Productivity Commission

Inquiry into the Workplace Relations Framework

Submission by:

Australian Shipowners Association

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SUBMISSION BY AUSTRALIAN SHIPOWNERS ASSOCIATION

Introduction

This submission is made on behalf of the Australian Shipowners Association (ASA). ASA represents Australian companies which own or operate:

- international and domestic trading ships;
- cruise ships;
- floating production storage and offtake facilities
- offshore oil and gas support vessels;
- domestic towage and salvage tugs;
- scientific research vessels; and
- dredges.

ASA also represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags. Our members collectively employ approximately 6,000 Australian seafarers.

ASA Members are active in dedicated international trades under both Australian and foreign flags and are employers of both Australian and international maritime labour.
The Association provides an important focal point for the companies who choose to base their shipping and seafaring employment operations in Australia.

ASA's purpose is to pursue strategic reforms that provide for a sustainable, vibrant and competitive Australian shipping industry and to promote Australian participation in meeting domestic needs for sea transport services, and contribution to Australia's international trade, to the benefit of Australian shipowners, their customers and the nation.

ASA's Members are:

ANL Container Line	MODEC Management Services	Sugar Australia
ASP Ship Management	The Port of Newcastle	Svitzer Australia
BP Australia	North West Shelf Shipping	Swire Pacific Offshore
Caltex Australia Limited	Service	Teekay Shipping
Carnival Australia	Origin Energy	(Australia)

EMAS Offshore	P & O Maritime Services	Viva Energy
Farstad Shipping (Indian Pacific)	Rio Tinto Marine	Tidewater Marine
	SeaRoad Shipping	Toll Marine Logistics
Maersk Supply Service	Shell Tankers Australia	Woodside
MMA Offshore	Smit Lamnalco	

1. The focus and structure of this submission

1.1. ASA previously made an extensive submission to the Fair Work Act Review Panel in 2012 as part of a review undertaken by the previous government. The ASA reiterates those submissions and repeats some elements of the submissions which we consider will assist the Productivity Commission (PC) within this submission.

1.2. The primary focus of this submission is on the enterprise bargaining framework established in the *Fair Work Act* ("**the Act**"). Accordingly, this submission will attempt to respond to some of the issues that have been raised in Issues Paper 3: The Bargaining Framework (IP3) and the terms of reference released by the PC, as well as making other relevant observations.

1.3. The bargaining framework comprises the following five central elements:

a. the provisions regulating the content of enterprise agreements – what matters are and are not permitted to be prescribed in an enterprise agreement;

b. good faith bargaining rules and the related powers of the Fair Work Commission (FWC);

c. the rules regulating the taking of protected industrial action, including the rules about how and in what circumstances protected industrial action can be terminated or suspended by the FWC;

d. the conciliation and arbitration roles and powers of the FWC in relation to enterprise bargaining disputes; and

e. the rules concerning approval of enterprise agreements.

1.4. ASA submits that, based on the experience in the maritime industry and detailed in these submissions, these elements of the enterprise bargaining framework:

a. do not provide a balanced framework for cooperative workplace relations (the opening words of section 3);

b. do not promote productivity (section 3(a)); and

c. do not achieve productivity and fairness (section 3(f)).

d. do not provide effective procedures to resolve disputes in the course of bargaining;

e. do provide differential impacts, relevantly for parts of the maritime industry; and

f. are able and need to be improved.

1.5. The approach taken in this submission is to explain these propositions, with reference to particular illustrative evidence and then, grounded on these submissions, provide ASA's submissions in relation to certain elements of the framework and respond to the questions raised in the issues papers and in particular, IP3.

2. Disproportionate bargaining power in the Maritime Industry

2.1. As a starting point, it is necessary to appreciate the reality that, in the maritime industry, employees and their employee organisations (unions) possess disproportionate industrial power. While this is not unique to the maritime industry, it is a reality and has been clearly demonstrated in a number of highly publicised bargaining stoushes between employers and unions in recent years.

