



*Submission in reply to the Productivity
Commission's Draft Report on Australia's
Workplace Relations Framework*

18 September 2015

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 97 years, AMMA's membership covers the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

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

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

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

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ABBREVIATIONS

ABCC	Australian Building and Construction Commission
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AFPCS	Australian Fair Pay and Conditions Standard
AHRI	Australian Human Resources Institute
AMMA	Australian Metal and Mines Association
ANAO	Australian National Audit Office
ANZSIC	Australian and New Zealand Standard Industrial Classification
AWA	Australian Workplace Agreements
AWOTE	Average Weekly Ordinary Time Earnings
AWRS	Australian Workplace Relations Study
BOOT	Better Off Overall Test
CGE	Computable General Equilibrium
COAG	Council of Australian Governments
CPI	Consumer Price Index
EA	Enterprise Agreement
EBA	Enterprise Bargaining Agreement
EITC	Earned Income Tax Credit
FWC	Fair Work Commission
FWO	Fair Work Ombudsman

GFBO	Good Faith Bargaining Order
IFA	Individual Flexibility Arrangement
ILO	International Labour Organization
KPMG Report	"Workplace Relations and the Competitiveness of the Australian Resources Sector"
LSL	Long Service Leave
NDT	No-Disadvantage Test
NED	Nominal Expiry Date
NES	National Employment Standards
NWRCC	National Workplace Relations Consultative Council
OEA	Office of the Employment Advocate
OECD	Organisation for Economic Cooperation and Development
OHS	Occupational Health and Safety
OLS	Ordinary Least Squares
PABO	Protected Action Ballet Order
PAYG	Pay As You Go
PC	Productivity Commission
PIR	Post-Implementation Review / Fair Work Review Panel
RBA	Reserve Bank of Australia
s.	Section
TRYM	Treasury Macroeconomic
WHS	Workplace Health and Safety
WR	Workplace Relations
WTO	World Trade Organization

INTRODUCTION

1. AMMA does not include a general or thematic introduction in this written submission in response to the Draft Productivity Commission Report, and has therefore not sought to provide a general assessment of the approaches taken and not taken, and has not responded at this stage to Chapters 1 and 2 of the Draft Report.
2. We therefore 'cut to the chase' in this reply submission and focus squarely on:
 - a. What has been recommended in draft form.
 - b. The various information requests and draft findings.
 - c. What should and should not be recommended to government in the PC's final report.
3. We have particularly strived to assist the PC on this last point. AMMA endeavours throughout this submission to ensure that what resource employers do and do not want to see recommended to government is very clear. Light shaded yellow boxes indicate our recommendations on how the PC should proceed in its final report and recommendations.
4. AMMA is scheduled to appear before the PC on Wednesday 23 September in Melbourne. At that time we will make an opening statement and intend to hand up a longer written version that will address Chapters 1 and 2 of the Draft Report, the PC's general approaches and draft findings, and traverse the ground that would be covered by an introduction to this submission.
5. This second/reply submission:
 - a. Responds to what has been recommended in draft form and provides feedback on what should and should not proceed into the final recommendations to government, and in what form.
 - b. Identifies outstanding and additional issues from the priority reforms advanced by resource industry employers which should be included in the final recommendations to government.
6. AMMA has sought to respond to the PC's draft approaches and discussion, and has therefore not sought to re-prosecute the full range of ideas and proposals advanced in our initial submission.

7. We must however play our role in ensuring government ultimately receives the proper range of recommendations necessary to make deliver the WR system Australia needs for the future, and AMMA must on behalf of its members seek to influence the prioritisation of reforms in your recommendations to government.
8. AMMA has therefore analysed the draft recommendations against the core experiences and reform priorities of resource employers, and made the refined and reply recommendations to the PC's draft recommendations that appear throughout this submission.

Structure of this submission

9. Following this introduction, AMMA's submission is in three parts:

[Part A] Resource employers have throughout this review process clearly identified six (6) priority areas / priority concerns with the operation of the existing FW framework.

Part A of this reply submission to the draft report reiterates to the PC where we say the priorities for reform should lie, and focuses squarely on what has been recommended in draft form, what should have been recommended in these areas, and the approach that should be taken in the PC's final report to government.

[Part B] Responding to further issues and recommendations which impact and concern AMMA members, and are effective a second tier of priorities which can and are also impacting on investment, operations and jobs.

[Part C] Addressing a range of other matters from the PC report and recommendations, which are not direct priorities for AMMA or employers in the resource industry. Part C also responds to some of the PC's analytics and its approach to assessing the compliance costs and impacts of what it is recommending (The PC's Chapters 25 and 26).

Summary of AMMA responses to recommendations

10. We thought it might assist the PC to include a straightforward table illustrating in summary form those PC recommendations resource employers support and oppose, those that need amendment and those that need to go further.
11. This is a snapshot table only. The AMMA position and recommended approach on each matter appears in the relevant section of Parts A, B and C, below.

