



# MINERALS COUNCIL OF AUSTRALIA

## SUBMISSION TO PRODUCTIVITY COMMISSION INQUIRY: AUSTRALIA'S WORKPLACE RELATIONS FRAMEWORK

---

MARCH 2015

## TABLE OF CONTENTS

---

EXECUTIVE SUMMARY .....	1
1. INTRODUCTION .....	7
About the MCA .....	7
The minerals industry workforce .....	7
This Inquiry and this Submission.....	9
2. AUSTRALIA'S MINERALS INDUSTRY: ECONOMIC CONTEXT .....	11
At the fulcrum of structural change.....	11
Australia's most globalised industry .....	12
A more challenging and constrained environment .....	13
Necessary focus on cost competitiveness, productivity and enterprise flexibility .....	15
3. AUSTRALIA'S WORKPLACE RELATIONS FRAMEWORK: SYSTEMIC ISSUES .....	22
Key principles .....	22
The Fair Work Act: Objects .....	24
In reality ... the whole is worse than the sum of its parts .....	28
4. REFORM PRIORITIES .....	30
Bargaining matters and agreement making .....	30
Protected industrial action .....	30
Agreement options (including Individual Flexibility Arrangements).....	31
Adverse action/general protections provisions.....	33
Unfair dismissal and redundancy provisions .....	33
Union entry rules .....	34
Greenfields agreements .....	34
Transfer of business .....	35
System-wide complexity and compliance costs .....	36

## EXECUTIVE SUMMARY

---

The minerals industry directly employs more than 200,000 highly skilled, highly paid workers across Australia. The majority of the industry workforce is employed in large enterprises and almost all mining jobs are full time jobs. Average wages in mining are much higher than in most other industries. Average (full-time) adult total earnings were \$2,569 per week in November 2014, 67 per cent higher than the all-industries average.

The important roles played by labour market institutions at a micro level (in establishing workplace incentives and constraints) and at a macro level (in influencing aggregate economic outcomes and national prosperity) make this review especially timely.

A renewed focus on labour market reform is essential to sustaining growth in living standards in Australia. Whereas the 2012 review of the Fair Work Act drew comfort from Australia's economic performance under the Act, nearly three years on it is hard to be as sanguine. Below average growth for five out of the past six years, rising unemployment and continued productivity weakness point to the need for renewed scrutiny of the operation of Australia's workplace relations framework.

At the same time, 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 where shared success places a premium on businesses having an engaged and adaptable workforce. These changes underline why employers and employees are demanding greater choice and flexibility in the world of work.

The old industrial workplace model that was 'present at the creation' of Australia's workplace relations system more than a century ago – heavily male-oriented, geared overwhelmingly towards goods production and heavily unionised – is less and less relevant to the needs and expectations of Australian employers and employees in the 21<sup>st</sup> century.

### **Australia's minerals industry: Economic context**

A traditional foundation of the nation's comparative advantage in international commerce, the minerals industry has been a beneficiary of past reforms that have made Australia's economy more robust, productive and flexible. It has also been a major driver of improved living standards. The industry has been at the fulcrum of structural change and, in the wake of the Millennium Mining Boom, now forms a larger part of Australia's economy.

At the same time, Australia has become a relatively high cost location for doing business and the past decade has seen a clear decline in the nation's productivity performance. As a result, Australia's mining operations and projects are no longer as cost competitive as they once were.

Australia's minerals industry needs to compete with more diverse and increasingly sophisticated rivals, often with highly competitive cost structures. The industry is highly capital intensive and characterised by high-risk exploration outlays, large upfront capital commitments (with high sunk costs), long-life assets, sophisticated technologies and long lead times to profitability. It is highly exposed to shifts in commodity markets and foreign exchange movements. Its capital, people and technology are globally mobile.

These characteristics underscore the industry's vital interest in efficient policy frameworks that meet policy objectives without imposing unnecessary cost burdens – costs that cannot simply be passed on to customers. For the minerals industry (more than most industries) international competitiveness and the capacity of businesses to adjust to changing global market conditions forms a critical lens through which policy frameworks need to be evaluated.

Against a backdrop of less buoyant market conditions, business success in the next decade will be more dependent than ever on the efficiency of the entire export supply chain, from exploration and initial development through to final shipment. Improvements in productivity, cost competitiveness and

enterprise flexibility are necessary if Australia is to unlock the growth potential across current and future mining projects.

The structural challenges facing the minerals industry relating to productivity, competitiveness and enterprise flexibility are mirrored across the wider Australian economy. The slowdown in productivity growth has been of sufficient duration and sufficiently broad-based to suggest a serious structural problem. Similarly, research on Australia's international competitiveness has shown a marked deterioration in Australia's position since the turn of the century. This research has further underlined the importance of labour market flexibility to the economy's overall economic performance.

### **Australia's workplace relations framework: Systemic issues**

Australia's workplace relations framework needs to be responsive to the expectations of employers and employees and provide for their mutual benefit. Mutual benefit rests, ultimately, on Australia having safe, cooperative, productive and equitable workplaces.

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.

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 to 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 2012 review of the Fair Work laws concluded that the current regime is operating broadly as intended. It found that the system is delivering 'fairness' to employers and employees and that economic outcomes under the system have been favourable to Australia's continuing prosperity.

The exception noted was productivity growth, though the review authors were not persuaded that the workplace relations framework was a material factor explaining the deterioration in Australia's productivity performance. The review sought to emphasise that, notwithstanding wide-ranging changes made under the auspices of the Fair Work laws, the current framework remains in step with the direction of workplace relations reform begun in the early 1990s.

The MCA urges the Productivity Commission to examine afresh whether the multiple objectives of the Fair Work Act are being achieved in practice, including whether trade-offs embedded in the current framework are appropriate. The MCA notes in this context that:

- Nearly three years on from the 2012 review of the Fair Work laws, Australia's economic performance appears less robust than the previous review's conclusions would suggest

- Concepts of fairness and equity are themselves likely to be multi-faceted and not always amenable to a simple frame of reference, metric or conclusion
- The direction of change under the Fair Work Act (including measures enacted through to 2013) makes it difficult to see aspects of the current regime as aligned with the reform direction begun more than two decades ago.

Individual elements of the Fair Work Act present discrete and specific problems. Yet the full adverse impact of current workplace settings can be gauged only by analysing the interaction of various provisions. The interaction of provisions sets up a negative feedback loop between incentives and outcomes, one that can take many forms but which have the effect of taking the focus of energies away from the core goal of promoting productive and cooperative workplaces.

For example:

- Provisions which favour union involvement in workplace bargaining beyond that commensurate with workplace representation are made more problematic by their interaction with expanded scope for protected industrial action during enterprise bargaining
- The negative impacts of greater scope for protected industrial action are made more acute by the more expansive approach to permitted matters in enterprise agreements
- The limitations on agreement making options (with no scope for individual statutory agreements) interacts with the effective neutering of Individual Flexibility Arrangements (IFAs) in awards and enterprise agreements to further circumscribe choice and flexibility in a bargaining context
- Within an expanded adverse action regime, the interaction of the reverse onus of proof on employers to defend claims and the uncapped nature of compensation claims creates additional incentives for unmeritorious claims
- Expanded right of entry provisions have been made more damaging by changes which conferred additional rights on union officials to interview or hold discussions with employees in areas previously not agreed to by employers.

In short, the adverse consequences of the Fair Work Act (unintended or otherwise) are greater than the sum of its problematic parts.

## **Reform priorities**

### **1. *Bargaining matters and agreement making***

- The legitimate sphere of enterprise agreements is entitlements for employees in respect of their wages and their conditions of employment.
- The Fair Work Act has opened the door to claims against mining companies which go well beyond what should be reasonably included in an enterprise agreement.
- The Act should make clear that 'permitted matters' are matters that pertain only to the employment relationship. They should not include items which pertain to relations between an employer and a union or between an employee and a union.
- The agreement-making process should actively promote improved productivity in the bargaining context.
- Consideration should be given to requiring the Fair Work Commission to be satisfied that improvements to productivity were discussed and given 'genuine consideration' as part of the agreement certification process.
- Procedural 'trip wires' can add to costs and delays in reaching agreements in the enterprise bargaining process.
- Procedural requirements should be simplified to ensure the enterprise agreement process operates as intended.

## **2. *Protected industrial action***

- Protected industrial action is often taken prematurely and in a way that imposes significant costs on businesses. By contrast, the rights and options afforded employers against premature and damaging industrial action are much more circumscribed.
- 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.
- The Act should be amended so that protected industrial action is only available as a last resort after a demonstrated attempt has been made to exhaust bargaining options and where the Fair Work Commission is satisfied that the applicant is bargaining in good faith.
- Whereas the threshold for taking protected industrial action is relatively low, the threshold for employers proving substantial 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 should review these provisions to ensure a more balanced framework, one that provides third parties adversely impacted by protected industrial action with practical forms of relief.
- The Act provides that an employer must not make a payment to an employee in relation to periods of protected industrial action. This is an appropriate and balanced provision.
- The Act should be clarified so that unions may not pursue retrospective application of wage increases in enterprise agreements in respect of periods where industrial action was being taken, themselves fund strike pay or induce employees to participate in pickets or other such union activity by making strike pay conditional on that conduct.

## **3. *Agreement options (including Individual Flexibility Arrangements)***

- Not allowing statutory individual agreements is out of step with a modern workplace relations framework and takes no account of their successful operation in the mining industry for more than two decades.
- A form of statutory individual agreement should be reintroduced, underpinned by the Better Off Overall Test (BOOT) and the National Employment Standards. The BOOT could be applicable over the life of the instrument, not just at the outset.
- Employers have found Individual Flexibility Arrangements (IFAs), the sanctioned form of direct contractual agreement, very difficult to negotiate for anything other than minor matters.
- Their value has been diminished by stipulations that they cannot be offered as a condition of employment and can be terminated on just 28 days' notice.

## **4. *Adverse action/general protections provisions***

- The Fair Work Act's adverse action or 'general protections' broadened the scope of protections. The interaction of the reverse onus of proof on employers to defend claims and the uncapped nature of potential compensation claims acts as a particular encouragement to unmeritorious claims.
- Such claims are being used to interfere unreasonably with ordinary management decision-making and performance processes. Federal Court decisions have raised significant uncertainties for an employer in dealing with inappropriate behaviour in the workplace.
- The scope of 'workplace right' is defined too broadly and a reverse onus is not appropriate as the onus should be on the person alleging the contravention to prove that a decision was made for a prohibited reason.

- The test should be that the provisions will be breached if an employer took action for a prohibited reason, and the prohibited reason is the sole or dominant reason action was taken (and not just a minor part of the reason as is the case at the moment).

## **5. *Unfair dismissal and redundancy provisions***

- The encouragement of speculative claims, with employers often driven towards ‘go-away’ payments, is a persistent problem with the unfair dismissal regime. The system should make applicants more accountable to demonstrate bona fide claims.
- Employers have insufficient tools to uphold fair and reasonable safety and conduct rules (e.g. alcohol and drug management policies).
- If an employer dismisses a person for reasons of ‘genuine redundancy’ that dismissal can be found to be unfair if it would have been ‘reasonable’ for the employer to deploy that person elsewhere in the employer’s enterprise or within an ‘associated entity’.
- 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.

## **6. *Union entry rules***

- Provisions relating to union access to workplaces should reflect the balanced arrangements that operated previously and that were endorsed originally by the Fair Work Act’s architects.
- Current provisions have become the vehicle whereby unions that have proven themselves otherwise unable to persuade employees about the merits of union membership can maintain unreasonable demands on employers and employees alike.
- 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 can demonstrate that it has members on that site, and those members have requested the union’s presence.

## **7. *Greenfields agreements***

- The Fair Work 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.
- There needs to timely recourse to the Fair Work Commission to seek approval for an employer-proposed greenfields arrangement (with time limits) if conscientious employer efforts to achieve an agreement are unsuccessful.

## **8. *Transfer of business***

- The Fair Work 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.
- 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. The 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.
- 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 the BOOT against the applicable Modern Award should not have to take on a previous employer's terms and conditions of employment.

#### **9. *System-wide complexity and compliance costs***

- Minerals industry remunerative norms are such that safety net provisions of the Fair Work Act are not of major significance. However, there are areas of complexity, rigidity, inconsistency and uncertainty arising from the interaction of enterprise agreements, award provisions and the National Employment Standards.
- Rights and entitlements can differ for employees working side-by-side and in the same team. In other cases, overlapping entitlements create additional costs for employers with the potential for 'double dipping' across the National Employment Standards and enterprise agreements.
- The legal costs incurred by employers in defending frivolous claims in a range of contexts can be very high. The system has also thrown up a range of legal avenues whereby unions or employees can avoid or delay ordinary workplace processes of change and performance management, irrespective of whether there are genuine 'fairness' issues involved.
- The Productivity Commission should undertake system-wide analysis of compliance burdens in these and related areas.



# 1. INTRODUCTION

---

## About the MCA

The Minerals Council of Australia (MCA) represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable economic and social development. The Council's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

MCA member companies account for more than 85 per cent of Australia's annual minerals industry production and a higher share of minerals exports. They range from the largest mining companies in the world operating across multiple commodity groups in many jurisdictions to junior explorers with a single project.