2.2. There are number of issues that are common to operators regardless of which subsector of the maritime industry that they operate in. For the purposes of this submission, context that is relevant to the bargaining framework and barriers contained therein, include the following:

a. small number of employees on any one asset (3-22 approximately), with three different unions representing a very small number of people;

b. in most cases, the unions refuse to operate as a single bargaining unit which has the dual effect of management dedicating extensive resources and expertise to negotiate agreements with three separate unions, and each union “holding out” on finalising agreements to leverage on the claims of other unions. This can result in negotiations dragging on for months;

c. the high cost of the capital assets (vessels can range from millions to hundreds of millions for vessels with specialist equipment on board) required to conduct business in the maritime industry, and the consequent impact on financing arrangements in the event that those assets cease generating revenue;

d. the ability of industrial action by any one of these groups to in effect shut down a business and third parties reliant on work being performed.

Offshore Oil and Gas Support Vessel

2.3. The offshore oil and gas support vessel industry sector is engaged is a niche market with a relatively small number of vessel operators with permanent operations based in Australia servicing offshore oil and gas exploration, construction and production facilities.

2.4. Any one vessel will usually have less than 20 employees engaged on the vessel at any one time. The vessels are manned by deck officers (represented by the AMOU), marine engineer officers (represented by the AIMPE) and integrated ratings and catering staff (represented by the MUA). Very small numbers of employees taking even short periods of protected industrial action can cause immense and disproportionate inconvenience and cost, and therefore harm, to these undertakings.

2.5. As highlighted above, the unions routinely refuse to negotiate as a single bargaining unit and instead negotiate separately for separate enterprise agreements covering their respective members working together as officers and crew on the same vessels. It is an easily demonstrable fact that the enterprise agreements operating in this sector tend to be identical (aside from superficial variances) for each category of employee across the different employers.

2.6. In previous legislative eras, the parties met on an industry basis and reached settlements. Since the time when industrial action in support of pattern bargaining has been unlawful, unions have continued to press industry claims but have done so in a manner which purports to be individual to particular enterprises. The legislative prohibition on pattern bargaining now contained in section 412 of the Act is inadequate to deal with this situation.

Trading Fleet Sector

2.7. This sector is commonly referred to as the blue water sector, and principally is engaged in the carriage of cargo around the coast of Australia and in some instances, internationally. In this sector, ships can be stopped from operating by protected industrial action taken by only a small number of crew members. Again, the relatively small number

of employees (between 15 and 22 routinely) on board the vessel are represented by three different unions

2.8. The cost to employees who take protected industrial action, in remuneration foregone, may be relatively small. However, the ship owner or charterer continues to bear the very great support costs of operating the ship and the costs of paying all other crew members. Likewise, shippers and customers whose cargo is being carried by the ship being held up can incur very substantial costs.

2.9. In addition, this sector is subject to coastal trading regulation which permits foreign ships to apply for a temporary licence to transport domestic cargo, a licence more readily available in the event that an Australian vessel is not in a position to move that cargo. This exposure to foreign competition heightens the impact for ship operators when they are unable to compete to carry cargo domestically.

Marine towage sector

2.10. In the marine towage industry, where for normal harbour operations a crew comprises a master, one engineer and one rating, (again, each represented by a different union) protected industrial action can affect normal shipping movements acutely. Where, for example, daylight and tidal requirements in a port determine shipping movements, very short periods of industrial action by just one member of a tug crew is capable of stopping all or a substantial part of shipping movements in that port for 24 hours or more. The impact on the Australian economy can be extremely severe as has been shown in a recent dispute involving towage workers in Port Hedland.[1]

2.11. In summary, as illustrated by the practical realities in each of the sectors of the maritime industry, the Act arms unions and employees with immense bargaining power exerted through industrial action. The harm able to be inflicted on vessel owners, charters, shippers and customers in each of these sectors, by industrial action, is out of all proportion to the modest loss of earnings of the employees who take the action. It also needs to be appreciated that, in the real world, there is not necessarily a commonality of interest between bargaining parties. Employers with current employees, or seeking greenfields agreements, are forced to give way to excessive claims or expose themselves or their customers to risks of very high costs of interruption and delay to their operations. The results can be seen in very high levels of remuneration and other terms won through

[1] As reported by the Australian Financial Review, Julie-Anne Sprague “”$390k tugboat workers to strike for 40pc rise” 7 August 2014.

bargaining undertaken under the Act. The results are not balanced or fair by reference to the Australian standards of remuneration and conditions of other industries and occupations. This is not sustainable long term.