Key:


Agree



Oppose



Strongly Agree



Strongly Oppose



Must go further


 Recommendation needs change
/ support in part.


Not a significant issue for resource employers / neutral

PC Recommendation	Part of this AMMA Submission	AMMA Position
3.1, p.150 Establish a Minimum Standards Division of the FWC.	Part B – Second Tier Priority “Institutions”	✓ ➡ Δ
3.2, p.157 5 year terms for FWC Members	Part B – Second Tier Priority “Institutions”	✗ ✗
3.2, p. 157 5 year terms for Minimum Standards Division	Part B – Second Tier Priority “Institutions”	✓
3.2, p. 157 Performance reviews for FWC and Minimum Standards Division Members	Part B – Second Tier Priority “Institutions”	✓ ✓
3.3, p. 157 New process for appointing FWC members.	Part B – Second Tier Priority “Institutions”	✗ ✗
3.4, p.158 Eligibility criteria for appointment to the FWC and Minimum Standards Division.	Part B – Second Tier Priority “Institutions”	✗

PC Recommendation	Part of this AMMA Submission	AMMA Position
3.5, p.159 Information on case outcomes and intendent performance reviews.	Part B – Second Tier Priority “Institutions”	✓ ➡
4.1, p.187 NES - Substitute public holidays in awards.	Part B – Second Tier Priority “NES”	✓ ➡
4.2, p.194 NES – No penalty rates for new public holidays.	Part B – Second Tier Priority “NES”	✓
4.3, p.195 NES - Extending annual leave and scope for agreed cashing out.	Part B – Second Tier Priority “NES”	Δ
NES, Information request, p.197 Casual employees exchanging loadings for additional remuneration.	Part B – Second Tier Priority “NES”	✗
Unfair Dismissal, Information request, p.232 Changes to lodgement fees.	Part B – Second Tier Priority “Unfair Dismissal”	✓
5.1, p.233 More scope to determine matters 'on the papers / more merit focused conciliation.	Part B – Second Tier Priority “Unfair Dismissal”	✓
5.2, p.233 Limits on compensation, and changes to remedies for procedural errors in dismissal.	Part B – Second Tier Priority “Unfair Dismissal”	✓ ✓
5.3, p.235 Remove emphasis on reinstatement.	Part B – Second Tier Priority “Unfair Dismissal”	✓

PC Recommendation	Part of this AMMA Submission	AMMA Position
5.4, p.240 Remove (partial) reliance on the Small Business Fair Dismissal Code.	Part B – Second Tier Priority “Unfair Dismissal”	✓
6.1, p.262 General protections – discovery	Part A – AMMA Priority “Adverse Action / General Protections”	-
6.2, p.263 General protections – Improved clarity on workplace rights.	Part A – AMMA Priority “Adverse Action / General Protections”	✓ ➡
6.3, p.263 General protections – Exclude frivolous and vexatious complaints.	Part A – AMMA Priority “Adverse Action / General Protections”	✓
6.4, p.263 General protections – Compensation cap.	Part A – AMMA Priority “Adverse Action / General Protections”	✓ Δ
6.5, p.263 Reporting on general protections matters	Part A – AMMA Priority “Adverse Action / General Protections”	-
Information Request, Chapter 7, p.282 - Bullying	Part B – Second Tier Priority “Anti-Bullying”	✓ ✓
8.1, p.334 Minimum wages – consider risks of unexpected economic variations.	Part C – Other Matters “Minimum Wages”	-
9.1, p.350 Minimum wages - temporary variations in awards in exceptional circumstances.	Part C – Other Matters “Minimum Wages”	➡
Information request, Chapter 9, p.359 Competency based minimum wages	Part C – Other Matters “Minimum Wages”	✗ ✗

PC Recommendation	Part of this AMMA Submission	AMMA Position
9.2, p.372 Review of apprenticeships & traineeships	Part C – Other Matters “Minimum Wages”	-
Information request, Chapter 10, p.385 An earned income tax credit	Part C – Other Matters “Minimum Wages”.	-
12.1, p.436 End 4 yearly modern award reviews,	Part B – Second Tier Priority “Awards”	✓✓△
12.2, p.440 Powers of the new Minimum Standards Division	Part B – Second Tier Priority “Awards”	-
14.1, p.527 Penalty rates.	Part C – Other Matters “Minimum Wages”.	-
14.2, p.528 Penalty rates, implementation.	Part C – Other Matters “Minimum Wages”.	-
Information request, Chapter 14, p.532 - Preferred hours clauses	Part C – Other Matters “Penalty Rates”.	✓✓
15.1, p.556 Bargaining, Wider FWC discretion to approve agreements, and to rectify small defects.	Part A – AMMA Priority “Enterprise Bargaining”	✓✓
Information request, Chapter 15, p.563 - Pattern bargaining	Part A – AMMA Priority “Enterprise Bargaining”	✓△
15.2, p.568 Requiring enterprise flexibility terms to permit IFAs to deal with all the matters listed in the model flexibility term.	Part A – AMMA Priority “Enterprise Bargaining”	✓