## The minerals industry workforce

The minerals industry's number one value and commitment is to the safety and health of its workforce, where everyone who goes to work in the industry returns home safe and healthy. MCA member companies maintain that:

- All fatalities, injuries and diseases are preventable
- No task is so important that it cannot be done safely
- All hazards can be identified and their risks managed
- Everyone has a personal responsibility for the safety and health of themselves and their work mates.

The minerals industry directly employs more than 200,000 highly skilled, highly paid workers across Australia. In the decade to 2013-14, the industry experienced among the fastest rates of job growth of all industries. Though employment is down from peak levels of mid-2012, it remains 15 per cent above the average of the past decade. The majority of the industry workforce (about 70 per cent) is employed in large enterprises (i.e. those that employ 200 workers or more). Almost all mining jobs are full-time jobs (97 per cent), the largest proportion of all industries.<sup>1</sup>

Mining produces more gross value added per unit of labour than any other industry in Australia – almost double the second highest industry (the finance sector). Mining generates around \$515,000 for the economy for every worker employed. Average wages in mining are much higher than in most other industries. Average (full-time) adult total earnings were \$2,569 per week in November 2014, 67 per cent higher than the all industries average (Figure 1).<sup>2</sup>

Western Australia, Queensland and New South Wales account for 85 per cent of national employment in mining. Mining employment is critically important to many regional and remote communities in Australia, with 61 per cent of industry employment in regional and remote areas, compared with 37 per cent for all industries. Mining accounts for up to 50 per cent of employment in some regional centres.<sup>3</sup>

The minerals industry is also the largest private sector employer of Indigenous Australians with more than six per cent of the industry's workforce identifying as Indigenous, up from an average of less

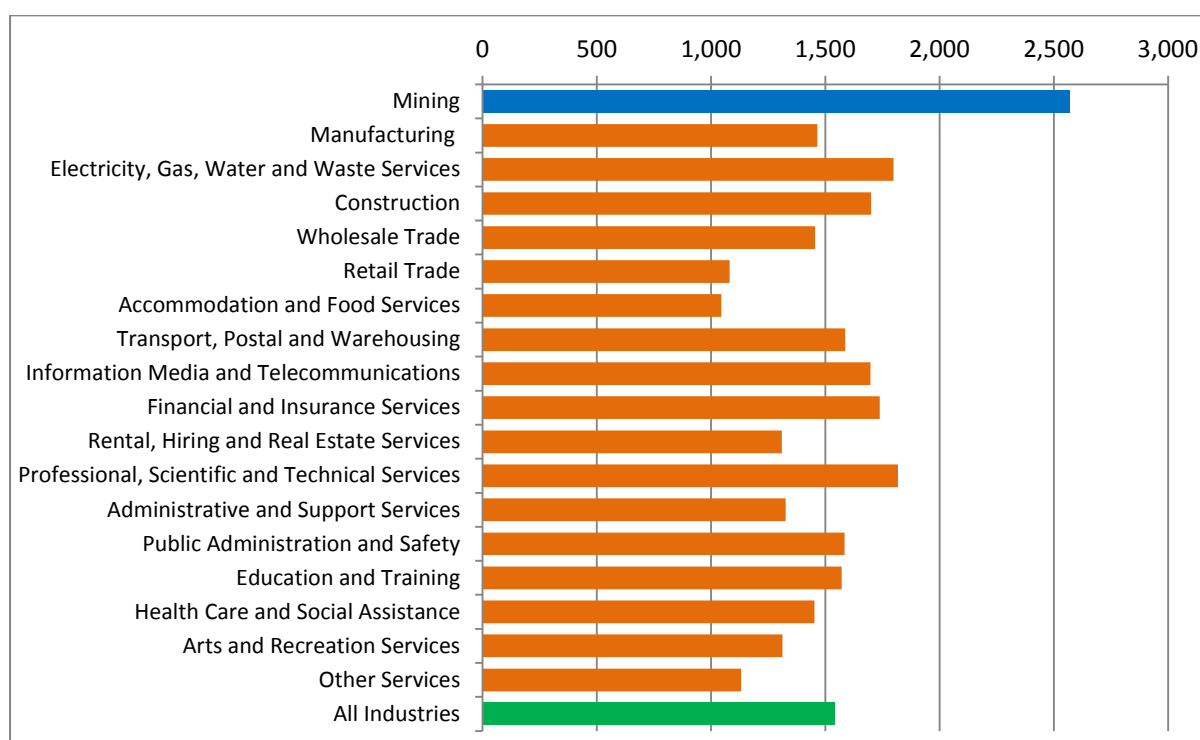
---

<sup>1</sup> Australian Workforce and Productivity Agency (AWPA), *National Workforce Development Strategy – Mining*, Australian Government, 2013. Throughout this submission, references to 'mining' for statistical purposes will in many cases include oil and gas extraction, in line with industry-wide data from the Australian Bureau of Statistics.

<sup>2</sup> Bureau of Resources and Energy Economics (BREE), *Resources and Energy Quarterly*, September Quarter 2014. Australian Bureau of Statistics (ABS), *Average weekly earnings*, ABS Cat. No. 6302.0.

<sup>3</sup> AWPA, *Resource sector skills needs 2013*, Australian Government 2013.

**Figure 1: Average weekly earnings by industry (November 2014, \$)**



Source: Australian Bureau of Statistics

than one per cent 20 years ago.<sup>4</sup> At some mining sites, Indigenous workers account for up to 40 per cent of those directly and indirectly employed. MCA member companies have developed a range of strategies aimed at retention and career development for Indigenous employees.

MCA member companies are also focused on improving the gender balance in the industry's workforce. Active strategies to reduce structural and cultural barriers that have limited female participation in the industry's workforce have seen the employment share of female workers increase to around 15 per cent in 2013, from an estimated 9 per cent in 1999, with some MCA member companies achieving to 25 per cent female workforce participation at certain sites.<sup>5</sup>

The minerals industry has a relatively high proportion of skilled workers with 63 per cent having a Certificate III qualification or higher, compared with 58 per cent for all industries. The top ten mining occupations account for more than half of industry employment, with nearly one in five workers employed as Drillers, Miners and Shot Firers. The industry employs large numbers of tradespeople (as a percentage of employment, about three times the all industries average). Mining is the second largest employer of qualified engineers in Australia after the architectural, engineering and technical services industry.<sup>6</sup>

The minerals industry spends around 5.5 per cent of payroll on training activities, with one in 20 employees either an apprentice or a trainee. Research released in 2013 found that 67 per cent of companies in the industry reported employing apprentices and trainees, more than double the Australian average of 29 per cent.<sup>7</sup> The industry also makes a major contribution to higher education, with the MCA-operated Minerals Tertiary Education Council (MTEC) contributing \$40 million to tertiary minerals disciplines since 1999.

<sup>4</sup> B. Hunter, M. Howlett and M. Gray, *The Economic Impact of the Mining Boom on Indigenous and Non-Indigenous Australians*, CAEPR, Working Paper 93, 2014.

<sup>5</sup> AWPA, *Resource sector skills needs 2013*, Australian Government, 2013.

<sup>6</sup> Ibid.

<sup>7</sup> National Centre for Vocational and Education Research (NCVER), *Training and Education Activity in the Minerals Sector*, March 2013.

Operational complexity across diverse mining and mining-related projects highlights the need for mining businesses to maintain high-quality, direct relationships with employees. This is essential to meet specific challenges at the workplace level and to adapt to rapidly changing market conditions, while preserving attractive terms and conditions of employment.

Highly-specific workplace health and safety issues (often in hazardous and remote environments), diverse skills needs across operations and cultural factors impacting on women, Indigenous Australians (and other underrepresented groups in the industry's workforce) are just some of the factors underpinning the importance the minerals industry places on flexibility and adaptability to challenges on the ground.

Practices vary across the industry on matters such as hours of work, rosters and shift patterns. Rosters typically consist of a set number of days on-site and a set number off-site. An on-site day is typically a 12 hour shift, but can only be eight hours for some workers at some mines. The typical length of a roster cycle is usually linked to the distance to be travelled to the mine site, with 'drive-in, drive-out' arrangements generally using shorter roster patterns than 'fly-in, fly-out' arrangements.

Examples of shift patterns worked in the mining industry are nine days on, five days off, and 28 days on, seven days off. Not all mining industry workers work such shift patterns. Some work just Monday to Friday, or a five day week out of any seven days. This diversity of rosters and shift lengths is reflected in the varying number of hours worked by mining industry employees in any given week.<sup>8</sup>

### **This Inquiry and this Submission**

The important roles played by labour market institutions at a micro level (in establishing workplace incentives and constraints) and at a macro-level (in influencing aggregate economic outcomes and national prosperity) make this review especially timely.

Whereas the 2012 review of the Fair Work Act drew comfort from Australia's economic performance under the Act, nearly three years on it is hard to be as sanguine. Below-average growth for five out of the past six years, rising unemployment and continued productivity weakness point to the need for renewed scrutiny of the operation of Australia's workplace relations framework.

At the same time, 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 where shared success places a premium on businesses having an engaged and adaptable workforce. These changes underline why employers and employees are demanding greater choice and flexibility in the world of work.

The old industrial workplace model that was 'present at the creation' of Australia's workplace relations system more than a century ago – heavily male-oriented, geared overwhelmingly towards goods production and heavily unionised – is less and less relevant to the needs and expectations of Australian employers and employees in the 21<sup>st</sup> century.

Mining has been at the centre of debates about structural change and Australia's policy choices in recent years. Yet too often debates have focused on zero-sum, distributional issues associated with the 'mining boom' while avoiding tougher questions surrounding how to ensure the Australian economy is competitive, productive, innovative and flexible for the long term. More challenging economic conditions mean these questions can no longer be pushed into the background.

This Submission by the MCA does not address every issue raised by the Productivity Commission in its five Issues Papers released in January 2015. It has a more targeted focus on three areas:

#### ***i) The economic context of this Inquiry from a minerals industry perspective***

The Millennium Mining Boom delivered an enormous economic dividend for Australia in the early 21<sup>st</sup> century. The gains are still accruing from growth in production and exports, with mining now a larger

---

<sup>8</sup> Australian Bureau of Statistics (ABS), 4102.0, *Australian Social Trends*, 'Towns of the mining boom', 10 April 2013.

part of the nation's economy. It is nonetheless clear that the industry and the country confront major economic challenges; and that these, in turn, call for a sharpened focus on productivity, cost competitiveness and enterprise flexibility. Australia's workplace relations framework has an important bearing on the capacity of the minerals industry to navigate this period of difficult adjustment and to reposition for future growth opportunities.

***ii) What a well-functioning workplace relations framework should aim to achieve***

This Inquiry provides a fresh opportunity to consider the foundations and objectives of a well-functioning workplace relations system. The Submission outlines some key principles designed to underpin a cooperative, productive and equitable regime, while highlighting weaknesses in the current system. In the case of the mining industry, the current regime has encouraged unreasonable claims, compromised workplace harmony and productivity, delayed adjustments to altered conditions and put at risk current and future high-wage jobs. The adverse consequences of the Fair Work Act (unintended or otherwise) are greater than the sum of its problematic parts.

***iii) Reform priorities***

The Submission outlines nine areas that should be addressed as part of a package of meaningful reforms to the workplace relations framework. They relate to:

1. Bargaining matters and agreement making
2. Protected industrial action
3. Agreement options (including Individual Flexibility Arrangements)
4. Adverse action/general protection provisions
5. Unfair dismissal and redundancy provisions
6. Union entry rules
7. Greenfields agreements
8. Transfer of business
9. System-wide complexity and compliance costs.