2.12. **Appendix 1** to this submission provides a brief comparison table highlighting the current terms and conditions in Australian enterprise agreements when viewed against the award safety net and commonly found conditions that apply on international trading vessels.

3. Broad content of enterprise agreements

The Act permits, and maritime unions routinely make, claims for inclusion in enterprise agreements of provisions that pertain to the relationships between unions and employers but do **not** pertain to the relationship between employees and employers. These claims may be driven by wider union agendas. They thereby expand the range of matters about which parties can disagree and can be significant obstacles to making enterprise agreements.

4. Pattern bargaining versus good faith bargaining

4.1. The Act purports to make industrial action in support of pattern bargaining unlawful. But *pattern bargaining* is so narrowly defined that the protection given is illusory. Authority under the predecessor *Workplace Relations Act 1996* (WR Act) effectively determines that if claims are not *identical*, then it is not pattern bargaining.[2] Suggestions that "common" claims might include claims which were "similar" or "prevalent" were rejected. Section 412 of the Act is not materially different. On current authority, all a union need do to avoid the effect of section 412 is, disguise its true industry claims by appearing to vary the claims in trivial ways on an individual basis while actually pressing a common set of claims across the industry.

4.2. The offshore oil and gas vessel operators are an obvious example of pattern bargaining in effect taking place on an industry basis. Employers in this sector, in the main (but not without exception) engage a single bargaining representative to negotiate on their behalf with the three maritime unions, as to negotiate individually generally will not result in an outcome that meets the needs of the business that differs substantially from other vessel operators. Once again, the FWC has found that pattern bargaining has not occurred with the vessel operators servicing the offshore oil and gas sector, with protected industrial

[2] *Trinity Garden Aged Care and Another* (Full Bench of the AIRC) 21 August 2006, PR973718 upholding a first instance decision of VP Lawler. See also *National Tertiary Education Industry Union v University of Queensland* [2009] FWA 90, Richards SDP.

action taken as a result.[3] The current round of bargaining is approaching three years, without an agreement being made.

4.3. The requirement to demonstrate that a bargaining representative is genuinely try to reach an agreement is a low threshold, which is not in the interests of employers or employees. Recent case law has demonstrated that even in cases where unions have bargained for "non-permitted matters", the FWC will not necessarily find that bargaining representatives have not genuinely been trying to reach an agreement.[4]

4.4. In addition, the Act does not impose good faith bargaining requirements on either unions or employers in relation to the negotiation of a greenfields agreement (see sections 173, 176 and 228 of the Act), making it difficult for employers to enter into such agreements on objectively reasonable terms.

5. Easy access to protected industrial action

5.1. It is exceedingly easy for a bargaining representative (usually a union) to obtain a secret ballot order from FWC. It has become largely a form filling exercise. The "genuinely trying to reach agreement" test in section 443(b) of the Act is satisfied by showing that claims have been made and pressed, and to some extent explained, and assertion that the applicant bargaining representative really wants what is claimed. There is no assessment required of the reasonableness of claims or whether protected industrial action may be premature. The structure of the legislation as currently drafted is such that in practical effect, protected industrial action can be taken at very early stages of bargaining.

5.2. The fact that a party is not bargaining in good faith is not a bar by itself to a secret ballot order[5]. This is a quite anomalous situation. An applicant for a secret ballot to authorise protected industrial action should be required, if challenged, to show that it is bargaining in good faith. The ease of getting secret ballot orders has effectively encouraged unions to apply for them on the quite rational basis that by voting for protected industrial action, employees arm themselves and their bargaining representatives with a cudgel to be used tactically and at will. In the maritime industry, protected action ballot order applications have become routine and are routinely granted.

[3] *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia [2014] FWC 8130*
[4] *Esso Australia Pty Ltd v AMWU, CEPU and AWU [2015] FWCFB 210*
[5] *Transport Workers Union of Australia v CRT Group Pty Ltd* [2009] FWA 425.