PC Recommendation	Part of this AMMA Submission	AMMA Position
15.3, p.570 Extended nominal expiry dates for agreements	Part A – AMMA Priority “Adverse Action / General Protections”	✓✓
Draft Finding 15.1, p.573 Requirements to discuss productivity improvements as part of the bargaining process.	Part A – AMMA Priority “Adverse Action / General Protections” AMMA <u>supports</u> this concept, which the PC has not accepted in the draft report.	✗✗
15.4, p.576 Replace the BOOT test with an NDT	Part A – AMMA Priority “Adverse Action / General Protections”	✓✓
Information Request, Chapter 15, p.576 Basis for the revised NDT.	Part A – AMMA Priority “Adverse Action / General Protections”	✓✓
15.5, p.579 Nominations of bargaining representatives.	Part A – AMMA Priority “Adverse Action / General Protections”	✓△
15.6, p.581 Bargaining representatives for greenfields agreements to be subject to good faith bargaining requirements.	Part A – AMMA Priority “Greenfields Agreements”	✓✓
15.7, p.586 New options where greenfields negotiations exceed three months.	Part A – AMMA Priority “Greenfields Agreements”	✓✓
16.1, p.604 Extend flexibility terms notice to 1 year, and capacity to extend termination notice where agreed.	Part A – AMMA Priority “Individual Flexibility”	✓✓
16.2, p.609	Part A – AMMA Priority “Individual Flexibility”	✓✓

PC Recommendation	Part of this AMMA Submission	AMMA Position
NDT to replace the current BOOT test.		
16.3, p.610 Fair Work Ombudsman to distribute information on individual flexibility arrangements.	Part A – AMMA Priority “Individual Flexibility”	✓
Information request, Chapter 17, p.627 Enterprise Contract	Part A – AMMA Priority “Enterprise Contracts”	✗ ✗
19.1, p.763 Protected action ballot orders only after enterprise bargaining has commenced,	Part A – AMMA Priority “Industrial Action and Disputes”	✓ ✓
Information request, p.680 Simplifying protected action ballot procedures.	Part A – AMMA Priority “Industrial Action and Disputes”	✗ ✗
Information request, p.689 Defining significant harm test for terminating industrial action.	Part A – AMMA Priority “Industrial Action and Disputes”	↻
19.2, p.690 Suspending or terminating industrial action causing / threatening significant economic harm.	Part A – AMMA Priority “Industrial Action and Disputes”	✓
Information Request, p.692 Restrictions on industrial action that risks life, personal safety, health or welfare.	Part A – AMMA Priority “Industrial Action and Disputes”	✗ ✗
19.3, p.694 Capacity to stand down where industrial action is withdrawn.	Part A – AMMA Priority “Industrial Action and Disputes”	✓ Δ

PC Recommendation	Part of this AMMA Submission	AMMA Position
19.4, p.694 Capacity to withhold protected action ballot for 90 days, following withdrawals of protected action.	Part A – AMMA Priority “Industrial Action and Disputes”	✓ Δ
19.5, p.795 Deduction for brief work stoppages	Part A – AMMA Priority “Industrial Action and Disputes”	✓ Δ
Information Request, Industrial Action, p.698 Forms of more graduated employer industrial action.	Part A – AMMA Priority “Industrial Action and Disputes”	✓
19.6, p.700 Increase maximum penalties for unlawful industrial action.	Part A – AMMA Priority “Industrial Action and Disputes”	✓
19.7, p.706 More power for FWC to make orders about frequency of entry	Part A – AMMA Priority “Union access to workplaces / Right of entry”	✓ ✓
19.8, p.708 Unions without members at the workplace and not covered by an agreement, to enter twice each 90 days.	Part A – AMMA Priority “Union access to workplaces / Right of entry”	✓ ➡
20.1, p.733 Making unlawful agreement terms that restrict engagement of contractors, labour hire and casuals	Part A – AMMA Priority “Agreement Content”	✓ ✓ ➡
21.1, p.749 Migrant workers - Additional resources for the FWO	Part C – Other Matters “Migrant Workers”	✓ Δ
22.1, p.759 Transfer of business	Part B – Second Tier Priority “Competition Policy”	✓ ➡

PC Recommendation	Part of this AMMA Submission	AMMA Position
Chapter 24, Information Request, p.783 - Secondary boycotts, Remove s.45DD(1) and s.45DD(2) of the CCA, and empower FWBC to investigate and prosecute.	Part B – Second Tier Priority “Competition Policy”	✓ Δ
Chapter 25, Information Request, p.796 - Operating costs for unions	Part C – Other Matters	✗ Δ