## 2. AUSTRALIA'S MINERALS INDUSTRY: ECONOMIC CONTEXT

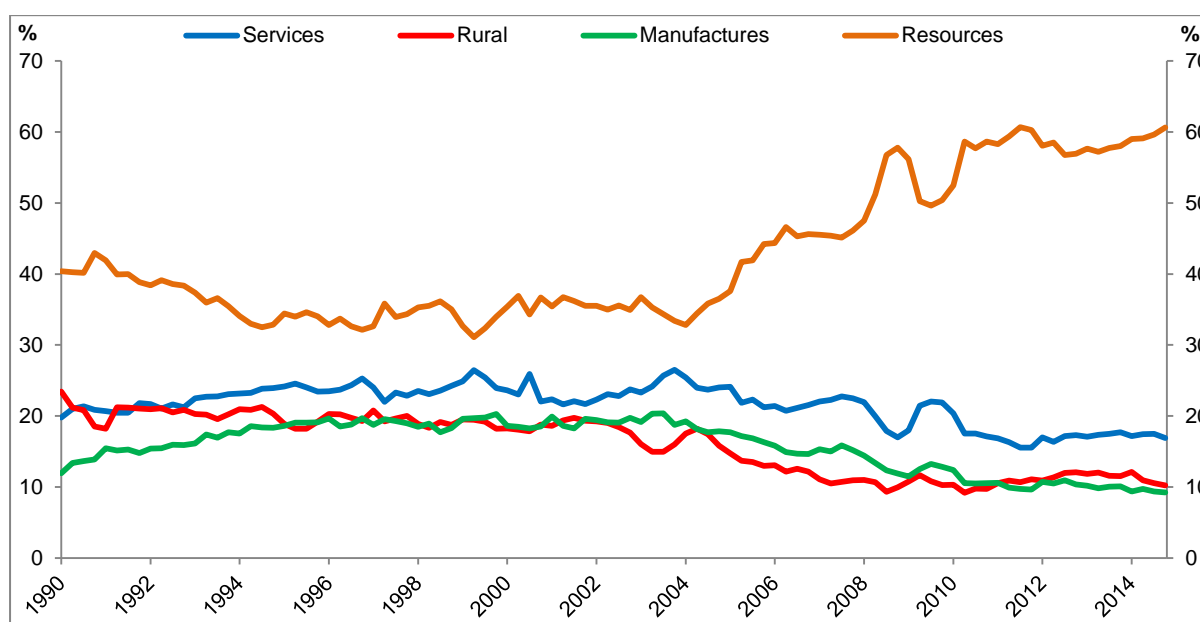
### At the fulcrum of structural change

Australia's economy has undergone a far-reaching transformation over recent decades. Among the factors that have underpinned profound structural change are economic reform, technological change and new patterns of work, changing demographics, increased demand for services and rapid growth and industrialisation in emerging Asian economies (in particular, China and India). Nothing in Australia's contemporary economic history suggests that the pace of change will slow.

A traditional foundation of the nation's comparative advantage in international commerce, the minerals industry has been a beneficiary of past reforms that have made Australia's economy more robust, productive and flexible. It has also been a major driver of improved living standards. The industry has been at the fulcrum of structural change and, in the wake of the Millennium Mining Boom, now forms a larger part of Australia's economy.

Beginning in 2002-03, increased demand for bulk commodities used in steel-making and electricity generation (in particular, iron ore and coal) resulted in a large rise in commodity prices, and hence in Australia's terms of trade. The rise in commodity prices (interrupted for a short period by the Global Financial Crisis of 2008-09) boosted activity and incomes and encouraged labour and capital to shift towards the mining industry.

**Figure 2: Australia's exports of goods and services – shares of total**



Source: Reserve Bank of Australia

This sustained rise in commodity prices was followed by a 'once-in-a-century' mining investment boom. This saw investment in the resources industry roughly quadruple to an historical high of more than 8 per cent of Gross Domestic Product (GDP) in 2012-13. Driven initially by large-scale investment in iron ore and coal projects, the investment boom has been concentrated more recently in large LNG projects.

Reserve Bank research has estimated that by 2011-12 the resources economy (including mining-related activities across various sectors of the economy) had grown to around 18 per cent of Australia's GDP, double the share in 2003-04.<sup>9</sup> The resources economy's share of employment also

<sup>9</sup> V. Rayner and J. Bishop, Reserve Bank of Australia, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, Research Discussion Paper, RDP 2013-02, February 2013.

doubled over the period to be almost 10 per cent in 2011-12. The shift in the composition of Australia's export profile was no less dramatic (Figure 2).

Minerals exports (which account for more than 80 per cent of total resources exports) have risen from around one third of Australia's total exports of goods and services in 2003-04 to roughly one half in 2013-14. Minerals exports today contribute about 10 per cent of Australia's GDP. The nation's largest mineral export earners in 2013-14 were iron ore (\$75 billion), coal – metallurgical and thermal (\$40 billion), gold (\$13 billion), aluminium ore and concentrates (\$9.7 billion) and copper (\$8.7 billion).

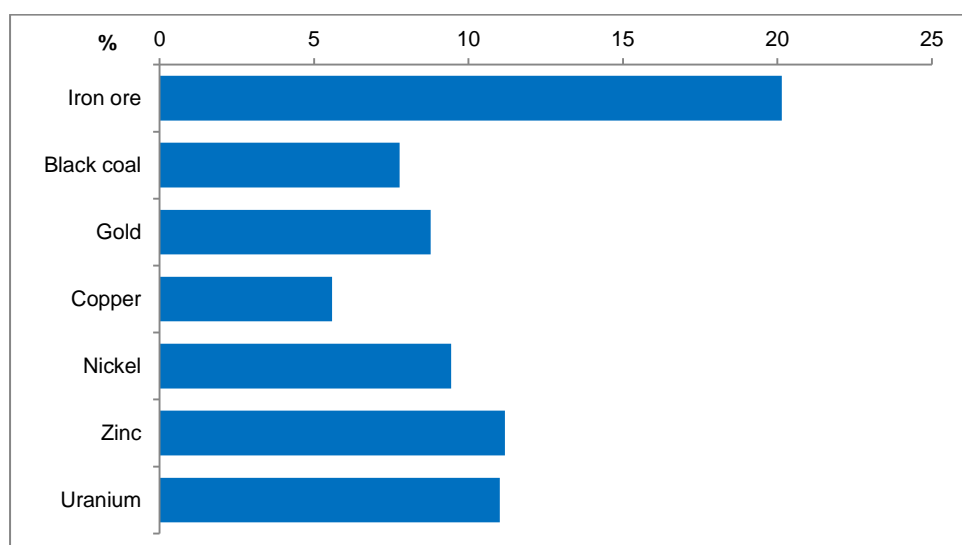
The industry's role as a foundation of national prosperity was underlined by research published by the Reserve Bank of Australia in August 2014 which compared Australia's economic outcomes in the early 21<sup>st</sup> century with a 'counterfactual' of no mining boom. The study found that by 2013 the boom had raised real per capita income by 13 per cent, raised real wages by 6 per cent and lowered the unemployment rate by about 1.25 per cent.<sup>10</sup>

At the same time, Australia has become a relatively high cost location for doing business and the past decade has seen a clear decline in the nation's productivity performance. As a result, Australia's mining operations and projects are no longer as cost competitive as they once were.

### Australia's most globalised industry

Australia's most globalised and export-oriented industry, the minerals industry is a 'price taker' in highly competitive global markets characterised by strong competing sources of supply. While Australia is a major producer of a number of commodities, the geographic distribution of mineral resources means global competition is intense and there is no shortage of opportunity for the strategic deployment of capital (Figure 3).

**Figure 3: Australia's share of global production – selected minerals, 2013**



Source: Geoscience Australia

In the early 21<sup>st</sup> century, higher global demand for resources opened up new economic opportunities not just for Australia but also for other comparable resource-rich economies such as Brazil, Indonesia, Canada, Chile, Russia and South Africa. The response has been global with supply catching up and in many cases overtaking growth in demand. The speed and methods by which new competitive rivals

<sup>10</sup> P. Downes, K. Hanslow and P. Tulip, Reserve Bank of Australia, *The Effect of the Mining Boom on the Australian Economy*, Research Discussion Paper, RDP 2014-08, August 2014.

have emerged in the global resources industry is not widely appreciated. Australia needs to compete with more diverse and increasingly sophisticated rivals, often with highly competitive cost structures.<sup>11</sup>

The Australian minerals industry is highly capital intensive and characterised by high-risk exploration outlays, large upfront capital commitments (with high sunk costs), long-life assets, sophisticated technologies and long lead times to profitability. It is highly exposed to shifts in commodity markets and foreign exchange movements. Its capital, people and technology are globally mobile.

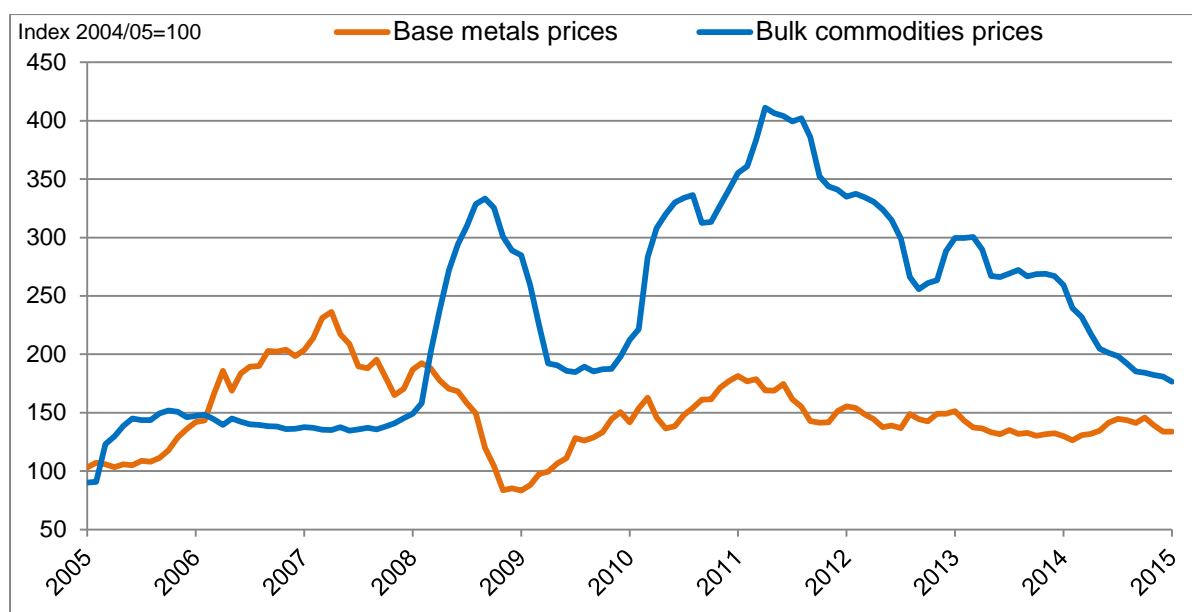
These characteristics underscore the industry's vital interest in efficient policy frameworks that meet policy objectives without imposing unnecessary cost burdens – costs that cannot simply be passed on to customers. For the minerals industry (more than most industries) international competitiveness and the capacity of businesses to adjust to changing global market conditions forms a critical lens through which policy frameworks need to be evaluated.

### A more challenging and constrained environment

After a period of strong growth, Australia's minerals industry has now entered a more challenging and constrained environment, one marked by lower commodity prices, persistently high operating and capital costs and new sources of global competition. Prices of key bulk commodities have fallen markedly from peak levels and are now 25 per cent below the average of the past decade (Figure 4).

A number of projects have been either scaled back or deferred. Some relatively high-cost mines have closed and employment in the industry has declined from peak levels. Capital, operating and exploration budgets remain under pressure from tighter cash flows.

**Figure 4: Mineral commodity prices (SDR terms)**

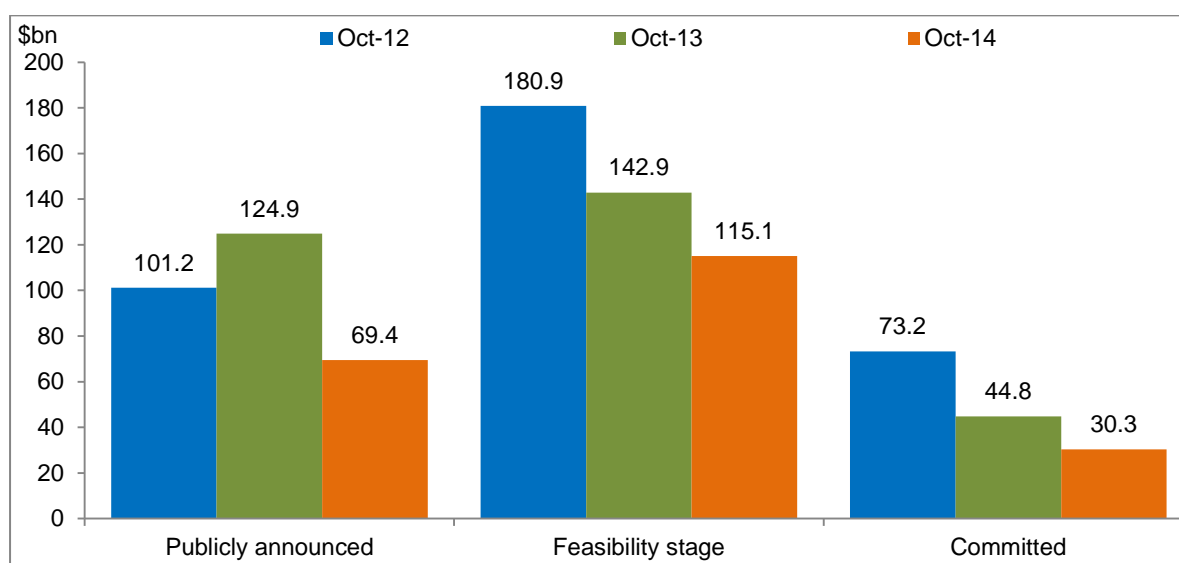


Source: Reserve Bank of Australia

Investment in the minerals industry has declined steadily from the very high levels recorded a few years ago. The Bureau of Resources and Energy Economics (BREE) estimated that in October 2014 there were 29 minerals mining and infrastructure projects at a committed stage of development with a total value of more than \$30 billion (Figure 5). Investment on committed projects has declined almost 60 per cent since October 2012.