6. Difficulties stopping or suspending protected industrial action

The tests for succeeding with an application to stop or suspend protected industrial action are too limiting. They do not allow the FWC to assess the reasonableness of the claims and conduct of the unions and employees in all the circumstances. Furthermore, the test of "significant harm" in sections 423 and 426 has been interpreted and applied very restrictively as illustrated in the Woodside case[6]. The significant harm test, as it has been applied by the FWC (and its predecessor Fair Work Australia), legitimises the use of disproportionate power to force concession of excessive remuneration and conditions in the maritime industry. It is not operating in a way that is fair or reasonably balanced.

7. Sidelining of Fair Work Commission

The FWC is not provided with any encouragement or effective powers to bring bargaining parties together to conciliate or otherwise assist in the resolution of bargaining disputes. The experience of the maritime industry is that there appears to be a reluctance by FWC members to do so. In making that assessment, we are aware that at least one Commission Member has made significant efforts to try and encourage an agreement in the offshore vessel operators bargaining round. However, this does not diminish the fact that enterprise agreements in the offshore oil and gas vessel operator sector have been the subject of almost three years of negotiation without an agreement.[7]

8. Approval process – no consideration of productivity

There is no consideration in the approval process by the FWC of whether an enterprise agreement for which approval is being sought provides or even enables improvements in productivity. The enterprise agreement approval process does nothing to promote productivity improvement. It should do so in order to assist in achieving the objects of the Act relating to productivity. ASA notes that the government has proposed legislation that is seeking to address this, which is currently before the senate.[8]

9. Adverse action and general protections

9.1. The experience of the maritime industry, which it appears to have in common with many other industries, is that one very significant effect of the general protection provisions in Part 3-1 of Chapter 3 of the Act, is to unduly impede proper performance management of employees.

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[6] *CFMEU v Woodside Burrup Pty Ltd* 2010 [2010] FWAFB 6021, 6 August 2010.
[7] The nominal expiry date for most offshore vessel operators is 31 July 2013, but negotiations began well in advance of that date with a view to securing an enterprise agreement.
[8] *Fair Work Amendment (Bargaining Processes) Bill 2014*

9.2. In particular, the broad range of "workplace rights" as described in the Act, combined with the reverse onus placed on the party against whom an allegation of a breach has been made, means that employers can be met with unmeritorious claims in the face of legitimate performance management of its employees. There is also no requirement that the alleged unlawful reason for the action be the 'sole or dominate' reason for the action taken, placing an even further burden on the party against whom the claim is made, in most cases the employer. While the High Court decision in *Bendigo Tafe*[9] has clarified the situation somewhat with respect to a reverse onus, legislative clarity would be welcome.

10. Union rights of entry

10.1. After the initial review of the Act in 2012, the previous government made amendments to the right of entry provisions to the FW Act. Some of these changes were as follows:

a. accommodation and transport arrangements in remote areas;

b. default meeting locations; and

c. conditions/limits on entry permits.

10.2. There was significant concern from a number of employer organisations about the likely costs that would be incurred should there be a requirement to provide transport to union representatives wishing to exercise right of entry, the recovery for the costs of which has the potential to give rise to a dispute between the union and employer. Further, the disruption to businesses required to organise such transport and accommodation poses an unjustifiable burden on those businesses.

10.3. Under the changes introduced by the previous government, the default location and process for agreeing a location for unions to meet with employees for discussion purposes was changed. The previous regime for right of entry should be reinstated, as has been proposed by the *Fair Work Amendment Bill 2014*.

10.4. The proposed change relates to the FWC potentially placing conditions on entry, an example being a limit imposed on the number of entries to one workplace within a defined period. Anecdotally, and indeed in some recent FWC decisions, it is evident that some permit holders are using their right of entry privilege as lever to exert industrial pressure on employers while causing disruption and distraction to management. There should be

[9] *Board of Bendigo Regional Institute of Technical and Further Education v Gregory Paul Barclay & Others [2012] HCA 32*

a significant deterrent for right of entry permit holders so that the privilege that the permit bestows is not abused.