Economic evidence

12. There is one threshold concern that AMMA must communicate to the PC at this stage of the process, and that we firmly request the PC have proper regard to in its final considerations, reporting and recommendations to the government.
13. At various points in this process the PC noted a paucity of economic evidence and empirical research on key WR policy considerations, including on both the need for reform, and in support of key positions and changes to the system being sought by those participating in reviews such as this one. This is not a new observation and there have been previous calls for greater empirical information and economic modelling on the impact of workplace reform.
14. AMMA foresaw the need for such evidence, and the risk that the PC may conclude that in the absence of such evidence, it could not be persuaded to make recommendations to government for the range of necessary reform.
15. On this basis, AMMA expended considerable time and resources to bring before the PC economic modelling from leading global economic consultancy, KPMG. We sought through this report to bridge a foreseeable information divide the PC would confront in this review and to provide precisely the calibre of economic modelling and analysis which the PC regularly deals with.
16. KPMG's 133 page report and modelling “*Workplace Relations and the Competitiveness of the Australian Resources Sector*” was received by the PC as an attachment to AMMA's initial submission.
17. AMMA's 481 page submission extensively relied on the KPMG research and grounded both the need for change in key priority areas (See Part A of this second/reply AMMA submission) and the specific priorities and proposals from the industry in this empirical, modelled, economic evidence.

18. AMMA was only submitting party to take such an initiative, and to devote the resources to commission and submit economic research/modelling that was directly and deliberately framed to address:
 - a. The considerations the PC is directed to in the terms of reference.
 - b. The considerations which the PC is charged to take into account in all its work, set out in s.8 of the *Productivity Commission Act 1998*.
19. We also note that through AMMA's cooperative partnership with RMIT, we were the only organisation to generate real time evidence on the performance of the 2009 amendments.
20. Resource industry employers were therefore particularly disappointed to see only a single reference in the Draft Report to this major and unique piece of research designed to assist the PC's deliberations, and to see that the PC had misinterpreted what KPMG found.
21. At p.701, the Draft Report the PC states:

AMMA argued that reductions in the ability to take industrial action would contribute to a 2-5 per cent increase in labour productivity in the resources sector. This was attributed to both a reduction in days lost to industrial action, and a 'reduction in the ability of industrial action to contribute to excessive wages and conditions' (AMMA, sub. 96 attach., p. 13). However, the Productivity Commission has reservations about these estimates. As with other sectors, the direct measured value of days lost to industrial action in the resources sector is likely to be small. Even in the coal mining industry, which has had the highest measured rate of disputation over the past five years, industrial disputes only reduced time worked by roughly one quarter of one working day per employee per year (figure 19.1).¹

22. The first problem with this is that it is wrong and a mischaracterisation of the KPMG research AMMA is bringing to the PC to assist this review.
23. CGE analysis was undertaken by KPMG to determine the economic impact of the reform options. The analysis is contained in summary format in the KPMG report².
24. KPMG indicated that the economic implications of AMMA's proposed reform options would³:

¹ PC Draft Report, pp.701-702

² KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, pp.122-129

³ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, Table 8-1, p.121

- a. Reduce the risk of actual and threatened industrial action and associated risks to project time lines and costs.
 - b. Reduction in employees' ability to influence the bargaining process through industrial action.
 - c. Reduction in days lost to industrial action and associated loss of production.
25. The CGE modelling undertaken by KPMG indicates that AMMA's reforms would have beneficial impacts upon the resource industry, and this would have wider positive benefits for the economy and labour force more generally.
26. AMMA notes that the draft PC report in two separate paragraphs refers to the KPMG report and purports to quote a specific section of the KPMG report which is relevant to understanding the composition of the factors driving the GGE modelling scenarios.⁴
27. The quotes on are inaccurate and AMMA respectfully requests that this is corrected in the PC's final report. The PC has indicated in the draft report that the PC *"has reservations about these estimates"* and provides further commentary upon the basis of the miss-quote. This is unfortunate and the PC is kindly encouraged to re-consider its observations which are made in the draft report.
28. As can be discerned in the KPMG report and the modelling scenario sections, the reform options are intended to moderate the capacity to use industrial action upon employers to extract higher than average increases in wages and conditions, because of the threat of industrial action.
29. It is this "premium", quite unrelated to productivity, which the leverage of industrial action can have on employers, is what is intended to be captured by the reform options and therefore the modelling scenarios. Moreover, the justifications which KPMG clearly outlines in its report relate to both resource sector *investment*, and not only resource sector *labour productivity*, with further information provided to the reader within the body of the report.
30. To accurately summarise the KPMG CGE modelling, it is important to consider the justifications by reference to the further information provided within the body of the report.

⁴ PC draft report, at p.701. The quote as it appears in the draft report is: *"reduction in the ability of industrial action to contribute to excessive wages and conditions"* (AMMA, sub.96, attach., p.13). In second paragraph on p.702, there appears a similar incorrect reference (*"excessive wages and conditions"*). The actual wording in the KPMG report at p.13 and p.125 is as follows: *"reduction in the ability of industrial action to contribute to excessive inflation in wages and conditions"* (emphasis added). There is also a reference to "Further information" referring the reader to Section 8.2.3 of the report.