<sup>11</sup> For a more extensive discussion on new sources of global competition, see Port Jackson Partners, *Opportunity at Risk: Regaining our competitive edge in minerals resources*, Report commissioned and prepared for the Minerals Council of Australia, September 2012.

**Figure 5: Minerals mining and infrastructure projects pipeline**



Source: Bureau of Resources and Energy Economics. Note the above figure uses the upper level of the value range estimated by BREE for publicly announced projects.

There were 177 minerals mining and infrastructure projects at the publicly announced or feasibility stage in October 2014 with total potential value of up to \$185 billion. These are projects for which a final investment decision has yet to be made. The value of feasibility stage projects at \$155 billion is down one third compared with two years earlier. The value of publicly announced projects has declined by a similar percentage to total \$69 billion as at October 2014.

Weaker commodity prices have also seen exploration expenditure decline sharply. Nominal exploration expenditure declined 31 per cent in 2013-14 to total \$2.1 billion. Compared with the previous financial year, exploration expenditure on new 'greenfield' deposits fell 33 per cent to \$682 million while expenditure on existing 'brownfield' deposits fell 30 per cent to \$1.4 billion. In original terms, metres drilled fell 15 per cent for existing deposits and 42 per cent in areas of new deposits.

Against a backdrop of less buoyant market conditions, business success in the next decade will be more dependent than ever on the efficiency of the entire export supply chain, from exploration and initial development through to final shipment. As one study observed in 2012:

What is clear is that inefficiencies which developed or were sustained over the high price phase of the boom can no longer be sustained over the next decade ... Rebooting the boom places a premium on cost control, timeliness, flexibility and adaptability along the full length of the minerals supply chain.<sup>12</sup>

The competitive challenge and the constraints under which Australian mining businesses operate were described aptly by one industry leader in 2014:

Using our systems I can identify that it costs our business approximately 1.5 times more for a truck operator in the Bowen Basin compared to the same truck in New Mexico in the USA. This highlights the productivity and cost challenge we have in Australia. We must always remember that the world sets our prices and Australia sets our costs.<sup>13</sup>

The development, production and export of mineral resources can and should remain a foundational source of economic strength and comparative advantage for Australia, notwithstanding near-term weakness in market conditions. Australia ranks in the top six producing nations of important minerals including iron ore, coal, copper, gold, nickel, uranium, bauxite and alumina, silver, lead, zinc, manganese and mineral sands such as rutile and zircon. Australia's Economic Demonstrated

<sup>12</sup> H. Ergas and J. Owen, *Rebooting the Boom: Unfinished business on the supply side*, A public policy analysis produced for the Minerals Council of Australia, December 2012.

<sup>13</sup> D. Dalla Valle, President BHP Billiton Coal, *CEDA Speech*, Brisbane, 2 April 2014.



Resources (EDR) for commodities such as iron ore, gold, diamonds, uranium, lead, nickel rutile and zinc are the world's largest, while Australia's EDR of coal, bauxite, copper, silver and a range of other commodities all rank in the top six worldwide.<sup>14</sup>

Market conditions will obviously play a lead role in shaping the contours of future industry growth. But this should not obscure the critical role policy and regulatory settings play in determining the scale, duration and location of gains from future growth in global demand for minerals. Improvements in productivity, cost competitiveness and enterprise flexibility are necessary if Australia is to unlock the growth potential across current and future mining projects.

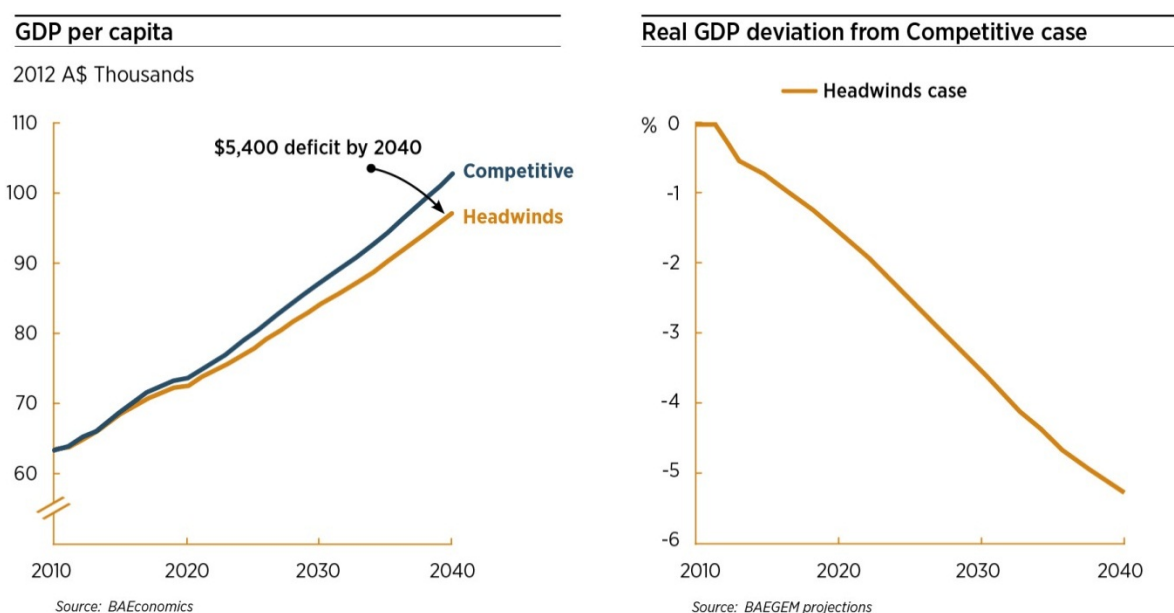
### Necessary focus on cost competitiveness, productivity and enterprise flexibility

The role of policy settings in influencing Australia's competitive position in the global minerals industry was explored in a landmark report by Port Jackson Partners (PJP) in 2012. Entitled *Opportunity at Risk*, the report concluded that Australia's mining operations and projects are no longer as cost competitive as they once were.<sup>15</sup>

To assess the leverage of policy over economic outcomes, the report modelled two economic scenarios – a 'Competitive' scenario (the reference case) and a 'Headwinds' scenario. The Competitive scenario envisages policy settings that prioritise mineral resources development and competitiveness. The alternative, Headwinds scenario was based on a less benign mining investment environment based on current workplace relations settings, continued project approval delays, a failure to invest skills and innovation and industry taxation arrangements then in place.

Figure 6 illustrates the opportunity lost under the Headwinds scenario to be very large. Without improved policy settings, real GDP in 2040 is 5.3 per cent lower than it would be under the Competitive scenario. That equates to a reduction in income relative to that scenario of more than \$5,000 per person in today's dollars.

**Figure 6: Growth under different policy scenarios**



Compared with the Competitive scenario, real wages are lower by 6.3 per cent under the Headwinds scenario. In summary, the PJP report concluded that policy decisions have the capacity to create or destroy an economic opportunity equal to more than 5 per cent of the Australian economy in 30 years' time, with lower minerals industry growth translating into poorer economic performance.

<sup>14</sup> Geoscience Australia, *Australia's Identified Mineral Resources 2014*, Canberra.

<sup>15</sup> PJP, Op. cit.

Increased capital and operating costs have reduced the competitiveness of Australian projects. In 2007, Australia could build coal and iron ore projects as cheaply as our competitors. By 2011-12, a marked gap had opened up based on the capital spend to build a tonne of new capacity with iron ore projects 30 per cent more expensive than the global average, while in thermal coal the figure was 66 per cent (Figure 7).

**Figure 7: Capital costs in Australia now far exceed those elsewhere**

**Capital Spend to Build a Tonne of New Capacity**

2011 US\$ per tonne of capacity



Source: Bank of America Merrill Lynch; JP Morgan; company announcements; press reports

The PJP report also found that more than half of Australia's existing mines across thermal coal, metallurgical coal, copper and nickel have operating costs above global averages. In 2006, for example, 63 per cent of Australia's thermal coal production fell within the bottom two quartiles of the global cost curve. In 2012, this figure had fallen to 28 per cent. In copper and nickel, nearly half of Australia's production was found to be in the most expensive 25 per cent of mines globally.

The rise in industry costs for key inputs like labour, equipment, energy and transport means Australia is one of the higher cost mining jurisdictions in the world. Labour costs, the primary driver of industry cost structures, significantly outpaced those in competitor countries over the course of the last decade. From a position broadly comparable with wage levels in Canada and the United States in 2001 (in US dollar terms), mining sector wages are now more than 50 per cent above levels in Canada and more than double mining wages in the United States (Figure 8).

The structural challenges facing the minerals industry relating to productivity, competitiveness and enterprise flexibility are mirrored across the wider Australian economy. The Governor of the Reserve Bank of Australia, Glenn Stevens, sounded an important warning in this context in late 2013. He observed that long-term national prosperity cannot be found in 'manipulating interest rates or the exchange rate'. Rather, prosperity (and with it the wherewithal for a fair and compassionate society) 'comes from the productivity efforts of the million-plus enterprises that are out there in the economy'.

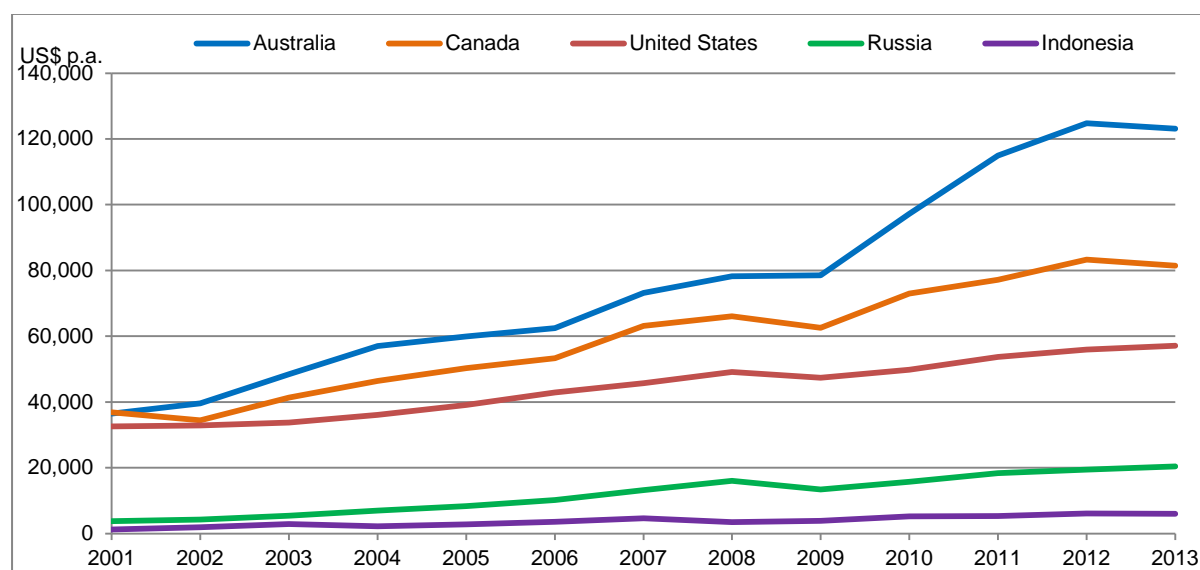
The Reserve Bank Governor went on to state that:

The myriad things which can make it harder or easier for businesses to innovate, to change their ways of doing things, to avoid unnecessary costs and to be more productive, all matter. No single one is decisive in itself; but collectively, they are crucial.

It is hard to escape the feeling that we as a society have tended, for quite a long time now, to go about our decisions on such matters while making the assumption, perhaps without realising it, that solid growth of the

economy will simply continue, and that it won't be affected by these other choices of various kinds. We are at a moment now when that assumption has to be questioned.<sup>16</sup>

**Figure 8: Annual Mining Sector Wages – nominal US\$ terms**



Source: AME

Elsewhere, Governor Stevens has singled out the need to:

... make sure that the accretion of regulatory actions being undertaken does not inadvertently make it harder for businesses to plan with confidence, to achieve better cost and productivity performance, or to take a chance on a new product, a new investment or a new worker.<sup>17</sup>

Productivity growth has consistently been the most significant source of income growth in Australia, accounting for an average of 90 per cent of growth in incomes in the past four decades. The simplest index of productivity is labour productivity or output produced per unit of labour (usually per hour worked). In the 1990s, labour productivity growth was well above the long-run average, owing to wide-ranging economic reforms, including labour market reform. In contrast, labour productivity growth has slowed since the early 2000s.