11. Proposed improvements to the current framework

ASA submits that the following improvements should be made to the enterprise bargaining framework of the Act to help remedy the shortcomings in the operation of that framework explained in this submission and better achieve the objects and intentions of the Act.

11.1. Content of enterprise agreements

Redefine the scope of matters permitted to be included in enterprise agreements by deleting section 172(1)(b):

> matters pertaining to the relationship between the employer or employers and the employee organisation or employee organisations that will be covered by the agreement.

11.2. Pattern bargaining

Amend section 412 so that the FWC is empowered and required to look to the substantial character of a union's conduct and look behind, where appropriate, purported paper claims.

Amend section 443 dealing with the grant of a protection action ballot to similar effect.

11.3. Protected industrial action

Better regulate the taking of protected industrial action by requiring that, before ordering a secret ballot for protected industrial action, the FWC must first be satisfied that:

a. the applicant, and other bargaining representatives of employees who may be the subject of the protected action ballot order, are *bargaining in good faith*;

b. the claims being made by bargaining representatives are not, in all the circumstances, unreasonable;

c. the bargaining process has not involved one bargaining party pursuing non-permitted matters;

d. that all employee bargaining representatives have made genuine efforts to reach agreement;

e. there is, in substance and reality, no pattern bargaining being pursued by bargaining representatives;

Improvements that could be made to improve the current framework include:

a. require that the FWC must attempt conciliation prior to making a secret ballot order;

b. empower the FWC, on application, to require single bargaining units to be constituted by separate unions or other bargaining representatives where this is reasonable;

c. provide that, if a secret ballot is ordered and subsequently approves industrial action, an employer can then lock out employees on three days' notice, or immediately where it is in response to employee protected industrial action, and remove the present limitation of lockouts to a response to employee industrial action;

d. allow the FWC a wide discretion to suspend protected industrial action and provide a cooling off period at any time where it is reasonable to do so; and

e. require the FWC to terminate or suspend protected industrial action where the action is causing significant harm to a third party and define "significant harm" so that it is a more realistic and less difficult test to satisfy than it was held to be by Fair Work Australia in the *Woodside case*.

11.4. **Better articulation of proposed industrial action**

Regardless of the thresholds imposed for the taking of industrial action, there should be a requirement for more precise articulation of the proposed nature of the industrial action to allow employers to adequately prepare for the impacts on their business. To simply indicate the intention to engage in unlimited rolling stoppages within a 30 day period does not allow for a business to mitigate its damage in any meaningful way. Further, the amount of time and resources dedicated to mitigating damages for an unknown number of stoppages is significant. Therefore, even if no or only short stoppages actually go ahead, the resources utilised to prepare for an occurrence that may eventuate are significant. This significant diversion of resources from a business is inconsistent with the objectives of the Act.

11.5. **Approval of enterprise agreements**

Require that the FWC be satisfied that the enterprise agreement genuinely provides or enables improvements in productivity and efficiency in the enterprise covered by the agreement. It is in the public interest that the FWC be satisfied that agreements help achieve the objects of the Act.

11.6. **Greenfields Agreements**

Allow the FWC, on application by an employer, to make an arbitral determination in a timely way that has the same effect as a greenfields enterprise agreement, where despite genuine efforts it has not succeeded in concluding a greenfields agreement with a union or unions within a reasonable time. In addition, good faith bargaining obligations should apply to parties in negotiation for a greenfields agreement

11.7. **Powers of Fair Work Ombudsman and Australian Building and Construction Commission**

The Fair Work Ombudsman has in the view of ASA been doing a good job. An improvement would be to increase the resources available to the Fair Work Ombudsman to enable more effective investigation of, and prosecution for, unprotected industrial action when it occurs. Employees, unions and employers that take unprotected industrial action should be held accountable for doing so. There needs to be a real and credible deterrent against unprotected industrial action. It is not reasonable to rely on employers to become prosecutors of their employees, and unions. This is a proper and important function of the Fair Work Ombudsman in securing compliance with the Act.

The Government has proposed to reinstate and extend the operation of the Australian Building and Construction Commission (ABCC) to include offshore constructions projects as part of its industrial relations agenda. A well-resourced independent organisation ensuring that the rule of law is adhered to by both employers and employees is critical to a fair and productive workplace relations framework, particularly in large projects critical to the economic prosperity of the nation.