31. Once again we commend the KPMG modelling to the PC, and reiterate that AMMA was the only major submitting party to meet the challenge of assisting the PC's considerations through such independent empirical evidence, and economic modelling of the highest order. This needs to be taken into account and engaged with more widely for the finalisation of this review and the final report and recommendations to government.
32. There is also a failure to properly deliver reasons for the approach the PC has taken to this research. Where the PC is not persuaded, or questions the research it needs to do more than just say it "has reservations" and then ignore the research from that point on. If the PC has reservations it needs to address the following questions
 - a. Which reservations?
 - b. With what parts of the findings or modelling?
 - c. On what basis were there reservations?
33. The PC needs to properly respect the research efforts of parties to this review by at least giving the affected party something to review and engage with at this stage of the process.
34. AMMA may well have been able to satisfy the PC on such concerns and to provide the PC with confidence to not only rely on what is the best economic evidence it has before it, but to do so to conclude in the terms sought by AMMA on priority areas for resource industry employers, and we argue the wider workforce and community (i.e. to go further on our priority recommendations for reform).
35. It is at present difficult to escape the conclusion that the PC determined the approach it wanted to take in this review without due regard to critical economic evidence, principally that from KPMG.
36. We note also with regret that were the PC to have engaged with the report and provided more detail on its concerns, we may well have been able to have these concerns addressed by the KPMG authors of the report.
37. We also note two other KPMG papers appear in the list of references at the back of the report and not the most recent research from that organisation directed squarely to this review. This furthers the perception that the PC has failed to have proper regard to the KPMG research/modelling put before it.
38. The disappointment of those seeking to assist the PC by bringing forward such research is one thing, but far more significant is that the PC does not seem to have proper regard to the economic case being made to it, or the foundation

of that case in economic modelling and precisely the economic considerations it is to have regard to.

AMMA Recommendation

We strongly recommend the PC look again at the KPMG report "*Workplace Relations and the Competitiveness of the Australian Resources Sector*" as the only substantive piece of bespoke independent economic research undertaken for this review, and have greater regard to the analysis and recommendations.

Proper engagement with and regard for this research should see the PC reconsider and make additional recommendations to address significant difficulties with the existing FW Act as it impacts on the priority areas canvassed in Part A of this submission.

PART A: PRIORITY WORKPLACE RELATIONS REFORMS

INTRODUCTION

39. The Australian resource industry, through its industry body AMMA, clearly and consistently identified six (6) priority areas for reform in its initial submission to the Commission in March 2015⁵.
40. They remain the priority reforms necessary to significantly improve the FW framework for employers, employees, the national economy and jobs.
41. Challenging developments following the lodgement of AMMA's initial substantive submission on 13 March 2015, both for our national economy and labour market, and for resource companies and their employees, reinforce these priorities and the urgency of seeing the FW Act significantly reformed in these key areas.
42. The six areas for reform of the FW Act resource employers urge the PC to prioritise are:
 - a. **Greenfields agreement making** – improving the capacity to access reliable greenfields agreements for new resource projects/operations without exorbitant wage and condition outcomes or unnecessary project delays.
 - b. **Agreement content** – ensuring that allowable matters in enterprise agreements pertain to the direct relationship between employers and employees and not to third parties or commercial and competitive rather than employment matters. This is also critically important for the range of claims that should be able to give rise to legally protected/privileged industrial action.
 - c. **Enterprise Bargaining** – ensuring employers and employees can rapidly and efficiently enter into agreements that progress their interests and contribute to the productivity and competitiveness of enterprises, and that the interests and priorities of employers and employees are paramount in determining the content and operation of agreements.
 - d. **Individual flexibility** – ensuring agreement-making options are broadened through the re-introduction of a workable form of individual agreement, and ensuring any alternative mechanisms, such as IFAs, work as affectively and accessibly as possible.

⁵ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015

- e. **Industrial action** – ensuring protected industrial action during bargaining can only be taken as a last resort and greater access to “cooling off” periods.
 - f. **Union access to workplaces** – ensuring the location and frequency of union “right of entry” visits is reasonable and takes due account of operational needs.
 - g. **Adverse action / the general protections** – ensuring greater rigor is introduced into the threshold for accessing the adverse action / general protections jurisdiction in order to moderate employers’ potentially unlimited liability for damages, and minimise the incidence of costly and damaging unmeritorious claims.
43. These remain the key priorities for resource industry employers, and should be major priorities for the PC’s final recommendations, as set out in this Part A of this submission directed to the PC’s Draft Report.
44. Part A of AMMA’s second submission examines and responds to the PC’s draft recommendations and information requests relating to these six priority areas, and identifies those which should proceed, those which should only proceed with modifications, those which should not be progressed and additional considerations which should be addressed in the PC’s final recommendations to government.
45. For convenience and clarity, we also address all PC’s recommendations and information requests from the Draft Report’s chapters on bargaining and industrial action, extending beyond those recommendations set to be of greatest significance and benefit to employers and employees.