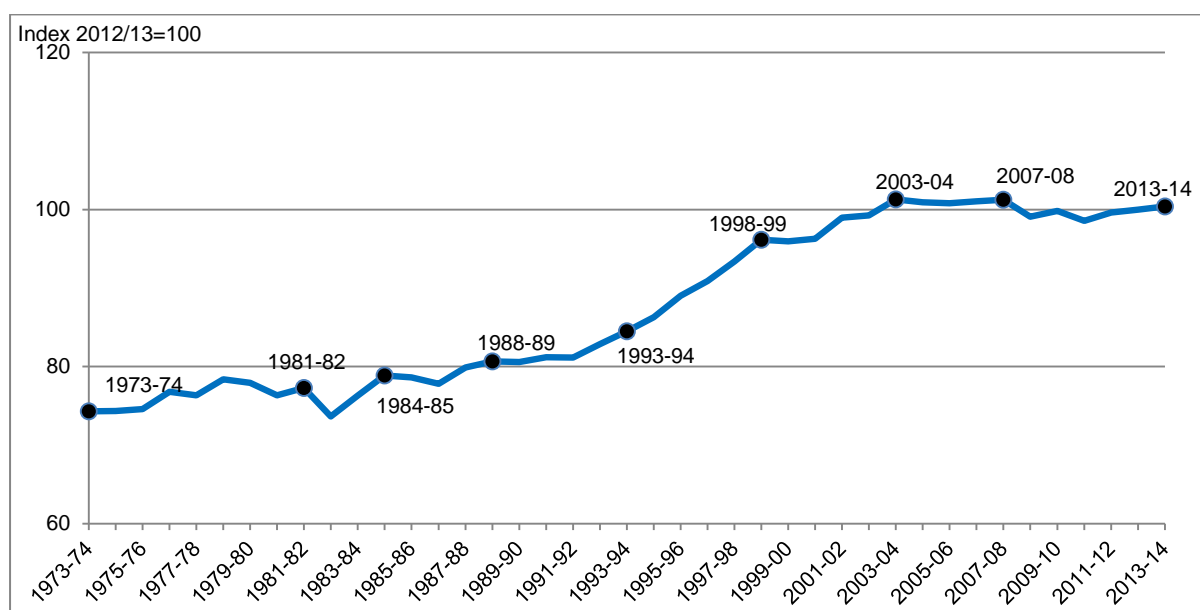
The most comprehensive measure of productivity is multifactor productivity (MFP) – also known as total factor productivity. MFP measures the amount of output obtained from a combined unit of labour and capital. In principle, it reflects the part of economic growth over and above that resulting from growth in hours worked and growth in capital employed, and is frequently taken to be an indicator of technological progress.

Over the last four decades, Australia's market sector MFP growth has averaged 1.1 per cent per year. Figure 9 shows Australia's poor MFP performance over the past decade. For much of the period, MFP growth has been negative. Since 2003-04 it has averaged -0.3 per cent per year. 2013-14 was the tenth consecutive year of negative or very MFP growth in the market sector, a pattern atypical in the longer term history of Australia's productivity performance (Figure 9).

<sup>16</sup> G. Stevens, Governor of the Reserve Bank of Australia, *Opening statement to the House of Representatives Standing Committee on Economics*, 18 December 2013.

<sup>17</sup> G. Stevens, Governor of the Reserve Bank of Australia, *Economic Policy after the Booms*, Address to the Anika Foundation Luncheon, 30 July 2013.

**Figure 9: Multifactor productivity growth**



Source: Australian Bureau of Statistics, Productivity Commission estimates.

Part of the explanation for this deterioration lies in temporary and/or sector-specific factors, including in relation to the mining industry (Box 1). Nonetheless, the slowdown in productivity growth has been of sufficient duration and sufficiently broad-based to suggest a serious structural problem.

#### **Box 1: Mining productivity trends**

ABS estimates show a substantial fall in mining sector productivity over the past decade or so. As measured, labour productivity, capital productivity and MFP all declined by around 40 per cent from 2003-04. However, the extent of the decline is overstated from the point of view of productive efficiency.

Firstly, ABS estimates do not take into account lags between investment, the build-up in capacity and the commencement of production. This alone may account for around half of the measured fall in capital productivity. Secondly, mining conditions have become more difficult, requiring miners to dig deeper, remove more overburden and transport more material in order to recover saleable minerals. Hence, mining has become more costly and more capital intensive.

Market conditions and the 'dash for growth' while prices were high are likely also to have had impacts on productivity, together with policy-related factors. These issues will be explored further in a forthcoming report for the MCA by economists Dean Parham and John Zeitsch.

A qualitative survey of MCA members conducted for this work points to approval processes and the industrial relations framework as the main two main areas requiring government attention to improve mining's productivity performance. Some 85 per cent of survey respondents indicated that the Fair Work Act has a negative effect on the ability to raise productivity.

More than half (55 per cent) of respondents nominated 'delays in reaching agreements' as a major impediment to productivity growth. Half (50 per cent) nominated as a major impediment the way the regime 'restricts flexibility in work arrangements'. Other factors nominated as major impediments to productivity growth were:

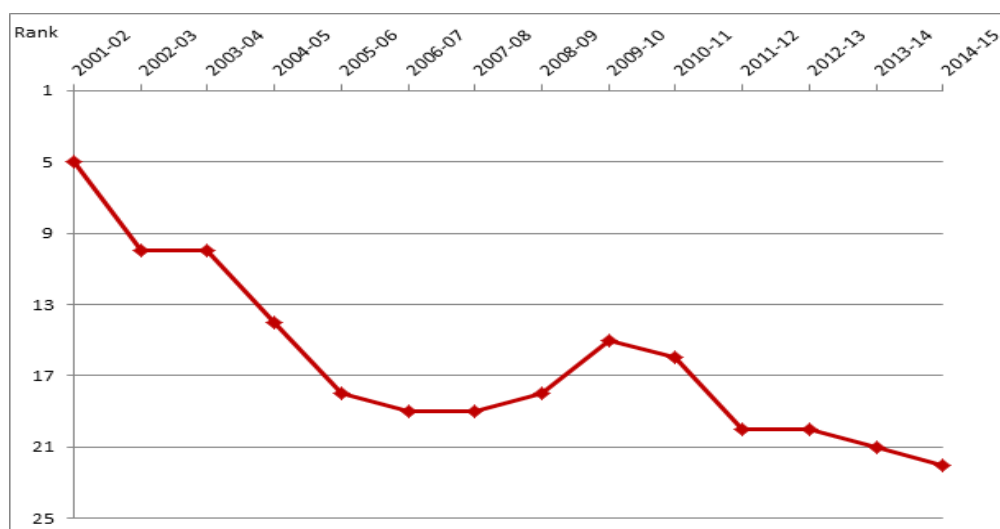
- Lack of productivity offsets in agreements (45 per cent)
- Restricts flexibility in pay across employees (40 per cent)
- Increased industrial disputes (40 per cent).

Related to Australia's productivity challenge is a structural competitiveness challenge. This was the focus of a study by Professor Tony Makin of Griffith University commissioned by the MCA and released in September 2014.<sup>18</sup> Makin is careful to note that while competitiveness is often talked about in the same breath as productivity there are important conceptual differences. Whereas productivity measures focus on how efficiently factor inputs are combined in production, measures of competitiveness have a more explicit focus on an economy's ability to sell goods and services to the rest of the world and to compete against goods and services abroad.

Across three alternative measures of competitiveness, Professor Makin identified a marked decline in Australia's position since the turn of the century. He notes that while in part this reflects a higher real exchange rate arising from the terms of trade 'shock' of the mining boom, 'the more worrying factor has been the role of domestic policies (notably fiscal and industrial relations policies) in aggravating competitiveness problems'.<sup>19</sup>

Labour market re-regulation has been identified explicitly as a source of reduced competitiveness in one of the measures outlined by Makin, namely Australia's ranking on the World Economic Forum competitiveness index. On this indicator, Australia has slipped from being ranked in the top 10 most competitive countries in the early 2000s to outside the top 20, with a ranking of 22<sup>nd</sup> for 2014-15 (Figure 10). Australia's relative ranking on 'burden of government regulation' has contributed markedly to the overall deterioration, while on the specific issue of 'labour market efficiency' Australia has gone from 9<sup>th</sup> in 2009-10 to 56<sup>th</sup> in 2014-15.

**Figure 10: World Economic Forum Global Competitiveness Index – Australia's ranking**



Source: World Economic Forum, *Global Competitiveness Report* (various issues).

Makin identified a central issue in the debate over labour market flexibility and productivity performance, namely why conventional productivity measures (which assume constant 'elasticity of substitution' between labour and capital) may fail to capture the full returns from labour market flexibility. This importance of labour market flexibility is underlined view by Australia's heavily reliance on commodity exports, and therefore high exposure to volatile terms of trade. He notes that:

Australia's high exposure to terms of trade volatility and its associated economic costs supports the case for heightened flexibility. Although the floating exchange rate acts to smooth economic adjustment across the economy external price shocks, it also generates a higher degree of uncertainty for many traded goods industries, compared for instance with other advanced economies. This places a particular premium on the

<sup>18</sup> T. Makin, *Australia's Competitiveness: Reversing the slide*, A public policy analysis produced for the Minerals Council of Australia, September 2014.

<sup>19</sup> Ibid, p. 8.

need for ready restructuring by firms along with reallocation of labour and capital to support new business models, products and processes. This restructuring is more readily facilitated if markets are highly flexible.

During the early phase of the mining boom, industrial relations arrangements did not have a major effect on exports. Workers, through their unions, were able to extract higher returns permitted by buoyant prices and profitability. Some of these gains, however, were taken in forms (such as restrictions on rostering) that have severe competitiveness implications now that Australian mining companies are no longer in a seller's market. Meanwhile, industrial relations arrangements surely did play an important role in the non-tradables sector (for instance, for aged care, child care, hospital services and government schools) by driving up costs and the prices of non-tradables more generally.

The importance of labour market flexibility to the economy's overall productivity performance, as conventionally measured, remains an issue of economic debate. An important reason for this is that standard measures of productivity are not linked in any direct way to the degree of flexibility in labour markets.

Standard productivity measures assume constant what economists call the 'elasticity of substitution' between labour and capital. In effect, the elasticity of substitution is the rate at which labour can be substituted for capital, and is likely to be affected by the degree of labour market flexibility.

Allowing variation through time in the way labour and capital are combined (where the "elasticity of substitution" is not assumed constant) can yield different results when estimating productivity performance. My own research with Sam Strong has found this to be the case during the reform era of the 1980s and 1990s.

Specifically, we found that labour productivity rose significantly and remained elevated during the economic reform period. Furthermore, our alternative specification which allows the substitutability of labour and capital to change over time suggests labour productivity increased by more than was recorded by conventional productivity measures between 1998 and 2008, when the labour market was more flexible than it is now. The policy implication is that labour market flexibility can play a role in improving productivity.<sup>20</sup>

The Productivity Commission's own analytical framework for analysing the drivers of productivity – based on 'incentives', 'flexibility' and 'capabilities' – also points to the potential importance of the workplace relations framework to Australia's productivity performance. That labour market flexibility contributes to superior economic outcomes is well established in economic research (Box 2).

---

<sup>20</sup> Ibid, pp. 71-72.

## Box 2: Why labour market flexibility matters

Researchers at the International Monetary Fund have found that:

... after controlling for other macroeconomic and demographic variables, increases in the flexibility of labor market regulations and institutions have a statistically significant negative impact both on the level and the change of unemployment outcomes (i.e., total, youth, and long-term unemployment). Among the different labor market flexibility indicators analyzed, hiring and firing regulations and hiring costs are found to have the strongest effect.

**Overall the results of the paper suggest that policies that enhance labor market flexibility should reduce unemployment.** At the same time, this raises the issue of the design and possible sequence of such reforms, and the adoption of policies aimed also to improve the quality of employment and to minimize possible negative short-term effects, not investigated in this paper, on inequality and job destruction. While data available for our large set of countries lack the necessary level of details to answer this question, micro- and macro-studies on OECD countries over the decade showed that it is important to protect workers, rather than jobs, by coupling of unemployment benefits with pressure on unemployed to take jobs and measures to help them (Blanchard, 2006). Moreover, employment protection should be designed in such a way to internalize social costs and not inhibit job creation and labor reallocation. **Artificial restrictions on individual employment contracts should also be avoided.**

**... EPL [employment protection legislation] explains MFP [multi-factor productivity] growth differentials quite well:** the four countries with the most flexible labor markets in 2001 (the US, the UK, Australia and Canada) experienced an MFP growth of 1.13 percent in high skill industries during that period. The countries with the less flexible labor markets (Germany, Spain and Italy) experienced an annual MFP growth of 0.68 percent in high skill industries.<sup>21</sup>

Senior economists at the Reserve Bank of Australia have concluded that:

Using data covering 18 OECD countries over the period 1974–2003 [including Australia], we explore the effects of product and labour market regulations on aggregate TFP [total factor productivity] growth for the business sector. **We find some evidence that lower levels of regulation are associated with higher TFP growth over subsequent years. There is also some evidence that labour and product market deregulation have more of an effect in combination. That is, greater flexibility (or efficiency) in one dimension appears to be more beneficial when the other market is also relatively flexible (efficient).**<sup>22</sup>

Former Treasury Secretary, Dr Martin Parkinson, has stated that:

There are many areas of the economy today that are still in need of a reformist eye. The provision of public services in health, education, utilities and transport come to mind. That sounds like enough for starters. **But I do worry that without the proximate motivation for reform that we had in the 1980s, we risk moving too slowly. On the labour market for instance, the discussion of reform is close to a no-go area, but it really is critical to our future success that we be willing to change where that is sensible.**<sup>23</sup>

Former Chairman of the Productivity Commission, Dr Gary Banks, has observed that:

**[I]ndustrial relations regulation is arguably the most crucial [area of regulation] to get right.** Whether productivity growth comes from working harder or working 'smarter', people in workplaces are central to it. The incentives they face and how well their skills are deployed and redeployed in the multitude of enterprises that make up our economy underpins its aggregate performance. **It is therefore vital to ensure that regulations intended to promote fairness in Australia's workplaces do not detract unduly from their productivity ...**

**If we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making.**<sup>24</sup>

<sup>21</sup> L. Bernal-Verdugo, D. Furceri and D. Guillaume, *Labor Market Flexibility and Unemployment: New Empirical Evidence of Static and Dynamic Effects*, International Monetary Fund Working Paper 12/64, 2012, p. 12, emphases added.

