

Following the introduction of the FW Act, union officials are currently able to exercise entry for holding discussions at any workplace where employees are eligible to be members of the union in question. Under the previous workplace relations framework in place from 1996 to 2008, union officials could only seek entry for discussions in workplaces where the union was bound by an award or enterprise agreement.

The MCA has argued previously that existing provisions have allowed unions to make liberal use of entry rules, basically as a vehicle for membership drives. The Productivity Commission has stated effectively that there is a net benefit in such circumstances, with the ‘primary benefit from allowing entry by unions that do not have any members on site and are not party to an agreement in a workplace is that it *may facilitate greater choice by employees about the party they wish to represent them*’ (emphasis added).⁴⁵

In the wider context of the FW Act, it would appear the Productivity Commission approves certain types of choice for bargaining representation (union-related), but not others (individual bargaining). The Productivity Commission has gone further in suggesting that forcing unions that do not have any members on site and are not party to an agreement in a workplace ‘to operate outside the premises appears unreasonable if there is scope for non-disruptive meetings in the workplace’.⁴⁶

The MCA remains of the view that a union has legitimate claims for access to a workplace where the union has negotiated an enterprise agreement that covers the site or is attempting to do so, the union

⁴⁴ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 60.

⁴⁵ Productivity Commission, [Workplace relations framework](#), Volume 2, Canberra, 4 August 2015, p. 706.

⁴⁶ Productivity Commission, [Workplace relations framework](#), Volume 2, Canberra, 4 August 2015, p. 707.

can demonstrate that it has members on that site, and those members have requested the union's presence. The MCA contends that by essentially supporting the changes made to entry rules under the FW Act, the Productivity Commission has taken a selective and partisan view on 'choice'.

The principal right to be provided here is that of employees to be industrially represented and assisted, if they wish, by a union of their choice. If a union wishes to market its industrial representation capacity to potential members, it is free to do so but this should not attract statutory rights of entry.

The Productivity Commission has at least recognised there are complexities and potential for abuse of the current entry provisions. It thus recommends some additional limitation on entry rights of unions that do not have members onsite and are not bound by an agreement at the workplace (allowing entry by such unions no more than twice every 90 days).

The MCA would contend that a more proportionate approach would be once every six months. In the interests of sensible, incremental reform it would support recommendation 19.8 if this element was changed accordingly.

The MCA continues to hold that provisions relating to union access to workplaces should reflect the balanced arrangements that operated prior to the FW Act and that were endorsed initially by the Act's political architects.

DRAFT RECOMMENDATION 19.8

The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.⁴⁷

Greenfields agreements

The FW Act's greenfields agreement framework removed options previously available to employers, including the ability to negotiate employer-only agreements or to offer individual statutory agreements on greenfield sites. The result has been enhanced capacity for unions to hold major projects to ransom causing project delays and significant cost blow-outs.

The MCA argued strongly in its March 2015 submission that there needs to be timely recourse to the FWC to seek approval for an employer-proposed greenfields arrangement (with time limits) if conscientious employer efforts to achieve an agreement are unsuccessful.

The Productivity Commission has accepted the pressing need for the rules around negotiation of greenfields agreements to be changed to reduce inefficiencies and end stalemates in negotiations. The draft report states unequivocally that 'unions wield excessive bargaining power under current arrangements' with the result that the viability of projects of major importance to Australia's economy can be delayed and ultimately jeopardised.⁴⁸

The Productivity Commission notes that the absence of good faith bargaining requirements during greenfields negotiations may contribute to bargaining stalemates. It has recommended removal of this anomaly, in line with the 2012 review of the FW Act and the Australian Government's Fair Work Amendment Bill 2014.

Accordingly, the MCA supports draft recommendation 15.6.

⁴⁷ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 60.

⁴⁸ Productivity Commission, [Workplace relations framework](#), Volume 2, Canberra, 4 August 2015, p. 579.

DRAFT RECOMMENDATION 15.6

The Australian Government should amend the rules around greenfields agreements in the Fair Work Act 2009 (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.⁴⁹

The Productivity Commission's key finding is that more options are needed to break stalemates in greenfields negotiations. Importantly, it has recognised that one option – as part of a menu approach – should be a time-bound employer greenfields arrangement subject to a non-disadvantage test. This constitutes a meaningful and important reform at a time when costs of developing new investment projects in Australia remain high.

Accordingly, the MCA supports draft recommendation 15.7.

DRAFT RECOMMENDATION 15.7

The Australian Government should amend the Fair Work Act 2009 (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):

- *continue negotiating with the union*
- *request that the Fair Work Commission undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union*
- *submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.*
- *Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.⁵⁰*

The decline in mining investment in Australia underlines the need for a more positive investment environment that provides some measure of certainty on project economics for large, capital-intensive investments where construction time-frames take many years. Legislative change on greenfields projects must occur for Australia to take advantage of future mining investment opportunities.

Transfer of business

The FW Act introduced a new statutory test for determining whether a transfer of business has taken place, one that captured a broader range of circumstances compared with the previous legislation. In addition, unlike the predecessor legislation, the FW Act does not provide for the automatic secession of transmitted instruments after 12 months, rather ensuring that the transmitted instrument will have ongoing operation.

The broad range of scenarios captured under the current transfer of business provisions is having damaging and perverse effects on mining businesses and on employment outcomes. A new employer may be forced to inherit and apply terms and conditions of employment which are uncommercial or inconsistent with the new employer's existing arrangements, policies and commercial strategies.

In some cases, the very reason the transfer of business rules come into play is because of overly generous entitlements that are not sustainable. Employers may then be disinclined to take on existing workers or struggling assets. The imposition of multiple instruments courtesy of transfer of business rules can impact morale and productivity. Such costs are likely to be more apparent where there is a rigid approach by the FWC to preserving the conditions of transferring employees at all costs.

⁴⁹ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 54.

⁵⁰ Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 55.

Research conducted by KPMG for the resources employer body AMMA cites upfront costs in excess of \$100,000 in legal and management advice, even in scenarios where the transferring instrument is eventually set aside, varied or terminated by the FWC with the full support of employees.⁵¹

The Productivity Commission has recognised there are circumstances where the transfer of business provisions are commercially unworkable and impose costs on employers and employees alike. It has recommended a limited exemption in the case of voluntary transfers of employee, mirroring a similar recommendation of the 2012 review of the FW Act.

DRAFT RECOMMENDATION 22.1

*The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.*⁵²

While the MCA supports draft recommendation 22.1, it is an inadequate response in an area that is causing unnecessary costs. To survive, businesses need to be able to adjust to changed business conditions. The existing transfer of business rules act as a drag on adjustment, growth, employment and productivity.

An employer with an existing framework (including under an enterprise agreement or employment contract) which is compliant with the National Employment Standards and which passes a well-structured NDT against the applicable modern award should not have to take on a previous employer's terms and conditions of employment.

⁵¹ KPMG, [Workplace Relations and the Competitiveness of the Australian Resources Sector](#), report prepared for the Australian Mines and Metals Association and attached to AMMA's submission (no. 96), p. 109.

⁵² Productivity Commission, [Workplace relations framework](#), Volume 1, Canberra, 4 August 2015, p. 61.