GREENFIELDS AGREEMENTS

PC Draft Report - Chapter 15, pp.579-586

Why this must be a priority for reform

46. In March 2013, when AMMA released its six priority areas for workplace reform for the next federal government⁶, greenfields agreement making was a leading reform priority and remains so today.
47. If anything, the crisis facing the resource industry in trying to get suitable industrial arrangements in place for major new projects is more challenging now than ever before, with more impediments to productivity being thrown up at every turn. New resource employment is also even more urgent, with the Australian economy desperately needing injections of confidence and job-creating investment.
48. The situation is currently dire.
49. AMMA's focus in this area is to ensure our members have the capacity to make greenfields agreements without exorbitant wage and condition outcomes, unworkable rostering provisions, unnecessary project delays and damaging industrial action after project commencement.
50. As highlighted in the major AMMA-commissioned economic analysis by KPMG⁷, investment in major resource projects has historically been a major driver of economic growth. Unfortunately, Australia now faces a number of challenges in competing internationally to attract investment to major Australian projects.
51. According to the KPMG analysis, around 16 resource and energy projects with an investment value of \$700 million will move from the feasibility stage to the committed stage each year. Around 10 of those projects will require greenfields agreements with an estimated 40 agreements in operation for each major project.
52. While those figures obviously fluctuate according to investment demand and the commodity cycle, analysis suggests a reduction in the delay due to greenfields negotiations under the current system would have significant economic benefits.

⁶ *Workplace reform priorities for Australia's next federal government*, AMMA [paper](#), March 2013

⁷ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015

53. Given the current number of projects and based on the assumption that half of all projects are delayed by greenfields negotiations, the total value of delays arising under the current system is estimated to be \$23 million across every five projects.
54. Reducing delays attributable to greenfields negotiations by two months would therefore save in the realm of \$4.6 million in net present value terms, according to KPMG⁸.
55. As AMMA outlined in our initial PC submission⁹, protracted negotiation timeframes have immediate cost implications for resource industry businesses, including but not limited to legal costs, project costs and time spent in negotiations. And that is before any inflated costs due to wage and agreement outcomes are even factored in, not to mention pressures on business in relation to rosters.
56. In recent months, even more serious issues have emerged, particularly for projects in Western Australia, where it is now virtually impossible for some metal ore construction projects to get a greenfields agreement in place with any union unless the employer concedes to a union-demanded roster that would have disastrous impacts on productivity.
57. What we have at present is completely unworkable legislation that is forcing employers to look for alternatives outside the greenfields agreement-making system in order to secure industrial certainty on their projects and ensure costs are sufficiently contained to attract international investment. This cannot be allowed to continue, as these alternatives are not able to deliver what a viable greenfields system would deliver.
58. There is an escalating risk that negative bargaining practices and outcomes associated with greenfields agreement-making under the existing FW Act are threatening future investment in major projects across Australia, particularly on construction projects in the west.
59. As cited in the KPMG economic analysis that AMMA provided to the PC, requirements for new projects include the following:
 - a. Project owners require projects to proceed on time and on budget;
 - b. Contractors require a stable working environment;

⁸ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015

⁹ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015

- c. Contractors are presently required to negotiate with one or more employee representative bodies (trade unions) to secure a greenfields agreement for a new project;
 - d. Without an agreement, there is a risk of industrial action and associated delays;
 - e. The extent of those delays increases unions' negotiation leverage as project commencement dates approach and risks of delays increase;
 - f. The contractor may consequently accept high-cost and low-control conditions to minimise delays to a project.
60. Given the benefits that flow to the Australian economy from investment in and the timely completion of major resource construction projects, this is one area of the WR system where serious reforms will have massive economic benefits.
61. Increasing confidence to invest in Australia's resources sector is an important counter-cyclical measure which can improve economic, living standards and job opportunities. It can in particular provide some of the tens of thousands of employees presently coming off resource project construction with opportunities to remain in the industry.

Draft PC report: overview

62. With changed economic circumstances and an increasingly intractable industrial relations environment, the PC must recommend tougher reforms in this area or risk allowing the industry to continue to be held to ransom in the long term, and lose an opportunity to disrupt and help reverse the decline in resource investment into Australia.
63. While AMMA strongly supports the draft recommendations the PC has made, in AMMA's view it is not nearly enough to stop there, with much more to be done to fix the mess the current system has created (in particular through changes to the greenfields provisions in the 2009 amendments that became the current FW Act).
64. It is obvious from the PC's draft report that it has attempted to weigh up competing interests intersecting in this area in arriving at its conclusions. However, AMMA fears the PC has not tackled the practical realities of the present situation and does not necessarily appreciate the sheer unworkability of the current legislation, nor the extent to which it is discouraging new project investment into Australia.