<sup>22</sup> C. Kent and J. Simon, *Productivity Growth: The Effect of Market Regulations*, Reserve Bank of Australia Research Discussion Paper 2007-04, p. 26f, emphasis added.

<sup>23</sup> M. Parkinson, Secretary to the Treasury, *Reflections on Australia's era of economic reform*, Address to the European-Australian Business Council, Sydney, 5 December 2014, p. 15, emphasis added.

<sup>24</sup> G. Banks, *Successful Reform: Past Lessons, Future Challenges*, Keynote address to the Annual Forecasting Conference of the Australian Business Economists, 8 December 2010, Productivity Commission, p. 16, emphases added.

### 3. AUSTRALIA'S WORKPLACE RELATIONS FRAMEWORK: SYSTEMIC ISSUES

---

Australia's workplace relations framework comprises the laws, regulations and institutions that, along with other factors, set incentives and constraints on workplace behaviour and outcomes. The Fair Work (FW) Act is the primary legislative device governing Australia's workplace relations framework.

This framework has a pervasive influence on individuals and businesses, as well as the performance of the economy as a whole. As the Productivity Commission has outlined, it shapes everything from personal income and conditions at work, to workplace trust and cooperation, to business profitability, employment and broader national prosperity.<sup>25</sup>

This section outlines key principles the MCA regards as underpinning a well-functioning workplace relations framework. It considers the objectives of the FW Act, the assessment of the system made by an earlier review of the laws and the degree to which changes ushered in under the FW Act may have compromised the post-1993 direction of workplace relations reform in Australia. A systemic weakness of the current workplace relations regime – namely, the way in which various provisions interact such that 'the whole is worse than the sum of the parts' – is highlighted.

#### Key principles

Australia's workplace relations framework needs to be responsive to the expectations of employers and employees and provide for their mutual benefit. Mutual benefit rests, ultimately, on Australia having safe, cooperative, productive and equitable workplaces. Such workplaces in turn help create a business environment favourable to investment.

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 economy-wide and societal 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 Australian minerals industry holds strongly that effective, sustained, direct engagement between employers and employees is the best way of ensuring mutual benefit. Direct relationships build

---

<sup>25</sup> Productivity Commission, *Workplace Relations Framework: The Inquiry in Context, Issues Paper 1*, January 2015.



cooperation and collaboration in the workplace and provide the foundation for productivity growth and improved terms and conditions of employment. Beyond economic returns to the enterprise and its employees, such relationships are fundamental to workplace health and safety, as well as to the industry's commitment to the local communities in which it operates as part of maintaining its social licence to operate.

The legal and regulatory framework governing workplace arrangements (in whatever form) should promote direct engagement, not erect obstacles that serve to undermine cooperative and productive relationships between employers and employees. Facilitating direct relationships provides employers and employees with the requisite capacity to innovate and adapt to a changing external environment based on values of mutual respect, shared enterprise and accountability.

A well-functioning workplace relations system also needs to take account of diversity at the enterprise and workplace level, as well as the diverse and changing requirements of employees. Workplaces across the minerals industry vary markedly – from head offices in capital cities, to operations in or near regional communities (large and small) to remote locations hundreds of kilometres from the nearest town, in a number of cases adjoining traditional Indigenous communities.

The Productivity Commission has previously examined in detail one of the associated features of workplace diversity in the mining industry in its report on geographic labour mobility.<sup>26</sup> It identified the importance of well-designed, flexible policies to assist in meeting labour demand across diverse parts of the country, including through long-distance commuting. The role of personal choice and locational factors influencing decisions over whether and where people move to take up employment opportunities underscores why 'one-size-fits-all' workplace arrangements are likely to be out of step with the requirements of both employers and employees.

At the same time, 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 where shared success places a premium on businesses having an engaged and adaptable workforce. These changes underline why employers and employees are demanding greater choice and flexibility in the world of work.

The old industrial workplace model that was 'present at the creation' of Australia's workplace relations system more than a century ago – heavily male-oriented, geared overwhelmingly towards goods production and heavily unionised – is less and less relevant to the needs and expectations of Australian employers and employees in the 21<sup>st</sup> century.

In accordance with their diverse needs, employers and employees should be able to choose the form of agreement appropriate to their particular circumstances. The dividends from choice and flexibility around agreement options have been demonstrated in the mining industry in the past based on strong alignment between contribution and reward and a shared commitment to workforce development based on a culture of mutual dependence.

A wider range of agreement-making options – including the availability of individual agreements in Western Australia from 1993 and nationally from 1996 – allowed for increased choice and flexibility, taking into account the increasingly diverse requirements of the mining industry's workforce. The take-up of individual agreements was found to be consistent with higher productivity and wages, reduced industrial disputation and improved workplace safety outcomes.

The MCA considers a balanced, fair and sustainable safety net of wages and conditions to be an important pillar of a modern workplace relations framework. This should include:

- Minimum conditions enshrined in legislation and applicable to all types of agreements, as well as appropriate protections against exploitation or discriminatory conduct
- Statutory guidance on the form and content of individual agreements

---

<sup>26</sup> Productivity Commission, *Geographic Labour Mobility*, Productivity Commission Research Report, April 2014.

- A global 'better off overall test'
- An independent, professional institution whose remit includes enforcement of minimum standards for wages and conditions.

The principle of freedom of association – the right to belong (and not to belong) to an organisation or association (including a trade union) and the right to choose the manner of representation in negotiations – is an additional foundation of a responsive and fair workplace relations system. Workplace rights regarding freedom of association are protected appropriately under the FW Act in that it is unlawful to take or threaten adverse action against a person for being (or not being) a member of a trade union or employer association or for choosing to be represented by a union.

A well-functioning workplace relations system maintains an appropriate balance between rights and obligations applicable to employers and employees alike. There are clear legal obligations on management with respect to such matters as ensuring employees are provided with correct entitlements and providing a safe workplace (including one free from discrimination and harassment). These are in addition to wider duties and responsibilities under corporate governance to act with care and diligence and to act in good faith in the best interests of the company.

A strong focus on the rights of employees is appropriate given these management obligations. Similarly, with employee rights come obligations and responsibilities. For example, the rights of an employee to exercise a workplace right or engage in industrial activity must be tempered by their obligations as an employee to behave in an appropriate and lawful manner.

The ultimate responsibility and right to run the business in accordance with operational success must rest with management. Management needs to have the capacity to align workplace incentives with business needs and objectives, including improved productivity and enterprise flexibility. For example, employee consultation cannot and should not be elevated to a right of veto over operational decision-making.

Finally, a workplace relations system should, as far as possible, be simple, clear and efficient, in the sense of minimising distortions and compliance burdens on parties. A well-functioning workplace relations system provides for timely decision-making and reduces unnecessary uncertainty and risk.

### **The Fair Work Act: Objects**

The FW Act's objectives are to provide laws that are 'fair to working Australians', 'flexible for businesses' and that 'promote productivity and economic growth for Australia's future prosperity'. As the Productivity Commission notes in Issues Paper 1:

The FWA cites objectives that are diverse and – as is often the case with such diversity – potentially in conflict: The FWA is intended to deliver outcomes that are fair, flexible, co-operative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear (s. 3). It also provides for special arrangements for small businesses; preference for collective bargaining; balance between family and workplace responsibilities; minimum wage and employment standards; and the right of freedom of association.<sup>27</sup>

A review of the Fair Work legislation commissioned by the previous Federal Government concluded in its 2012 report that 'the effects of the Fair Work legislation have been broadly consistent with the objects set out in s. 3 of the FW Act' and that 'the legislation is operating broadly as intended'. The Panel observed that:

In our view, the current laws are working well and the system of enterprise bargaining underpinned by the national employment standards and modern awards is delivering fairness to employers and employees.<sup>28</sup>

The Review Panel went on to make a number of other findings. For example, it:

<sup>27</sup> Productivity Commission, *Workplace Relations Framework: The Inquiry in Context, Issues Paper 1*, January 2015, p. 7.

<sup>28</sup> Australian Government, Department of Education, Employment and Workplace Relations, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p. 3.

... did not accept that enhancing productivity and enhancing equity are conflicting goals. Increased productivity permits both higher wages and profits. Increased equity need not come at a cost to productivity. Indeed by supporting harmony in the workplace, increased equity may well reduce turnover, training costs and employee dissatisfaction, all of which enhance a productive workplace culture.<sup>29</sup>

The Panel also concluded that since the Fair Work legislation came into force economic outcomes have been favourable to Australia's continuing prosperity (based on wages growth, industrial disputation, employment growth and the like). The Review Panel noted 'the exception has been productivity growth' which has been disappointing in the 2000s, but it was 'not persuaded that the legislative framework for industrial relations accounts for this productivity slowdown'.<sup>30</sup>

A key premise of the 2012 review was the broad continuity of workplace relations arrangements since 1993 based on a greater focus on enterprise bargaining, constraints on resort to arbitration, a safety net of minimum conditions, and recognition of a right to strike in pursuit of a collective agreement.

A series of points can be made in relation to the objects of the FWA and the earlier review.

Firstly, the Review Panel can legitimately argue that enhancing productivity and enhancing equity are not, in and of themselves, necessarily in conflict. Indeed, they *can be* mutually reinforcing. Equally, however, the Productivity Commission is correct to note that the various goals of the Act can be potentially in conflict. Virtually all economic policy decisions and frameworks embody trade-offs. It is only appropriate that any trade-offs are considered and tested in a rigorous and transparent way by this Inquiry.

This point was well made by the former Productivity Commission Chairman Gary Banks in 2012 in addressing why workplace relations regulation generally sits outside the reach of competition policy:

The basis for this has been that labour markets are more complex than product markets and involve a significant human dimension. And these points are correct. But are they good reasons for foregoing scrutiny of whether the benefits of particular restrictions on competition and other regulatory measures in the labour market exceed the costs and, where they do, whether they are the best way of achieving those benefits?

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

Ensuring that people are treated fairly in workplaces must remain a central concern. However, any trade-offs with productivity or competitiveness that may be associated with specific regulatory instruments need to be carefully considered and re-assessed over time. After all, productivity gains provide the only sustainable source of higher wages and job security for workers.<sup>31</sup>

The MCA endorses this view wholeheartedly and urges this Inquiry to assess in detail whether the appropriate trade-offs are embedded in Australia's current workplace relations system.

Secondly, almost three years on from the 2012 review of the Fair Work laws, Australia's economic performance appears less robust than the review's conclusions would imply. Economic growth in Australia has been below its long run average in five of the past six financial years, averaging 2.5 per cent a year. Unemployment has risen and the rebalancing of economic growth based on an expected pick-up of non-mining investment has yet to materialise in line with official forecasts.

---

<sup>29</sup> Ibid, p. 19.

<sup>30</sup> Ibid, p. 19.

<sup>31</sup> G. Banks, *Competition Policy's regulatory innovations: quo vadis?* Presented at the Economists Conference Business Symposium, 12 July 2012, Productivity Commission, Canberra, p. 8.

Looking ahead, the economy faces continued headwinds from the decline in the terms of trade along with falling rates of labour utilisation as the population ages. At the same time, the global economy remains vulnerable to a range of potential shocks. This brings Australia's productivity challenge into even sharper focus, noted by the Treasury Secretary in his speech to CEDA on 27 February 2015.

For Australia's per capita national income to grow at the historical average of 2.2 per cent per annum over the next decade, annual labour productivity growth would need to increase to around 2.7 per cent to counteract the effects of population ageing and a falling terms of trade.

This is well in excess of what has been achieved in the past 50 years – and almost double what was achieved in the past decade.

These statistics really frame the challenges to our economy and need to be taken seriously.<sup>32</sup>

Thirdly, concepts of fairness and equity in the workplace are themselves likely to be multi-faceted and not always amenable to a simple frame of reference, metric or conclusion. It is therefore important also that the Productivity Commission probe this issue more deeply: fairness to whom?

This applies, for example, in taking account of the impact of a prevailing set of laws, regulations and institutions not just on those in employment, but also those not in employment, those under-employed and those aspiring to future employment.

Complex equity issues also revolve around the role of workplace 'protections' and their practical impact. If protections are designed in a way that encourages unmeritorious or extreme claims, this cannot be considered 'fair' to employers or, ultimately, to employees who do not pursue such claims. The same is true if various workplace protections were to shelter poor workplace performance or otherwise prevent timely and effective performance management.