11.8. **Exercise of Right of Entry Powers**

Limiting the number of occasions that notice of intent to enter a workplace can be issued against one enterprise (for matters that are not health and safety related) and ensure that in the event of repeated notices and/or withdrawals of such notices, aimed at causing workplace disruption and exerting influence, a suitable deterrent to such disruptive behaviour is put in place.

12. Answers to specific questions in the Issues Papers relevant to this submission

The Inquiry in Context - Issues Paper 1

12.1. What are appropriate objectives of the Workplace Relations System?

Appropriate objectives for an adaptable and progressive workplace relations system include:

- flexibility within the framework to allow and encourage innovation in the running of Australian businesses;
- a fair, reasonable and robust safety net with a particular focus on the low paid and vulnerable in the workforce;
- a bargaining framework that encourages productivity and flexibility for employers and employees;
- ensuring that employers and employees have appropriate mechanisms to advance their respective bargaining claims within a framework that considers the interests of Australia's future economic prosperity;
- ensuring sufficient flexibility to assist employees balance their work and family responsibilities by providing appropriate flexible working arrangements.

12.2. Is the current system well suited to contemporary (and evolving) workplace needs in an increasingly globalised economy?

Based on industry specific experience, there is no evidence that the focus of the current Act has helped to achieve improved productivity in the maritime industry, which is a truly global industry. By allowing the exertion of disproportionate bargaining power, the Act has enabled unions and employees to exert power to obtain levels of remuneration that are not justified on any comparative work value basis and which by Australian and international standards are excessive. (See the comparative data referred to in Appendix 1 of this submission.)

The Bargaining Framework (Issues Paper 3)

Greenfields Agreements

12.3. What are the best arrangements for greenfields agreements including an assessment of the effects of any arrangement on the viability and efficiency of major projects on the one hand and, on the other, maintaining the appropriate level of bargaining power for employee representatives?

ASA's proposed solution is highlighted in this submission above, which provides a way for enterprises to obtain a realistic independent assessment of appropriate terms and conditions of employment that will ensure certainty and stability for new projects, encouraging investments and creating employment opportunities. Such an independent assessment also provides employee representatives the opportunity to present persuasive evidence of the appropriate conditions for work performed on a particular project for consideration by an independent arbitrator. This would be used as a last resort circuit breaker for unions, employees and employers where attempts to reach an agreement have failed.

Pattern Bargaining

12.4. What is the appropriate role, if any, of pattern bargaining?

Pattern bargaining is a reality for some industry sectors, although the provisions of the Act, and interpretation by FWC would indicate otherwise.[10] The prohibitions contained in relation to pattern bargaining in the Act are not anywhere near robust enough to be effective. If the focus of the bargaining framework is truly to allow flexibility and innovative work practices on an enterprise basis, this need to be addressed in a more effective way.

Permitted Matters

12.5. What aspects of the employee/union – employer relationship should be permitted matters under enterprise agreements, and how would it be practically possible to address in legislation any deficiencies from either the employer, employee or union perspective.

Certainly it is well accepted that matters pertaining to the employment relationship between an employer and employee are matters about which an enterprise agreement can be negotiated. As highlighted in this submission, the Act should remove from the list of permitted matters things that relate to the relationship between the employer and employee representative organisation. By broadening the matters about which an agreement can be made beyond these, the potential for further disagreement between bargaining representatives is created. This can create significant impediments to reaching an agreement and may significantly delay the implementation of any benefit under a new enterprise

[10] *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia [2014] FWC 8130*

agreement for either an employer or an employer, because of a matter that may be unrelated to the relationship between those two parties.

Productivity

12.6. Does the bargaining framework promote discussion and uptake of measures to improve workplace productivity? Why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of an enterprise?

There is no evidence at all that the bargaining framework promotes discussion or uptake of measures to improve workplace productivity. At no point in the process does improvement of productivity receive scrutiny let alone promotion or encouragement.