65. The factors the PC has weighed include:
- a. The bargaining power of respective bargaining parties;
 - b. The need for there to be incentives for both parties to reach an agreement;
 - c. The importance of retaining enterprise-specific rather than industry-specific wages and conditions;
 - d. The risk of protected industrial action during the construction phase of new projects;
 - e. The need for employee protections; and
 - f. The need for businesses to remain in the driver's seat while ensuring minimum standards and competitive market factors are allowed to play their respective roles in setting wages and conditions.
66. AMMA particularly welcomes the PC's acknowledgements in its draft report that:
- a. Bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines (p.4).
 - b. Large capital-intensive projects require certainty about the start date of the project to secure finance, to plan the project and manage risk (p.33).
 - c. Unions' capacity to hold out in greenfields negotiations provides them with unique and excessive bargaining power and risks stripping some of the needed returns from inherently risky projects (p.33).
 - d. Unlike other enterprise bargaining processes, the usual drivers of speedy bargaining – including the desire for swift pay increases for an existing workforce – are not present in greenfields negotiations as employees are yet to be hired (p.33).
 - e. The rules around negotiating greenfields agreements require modification to reduce inefficiencies and end stalemates (p.533).
 - f. Unions have higher bargaining power in greenfields negotiations than in other types of negotiations (p.550).
 - g. Procedural issues when negotiating a greenfields agreement can delay the commencement of new projects (p.552).

- h. Greenfields agreements should logically survive the duration of construction of a project, with any agreement lasting less than the expected duration of a project exposing the business to substantial risk (p.568).
 - i. Delays in negotiating greenfields agreements can lead to underutilised capital and cause contractors to incur penalties for the delay in delivery thus creating an imbalance in bargaining power (p.568).
 - j. The notion of enterprise bargaining sits somewhat ill at ease with a situation where there is no workforce yet to bargain with (p.579).
 - k. Greenfields agreements can be important for negotiating finance, as project risk is influenced by labour costs, meaning any weakness in arrangements can have potentially large impacts on major project investment in Australia (p.580), and in AMMA's view this is what we are currently seeing with union claims for what are often non-commercial and operationally damaging rostering arrangements to be included in greenfields agreements.
 - l. There are already incentives in place for employers to offer sufficiently high wages to attract new workers to their projects and remain there (p.581), something which is clearly borne out by the experiences and pay structures applied by AMMA members.
 - m. Wages and conditions should generally reflect the economic circumstances of a sector – subject to the safety net (p.582).
 - n. A broad arbitration function for the industrial umpire would be “undesirable” and contrary to the goal of privately undertaken negotiations, with arbitrated outcomes more likely to be exposed to variations in decision-making between tribunal members (p.583).
67. While the PC has made just three substantive recommendations regarding greenfields agreement-making, they are important ones and in AMMA's view will make a difference.
68. However, more needs to be done, beyond the draft proposals to date

Draft PC Recommendation 15.3 – greenfields agreement duration

69. The PC addresses the duration of greenfields agreements (and other types of enterprise agreements) in draft recommendation 15.3¹⁰:

¹⁰ Draft PC Report, p.53

DRAFT RECOMMENDATION 15.3

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

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

AMMA response

70. AMMA strongly supports both parts of this recommendation as one of the most significant of all recommendations in the PC's draft report.
71. The first part of the recommendation would see all enterprise agreements, including greenfields agreements, able to have a maximum life of five years, up from the current four. In AMMA's view, a key benefit of this is exposing industrial parties to protected industrial action less frequently and providing the capacity to lock in terms and conditions with greater certainty for longer periods, providing certainty for both parties. The longer duration will also allow a vast proportion of new projects to be completed and become operational without agreement renegotiation or any risk of industrial action.
72. The second part of the recommendation would allow a greenfields agreement to exceed five years and match the "life" of the construction phase of a new project - but in doing so the business would have to satisfy the FWC that a longer period was justified.
73. AMMA very much welcomes the PC's acknowledgement there should be the capacity for an employer to form an agreement whose duration matches the life of construction (p.34 of the PC draft report). Australia has the commercial, technical, legal and national security benefits to justify the construction of further massive projects in our resource sector, and it is imperative that our WR system supports, rather than impedes such investments into this country.
74. The concerns AMMA has with this part of the above draft recommendation is how businesses will satisfy the FWC that a life of more than five years is justified.

75. AMMA proposes the following scenarios where such a test should be removed, and this could be prescribed in the legislation:
- a. Remove the test of having to satisfy the FWC that a longer duration is justified in cases where both the business and union(s) agree to a longer duration; and
 - b. Remove the test where the capital expenditure of a project exceeds a certain threshold (in AMMA's view an appropriate threshold would be new projects with a capital expenditure of \$50 million or more); and
 - c. Remove the test where all employees covered by it are to be paid more than the current unfair dismissal high-income threshold (or some other high-income threshold), meaning that very generous terms and conditions are able to be locked in to the benefit of the workforce; and
 - d. Provide scope to remove the test where there are other public interest benefits to the project proceeding, principally for jobs and injection of incomes and investment into Australia / particular regions, and potential royalties and taxes that would benefit the national community or a state and territory community.
76. It is important that if such a test is applied, the bar not be set so high that no projects can access the longer agreement duration, which defeats the purpose of introducing such a measure in the first place. It is also important there be no unnecessary frustrations and delays in deciding on agreement length as the whole point of reform in this area is to ensure projects can proceed in a timely fashion and delays to mobilising are minimised.
77. It is important to note that it is the case under the current system with all types of agreements that the bargaining parties themselves agree on the duration of an agreement.
78. At face value, the only time under the PC's proposed framework where the FWC would have any say over agreement duration would be when the business agrees to "last offer" arbitration over the content of the greenfields agreement, which may presumably include arbitration of agreement length by choosing between either the employer or the union's preferred length.