Again, issues of fairness relate not just to the effects on employers but just as powerfully to those employees forced, in some sense, to compensate for poor workplace performance by others, without appropriate accountability mechanisms.

Fourthly, while the Review Panel sought to emphasise elements of continuity between the Fair Work laws and the broader direction of workplace relations reform since the early 1990s, the MCA would urge the PC to examine afresh the way changes made under the auspices of the Fair Work regime may have departed from the fundamental direction of workplace reforms begun in 1993.

The then Prime Minister, the Hon. Paul Keating, articulated clearly the model envisaged at the time:

Let me describe the model of industrial relations we are working towards ... It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net. This safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers ...

These agreements would predominantly be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can guarantee sustainable real wage increases ... We need to make the system more flexible and relevant to our present and future needs ...

Completing industrial relations reform is another link in the chain of reform which began a decade ago. It is important now that we accelerate the reform so that all the other elements of flexibility in the economy can work in greater harmony.<sup>33</sup>

The model therefore hinged critically around empowering employers and employees to make decisions about future needs through a more flexible framework, gearing bargaining increasingly towards productivity outcomes and ensuring that workplace laws work in tandem with other market-oriented reforms to make the Australian economy more robust, flexible and adaptable.

---

<sup>32</sup> J. Fraser, Secretary to the Treasury, Australia's Economic Policy Challenges, Address to the Committee for Economic Development of Australia, 27 February 2015, p. 14.

<sup>33</sup> The Hon. P. Keating, Prime Minister, *Speech to the Institute of Directors Luncheon*, Melbourne, 21 April 1993, pp. 10f, 13.

By and large, the architects of the Fair Work laws sought (at least initially) to portray the post 2007 changes as consistent with this reform direction. In August 2007, the then Opposition Leader and then Shadow Minister for Employment and Industrial Relations acknowledged that: 'There is a clear case for workplace reform in Australia. A modern and flexible economy demands it'.<sup>34</sup>

Just prior to the 2007 Federal Election, a further commitment was made that 'not one part of Labor's industrial relations policy is about going back'.<sup>35</sup> Among specific commitments were to:

- Maintain existing union access rules to workplaces
- Enforce 'a clear set of tough rules' for industrial action
- Introduce a viable process for individual flexibility arrangements to compensate for the phasing out of Australian Workplace Agreements (AWAs)
- Retain a 'tough cop on the beat' in the building and construction industry.

Unfortunately, these promises were not kept in government.

The FW Act relaxed existing right of entry laws by linking them to union eligibility rules rather than the previous requirement for a union to be covered by an agreement or Award at a worksite. In addition, the abolition of AWAs facilitated union entry visits to previously non-unionised worksites, as employees had to be employed on collective agreements. Moreover, entry clauses were made allowable matters in enterprise agreements, which meant that unions could now take protected industrial action over the clauses where employers refuse to accede to them.<sup>36</sup>

More broadly, a low threshold was set for taking protected industrial action with a high threshold set for those seeking orders to stop industrial action, particularly for third parties economically and operationally harmed by such action in their supply chains, contractors or markets. The flexibility envisaged in the form of Individual Flexibility Arrangements proved largely illusory. And the policing of the building and construction industry was softened considerably through downgrading the powers of the inspectorate and greatly reducing available penalties.

In a study for the MCA in December 2013, Dr Gerard Henderson, Executive Director of The Sydney Institute, pointed to some of the more systematic ways in which Australia has drawn back from the earlier reform direction. He noted that in some respects industrial relations in Australia 'is now more centralised and regulated than it was a quarter of a century ago ... despite the fact that the Australian economy is more diverse, more reliant on small business growth and operating in a more competitive global market place'.

Two facts illustrate the point.

In the 1990s, around a third of awards in Australia came within the ambit of the old Commonwealth Conciliation and Arbitration Commission. By 2010, the relevant figure for Fair Work Australia – later to be renamed the Fair Work Commission – was close to 90 per cent.

Secondly, between 1992 and 2012, the proportion of employees who were trade union members fell from around 40 per cent to 18 per cent – with the proportion in the private sector workforce down to around 13 per cent.

Yet, courtesy of privileges embedded in the system, the Australian Council of Trade Unions (ACTU) can now claim that unions negotiate on behalf of some 60 per cent of the workforce. Thus the institutional sway of the union movement has been preserved (and in some cases enhanced) even while trade union membership has declined dramatically.

---

<sup>34</sup> K. Rudd and J. Gillard, *Joint Statement: Forward with Fairness – Policy Implementation Plan*, 28 August 2007, p. 1.

<sup>35</sup> *Sydney Morning Herald*, 'We won't go backwards on IR: Gillard', 1 November 2007.

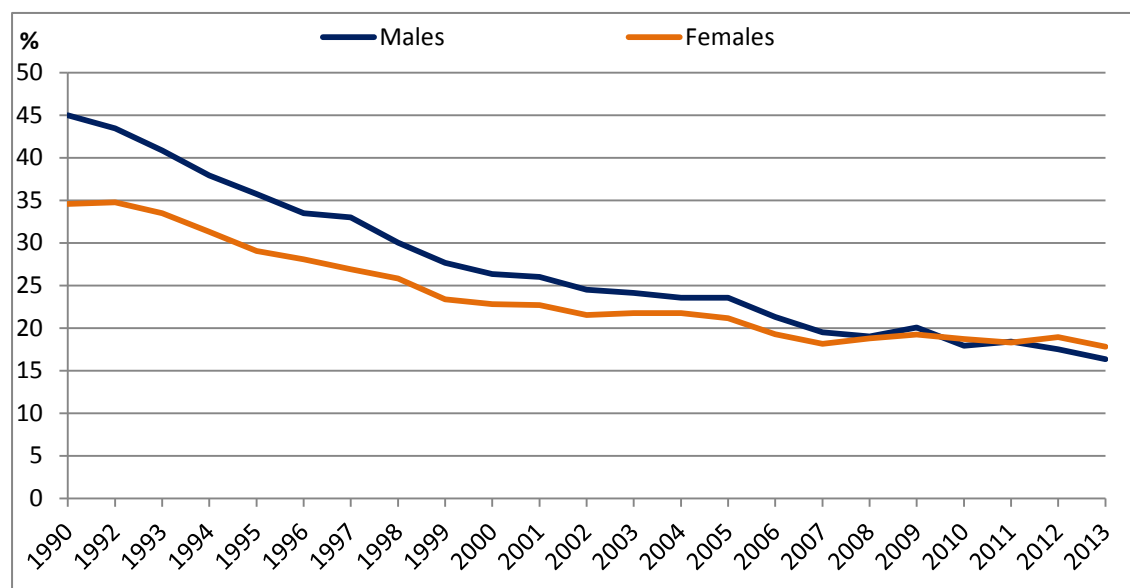
<sup>36</sup> Australian Mines and Metals Association (AMMA), *Fair for Who? The rhetoric versus the reality of the Fair Work Act*, October 2012, p. 4.

In short, the Fair Work Act has effectively revived the power of the trade union movement, the award system and the Commonwealth's industrial tribunal in the form of the Fair Work Commission.<sup>37</sup>

### In reality ... the whole is worse than the sum of its parts

The FW Act has provided the legal springboard for increased trade union power and privileges in workplace bargaining, despite unions representing less than 20 per cent of the total workforce, and only 13 per cent of the private sector workforce (Figure 11). It has permitted and, in some cases, facilitated efforts to restrict the rights and responsibilities of management to take decisions in accordance with operational success.

**Figure 11: Trade union membership**



Source: Australian Bureau of Statistics

Unreasonable claims and actions have increased project costs, compromised workplace harmony and productivity, delayed necessary adjustments to altered business conditions and put at risk current and future high-wage jobs.

Individual elements of the FW Act present discrete and specific problems. Yet the full adverse impact of current workplace settings can be gauged only from analysing the interaction of various provisions; not least those with the implicit intent of the bolstering trade union power over management's capacity to operate a successful business.

In short, the adverse consequences of the FW Act (unintended or otherwise) are greater than the sum of its problematic parts. The interaction of provisions sets up a negative feedback loop between incentives and outcomes, one that can take many forms but which have the effect of taking the focus of energies away from the core goal of promoting productive and cooperative workplaces.

For example:

- Provisions which favour union involvement in workplace bargaining beyond that commensurate with workplace representation are made more problematic by their interaction with expanded scope for protected industrial action during enterprise bargaining
- The negative impacts of greater scope for protected industrial action are made more acute by the more expansive approach to permitted matters in enterprise agreements

<sup>37</sup> G. Henderson, *The Return of the Industrial Relations Club*, A public policy analysis produced for the Minerals Council of Australia, December 2013.

- The limitations on agreement making options (with no scope for individual statutory agreements) interacts with the effective neutering of Individual Flexibility Arrangements in awards and enterprise agreements to further circumscribe choice and flexibility in a bargaining context
- Within an expanded adverse action regime, the interaction of the reverse onus of proof on employers to defend claims and the uncapped nature of compensation claims creates additional incentives for unmeritorious claims
- Expanded right of entry provisions have been made more damaging by changes which conferred additional rights on union officials to interview or hold discussions with employees in areas previously not agreed to by employers.

Far from assisting efforts to improve productivity and to align employment arrangements with the drivers of operational success, the current workplace relations regime has resulted in unnecessary delays and increased costs of doing business. It has also made it more difficult for companies looking to meet the diverse needs and preferences of employees.

Notwithstanding what was proposed, the FW Act in reality has run directly counter to the direction of reforms to Australia's workplace relations system begun in the early 1990s. The dismantling of centralised wage fixation and the advent of enterprise bargaining was designed to provide firms with more scope to fashion remuneration and work practices to the circumstances of their markets and regions.

Through individual, incremental but nonetheless deliberate steps, the FW Act has not simply shifted the 'pendulum' of workplace relations in Australia to achieve a different balance between fairness and efficiency. It has undermined the overall reform direction set in 1993. Given that, as the former PC Chairman Gary Banks has observed, 'productivity gains provide the only sustainable source of higher wages and job security for workers', this is likely in the longer term to come at the cost of both efficiency *and* fairness.<sup>38</sup>

---

<sup>38</sup> G. Banks, Op. cit., 2012, p. 8.

## 4. REFORM PRIORITIES

---

### **Bargaining matters and agreement making**

The legitimate sphere of enterprise agreements is entitlements for employees in respect of their wages and their conditions of employment. The FW Act has opened the door to claims against mining companies which go well beyond what should reasonably be included in an enterprise agreement. Such claims have included:

- Restrictions on the use of contractors and temporary employees without union agreement
- Increased restrictions on management's ability to interview employees for disciplinary, performance or safety-related reasons
- 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
- 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.

In effect, the FW Act has provided cover for a wide variety of union-friendly clauses to be included in enterprise agreements. The expanded range of bargaining matters has meant expanded scope for disputes, delays in reaching agreements and associated costs (including diversion of management focus from core business operations).

Section 172 should make clear that 'permitted matters' are matters that pertain only to the employment relationship. They should not include items which pertain to relations between an employer and a union or between an employee and a union.

In line with the thrust of reforms begun more than two decades ago (and the Objects of the FW Act), the agreement making process should actively promote improved productivity in the bargaining context. As part of the agreement certification process under the Act, consideration should be given to requiring the Fair Work Commission to be satisfied that improvements to productivity were discussed and given 'genuine consideration'.

Procedural 'trip wires' can add considerable costs and delays to the enterprise bargaining process. Employers can successfully negotiate an enterprise agreement directly with employees (with majority or even unanimous support) only to have a third party stymie the approval process by alleging procedural non-compliance on a technicality.

This has been the experience of at least one MCA member company. 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.

Procedural requirements should be simplified to ensure the enterprise agreement process operates as intended with a focus on cases of genuine deception or unfairness.

### **Protected industrial action**

The FW Act contends that protected industrial action should only be available where a party has been, and is, genuinely trying to reach an agreement. In practice, the relevant provisions have been interpreted loosely such that protected industrial action is often taken prematurely and in a way that imposes significant costs on businesses.



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. It has been common for unions to seek and to obtain protected action ballot orders as a preliminary step in enterprise bargaining whether or not there is any immediate intention to take protected action and whether or not an impasse has genuinely arisen. By contrast, the rights and options afforded employers against premature and damaging industrial action are much more circumscribed.

Protected industrial action should not be available in support of any non-permitted matters. Sections 413 and 443 of the FW Act should be amended so that protected industrial action is only available as a last resort after a demonstrated attempt has been made to exhaust bargaining options and where the Fair Work Commission is satisfied that the applicant is bargaining in good faith. It should not be available as an early 'softening up' process to condition later negotiations.

Whereas the threshold for taking protected industrial action is relatively low, the threshold for employers proving substantial 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 should review these provisions to ensure a more balanced framework, one that provides third parties adversely impacted by protected industrial action with practical forms of relief.

The FW Act provides that an employer must not make a payment to an employee in relation to periods of protected industrial action. This is an appropriate and balanced provision given the imposition of protected industrial action is designed to inflict economic damage on an employer. Maintaining this balance is important in the justification for the legal immunity granted by section 415. However, it is undermined if a union sponsoring protected action itself pays the employees on strike.