Employers have pursued the facilitation of productivity improvements through enterprise agreements or the removal of constraints on productivity. The obstacles to achieving productivity improvements arise from the failure of the legislation to place any significance on productivity improvement in any part of the bargaining and agreement making framework. While certainly competitive pressures do exist for parties to improve productivity, it should be an inherent requirement on any regulatory framework to encourage and foster such improvements.

Good Faith Bargaining

12.7. To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified? What would be the effects of any changes?

By making the changes to the Act in respect of content of enterprise agreements, pattern bargaining and protected industrial action proposed in this submission, good faith bargaining arrangements would be improved.

12.8. Are the FWC good faith bargaining orders effective in improving bargaining arrangements?

Based on some of the reasoning arising out of decisions on good faith bargaining, it appears as the FWC has been given inadequate powers, and should be given additional powers to settle bargaining disputes where it is found that a party is not bargaining in good faith. FWC should be able to review the positions of each of the parties, their relative industrial and economic circumstances, productivity issues and the like and be empowered to resolve, by arbitration if necessary, on an issue by issue basis, the matters in contention.

Limited Conciliation and Arbitration

12.9. To what extent should there be any changes to the FWC's conciliation and arbitration powers?

There is a delicate balance between allowing industrial parties to engage in "hard bargaining" and ensuring that there are effective and efficient ways of resolving industrial disputes. Certainly the experience and expertise of FWC members could be utilised to assist industrial parties where an impasse has resulted. This could involve the FWC of their own motion requiring parties to attend conciliation, and in more limited circumstances, submitting to arbitration. It is ASA's view that recommendation 22 of the 2012 review panel report be adopted, with consideration given to whether where there may be a situation that warrants compulsory arbitration (for example, in a greenfields agreement negotiation).

Industrial action

12.10. IP3 directly references data which indicates that industrial disputes have been declining (Figure 3.1) and the question then arises as to whether there is any requirement for changes in the FWC's arrangements for industrial disputes.

IP3 hypothesises about the reasons for the decline in industrial disputes, including the effect of changes in workplace relations arrangements, including the emergence of the enterprise bargaining process, changes in industry structure, increased competitive pressures of business and lower rates of union membership. The statistics in this paper also do not go into the economic impact for the employer or third parties reliant on work being performed in the event industrial action is taken or threatened. The economic harm that is inflicted even through short periods of industrial action is disproportionately immense compared to the relatively small remuneration forgone by a striking workforce. A recent example of the threat to iron ore exports of up to $100m per day demonstrate the damage that can be inflicted.[11] Where a party possesses and is willing to exert disproportionate bargaining power, significant economic harm can result.

12.11. IP3 asks specifically for the impact on aborted strikes (the capacity to withdraw notice of industrial action) as a negotiating tool, and the degree to which there is any practical response apart from the good faith bargaining requirements of the Act

The statistics produced in the issues papers prepared by the PC do not accurately reflect the impact on business when a protected action ballot is granted and notification of industrial

[11] As reported by the Australian Financial Review, Julie-Anne Sprague ""Industrial disputes in WA endanger output at Fortescue, BHP and Chevron"24 Sept 2014

action is given. At this stage an employer has little option to put in place contingencies on the assumption that the notified action will proceed, which can be challenging when the notice is ballot is drafted as broadly as possible so as to entertain numerous and lengthy work stoppages. In most cases stoppages, when they occur, are for relatively short periods.

Notification of protected industrial action will invariably result in frantic negotiations to avoid the stoppage, and the significant consequences that flow from such a stoppage. Not surprisingly, there is a strong incentive for bargaining representatives to leverage pressure on an employer by notifying them of stoppages, even when not all avenues of negotiation have necessarily been exhausted.

There are numerous examples of notification of stoppages, and estimates of the resultant economic consequences, only for the notification to be withdrawn and the proposed strike cancelled at the last minute.[12] Of course, bargaining parties resuming their negotiations as an alternative to taking protecting industrial action should be encouraged, however the impact on a business who has already done significant preparation to mitigate their damage should not be forgotten. It is not just working days lost that represents a true reflection of the cost of industrial action to business and the broader economy.

[12] Boral Resources (NSW) Pty Ltd C2009/11214 reveals an example.