The Act should be clarified so that unions may not:

- Pursue retrospective application of wage increases in enterprise agreements in respect of periods where industrial action was being taken
- Themselves fund strike pay
- Induce employees to participate in pickets or other such union activity by making strike pay conditional on that conduct.

### **Agreement options (including Individual Flexibility Arrangements)**

The FW Act is based on the premise that an individual statutory agreement can never be part of a productive, cooperative and equitable workplace relations framework. There is ample evidence from within the minerals industry that this premise is incorrect. 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.

The minerals industry has utilised individual statutory agreements (e.g. Australian Workplace 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 (Box 3).

A form of individual statutory agreement should be reintroduced, underpinned by the Better Off Overall Test (BOOT) and the National Employment Standards. To ensure the agreement worked as intended, the BOOT could be applicable over the life of the instrument, not just at the outset.

Individual Flexibility Arrangements are the sanctioned form of direct contractual agreement within the existing system and were proposed as an alternative means of providing for 'individual flexibilities' as part of all modern awards and enterprise agreements. In practice, employers have found flexibility clauses very difficult to negotiate for anything other than relatively minor matters.

Faced with union opposition to flexibility around key issues such as hours of work, rostering and overtime, a survey of resource industry employers found that two-thirds of respondents regard IFAs as being of 'little' or 'no value'.<sup>39</sup>

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.

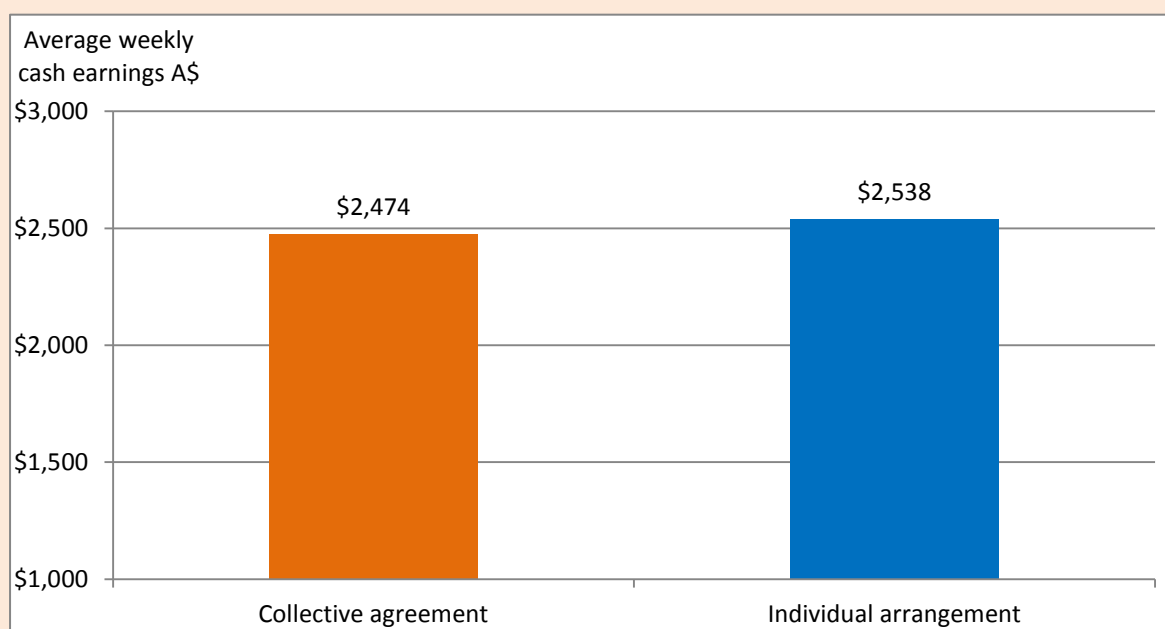
The former restricts the attractiveness of IFAs by creating uncertainty and opening up the possibility of time-consuming additional negotiation. Such a restriction is not justified given the statutory protections in place under the FW Act. An employer should be able to discuss with a potential employee 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 FW Act should be amended to make it permissible to make an employment offer conditional on agreeing to enter into an IFA.

The ability of an employee to terminate an IFA with 28 days' notice also results in uncertainty and reduces the potential benefits of the instrument. The capacity for unilateral termination should be removed or made subject to consent or a reasonable dispute settlement process.

### Box 3: Individual agreements in the mining industry

Individual agreements have been used extensively in the mining industry for more than two decades. They have facilitated flexible and productive work practices, while also providing attractive salaries and working conditions for the industry's changing workforce. Indeed, employees on individual arrangements have consistently received higher remuneration than those on 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, that allows an employee to agree employment arrangements directly with his or her employer.



Source: Australian Bureau of Statistics, Cat. No. 6306.0.

<sup>39</sup> AMMA, *Submission to the Fair Work Act Review Panel on the post-implementation review of the Fair Work Act 2009*, February 2012.

## **Adverse action/general protections provisions**

The FW Act's adverse action or 'general protections' broadened the scope of protections compared with previous legislation. The discrimination provisions extended protection from unlawful termination on discriminatory grounds to cover other types of adverse action short of dismissal, and the protection against adverse action when making a complaint or inquiry is also broader. The general protections apply to both existing and prospective employees.

Current provisions have opened the door to unmeritorious claims. The interaction of the reverse onus of proof on employers to defend claims and the uncapped nature of potential compensation claims acts as a particular encouragement to unmeritorious claims. Such 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 scope of 'workplace right' is defined too broadly and a reverse onus is not appropriate as the onus should be on the person alleging the contravention to prove that a decision was made for a prohibited reason. To ensure that appropriate disciplinary action can be taken to redress inappropriate behaviour, it is necessary to utilise a test that the provisions will be breached if:

- An employer took action for a prohibited reason, and
- The prohibited reason is the sole or dominant reason action was taken (and not just a minor part of the reason as is the case at the moment).

## **Unfair dismissal and redundancy provisions**

The FW Act's unfair dismissal regime makes an unfair dismissal remedy available to an employee subject to satisfying a qualifying period, being below a statutory high income threshold (if not covered by an instrument) and complying with appropriate time constraints for the bringing of a claim.

Owing to the regime's incentive structure and associated costs, a persistent problem is the encouragement of speculative claims with employers often driven towards the 'least-worst' option in the form of 'go-away' payments. It is often cheaper to settle claims short of court proceedings, even where there is little evidence to support an applicant's allegations.

The system should make applicants more accountable to demonstrate bona fide claims. There are insufficient checks and balances in the system to ensure the information on unfair dismissal applications is complete and correct.

At the moment, employers have insufficient tools to uphold fair and reasonable safety and conduct rules (e.g. alcohol and drug management policies). The criteria for considering harshness under section 387 should include an additional criterion addressing whether an employee breached a policy or procedure applicable to the employee.

Under section 389 of the FW Act, if an employer dismisses a person for reasons of 'genuine redundancy' that dismissal can be found to be unfair if it would have been 'reasonable' for the employer to deploy that person elsewhere in the employer's enterprise or within an 'associated entity'.

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.

Where an employer satisfies the FW Act that a valid reason exists for a termination decision the remedies should not include reinstatement. There have been cases where the tribunal has ordered the reinstatement of a worker following a serious safety breach.

### **Union entry rules**

The minerals industry supports a balanced union entry regime that allows 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. Prior to the FW Act, the system worked reasonably well. Indeed, this was the view articulated by the then Deputy Opposition Leader in 2007.

Subsequently, the grounds for union entry were expanded under the FW Act to include access where a union was not party to an agreement on that site. This change led to a substantial increase in visits. These provisions have become the vehicle whereby unions that have proven themselves otherwise unable to persuade employees about the merits of union membership can maintain unreasonable demands on employers and employees alike. Legislative amendments in 2013 (which effectively provided a union with an unfettered right to utilise break areas and mandated that businesses subsidise union activities) skewed the system even further in the direction of union demands.

The experience of one MCA member has become emblematic of the skewed nature of the current regime. 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, the 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. That the union has taken the matter to the Fair Work Commission to press its claim highlights further the perverse incentives within the current regime.<sup>40</sup>

The provisions relating to union access to workplaces should reflect the balanced arrangements that operated previously 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.

### **Greenfields agreements**

An area where the FW Act has bitten especially hard in its impact on the mining industry is greenfield negotiations where, unlike the previous workplace relations regime, unions have mandatory involvement under the Act. A degree of certainty about the near-term industrial environment (including employment conditions) is vital in providing investors with confidence in Australia's policy settings, especially given the capital requirements and risks associated with new mining projects.

Where a competitive and timely greenfields agreement cannot be negotiated, the project proponent carries the risk of starting up with no security of terms and conditions and no protection against industrial action. The 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.

Research for the Australian Mines and Metals Association (AMMA) has found that 30 per cent of mining employers had attempted to negotiate a greenfields agreement since the commencement of the FW Act. Of these respondents, more than half (54 per cent) encountered difficulties in concluding

---

<sup>40</sup> D. Dalla Valle, 'Right to enter must not cut productivity', *The Australian*, 28 November 2014.

a greenfields agreement, with unions often refusing to negotiate until demands relating to a separate, brownfields agreement were met.<sup>41</sup>

Some 40 per cent of surveyed companies who had negotiated a greenfield agreement said that union conduct had caused delays on scheduled mobilisation and start-up dates. Half of this group reported that the delays had been major. The research found that one in five major resource projects in Australia have been put at serious risk due to ongoing union stalling tactics on greenfield agreements.

Employers need additional options to remove the capacity for unions to hold a project to ransom by pursuing inappropriate and exorbitant claims. There needs to be timely recourse to the Fair Work Commission to seek approval for an employer-proposed greenfields arrangement (with time limits) if conscientious employer efforts to achieve an agreement are unsuccessful.

### **Transfer of business**

The transfer of business provisions in the FW Act and in earlier regimes recognise that when a business purchases or otherwise takes on another business it assumes certain responsibilities. In certain circumstances, the provisions require that employment instruments (like enterprise agreements) transfer with employees when work transfers from one business to another.

The FW Act defines a transfer of business as occurring where the 'work' is the same and where the employing entities are sufficiently connected. The 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. Under current provisions, a transfer of business occurs when:

- The employment of an employee at the old employer has terminated
- That employee becomes employed by the new employer within three months
- The work performed for the new employer is the same, or substantially the same, as the work performed for the old employer, and
- At least one of the following 'connections' exists between the new and old employer
  - There has been a transfer of assets
  - The old employer has outsourced the transferring work to the new employer
  - The new employer ceases to outsource work to the old employer and instead 'insources' the work, or
  - The new employer is an associated entity of the old employer when the transferring employee begins employment.

Unlike the predecessor legislation, the FW Act does not provide for the automatic cessation of transmitted instruments after 12 months, rather ensuring that the transferring instrument will have ongoing operation. Under the Act, the Commission has broad powers to tailor the operation or prevent the transfer of instruments before or after a transfer of business.

The broad range of scenarios captured under the current transfer of business provisions is having damaging and, in some cases, perverse effects on mining businesses and on employment outcomes. In some cases, companies are led to undertake suboptimal measures to avoid being bound by agreements that the company in question did not make and was not a party to.

The 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. Because the transferred terms apply only to transferring employees, this can result in different categories of employees (the old workforce and the new workforce) doing similar work on different terms of

---

<sup>41</sup> S. Kates, *The AMMA Workplace Relations Research Project – A survey based analysis*, Report 6, August 2013.

employment, which is undesirable. The provisions have proven to be particularly problematic in relation to in-sourcing-out-sourcing situations.

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 the BOOT against the applicable Modern Award should not have to take on a previous employer's terms and conditions of employment.

### **System-wide complexity and compliance costs**

Despite efforts to make Australia's workplace relations system simpler and less legalistic, the Productivity Commission has noted that Australia appears to give more weight to 'elaborate rules' and processes than other Anglo-Saxon countries.<sup>42</sup> As highlighted earlier, minerals industry norms are such that safety net provisions of the FW Act are not of major significance. However, there are areas of complexity, rigidity, inconsistency and uncertainty arising from the interaction of enterprise agreements, award provisions and the National Employment Standards (NES).

Rights and entitlements can differ for employees working side-by-side and in the same team. For example, an engineer covered by the Professional Employees Award cannot cash out annual leave but other non-award covered employees working in the same team can do so under the NES. In other cases, overlapping entitlements create additional costs for employers with the potential for 'double dipping' across the NES and enterprise agreements.

A system-wide issue relates to the legal costs incurred by employers in defending frivolous claims in a range of contexts. At the same time, the system has thrown up a range of legal avenues whereby unions or employees can avoid or delay ordinary workplace processes of change and performance management, irrespective of whether there are genuine 'fairness' issues associated with them.

The Productivity Commission should undertake system-wide analysis of compliance burdens in these areas. Through the course of this Inquiry, the MCA will provide the Productivity Commission with additional detailed information to assist with such analysis.

---

<sup>42</sup> Productivity Commission, *Workplace Relations Framework: The Inquiry in Context, Issues Paper 1*, January 2015, p. 9.