Draft PC Recommendation 15.6 – Good faith bargaining

79. The PC addresses how greenfields bargaining should proceed in draft recommendation 15.6¹¹:

¹¹ Draft PC Report, p.54

DRAFT RECOMMENDATION 15.6

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

AMMA response

80. Applying the good faith bargaining provisions to greenfields agreement-making is something AMMA has advocated since our 2012 submission to the FW Act Review Panel as part of the post-implementation review of the Act¹². AMMA argued for it again in our initial submission to the current PC review¹³ as a logical step in introducing more rigour and broader options into greenfields bargaining for all parties.
81. AMMA notes that in 2012 the FW Act Review Panel took up AMMA's proposal as one of its recommendations, as did the current Federal Government in its *FW Amendment Bill 2014* that was still before the federal parliament at the time of writing this submission.
82. AMMA strongly supports the PC's draft recommendation to apply good faith bargaining to greenfields negotiations for the following reasons:
- a. It would go some way towards ensuring unions do not simply: refuse to negotiate with a particular employer; fail to respond to proposals; or fail to meet with employers in a timely fashion (with exactly the same obligations applying to employer bargaining representatives), noting that unions know employers need to get labour arrangements in place rapidly to secure investment into projects (a disparity of bargaining power in favour of unions if ever there was one); and
 - b. It is essential if employers are given a greater array of options for greenfields agreement-making, as proposed by the PC in its suite of recommended reforms, that both employers and unions are required to abide by the good faith bargaining requirements (which neither currently are) in negotiations.

¹² [Submission](#) to the FW Act Review Panel on the post-implementation review of the Fair Work Act 2009, AMMA, February 2012

¹³ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015, Chapter 3.4, p127

Draft PC Recommendation 15.7 – Protracted greenfields negotiations

83. The PC addresses what should happen when greenfields negotiations become protracted in its draft recommendation 15.7¹⁴ (below), which would provide businesses with some alternatives in the event that negotiations with a union or unions reach an impasse:

DRAFT RECOMMENDATION 15.7

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

- continue negotiating with the union
- request that the Fair Work Commission undertake ‘last offer’ arbitration of an outcome by choosing between the last offers made by the employer and the union
- submit the employer’s proposed greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.

AMMA response

84. While this is somewhat different to what AMMA advocated in its initial submission to the PC review, this would be a major step in the right direction.
85. Importantly for AMMA and its members, Draft Recommendation 15.7 keeps employers in the driver’s seat in terms of choosing between the available options, which is as it should be given the commercial risks that businesses face, and the different investment, operational, market and logistical challenges for employer operators and construction contractors.
86. The PC says at p.4 of its draft report:
- “A limited menu of bargaining options would address the worst deficiencies, while taking account of the different nature of greenfields projects.”*
87. AMMA also agrees with the PC’s cautious approach with regard to the FWC’s role in determining new project agreement outcomes as stated below (p.33):

¹⁴ Draft PC Report, p.55

"Allowing the FWC to determine the 'best' outcome would be at odds with the desirability of leaving essentially commercial decisions in the hands of those parties with the greatest information."

88. AMMA and its members are opposed to any compulsory third-party arbitration and therefore welcome the PC's qualification of the FWC's limited role in this regard (p33):

"The FWC would not re-open the matter to make its own judgment, but would merely act as an umpire for the two choices put to it. Knowing this, the parties to the agreement would have strong incentives to make reasonable claims."

89. AMMA notes the FW Act Review Panel in 2012 also recommended "last offer" arbitration but not as one of several options from which the business could choose, and in a way that placed far too much control over outcomes in the hands of the FWC. The tribunal would have been able to bring on matters itself for arbitration on its own motion following protracted greenfields delays.
90. AMMA opposed the previous Review Panel recommendations which are significantly different to those now recommended by the PC. Detrimentially for AMMA's members, the Review Panel recommendations would have:
- a. Allowed either party, or the FWC, to trigger arbitration as opposed to limiting that right to the business as the PC now proposes;
 - b. Allowed last offer arbitration as just one form of arbitration that could be conducted, with the FWC not limited to choosing between the union's and employer's best offers but having the ability to arbitrate a completely different outcome, as opposed to what the PC proposes;
 - c. Allowed the FWC to determine the final content of greenfields agreements, taking all control over when and how an agreement was finalised out of the hands of the business; and
 - d. Offered no other alternatives, after a notified time period had elapsed and conciliation had failed, than to submit to arbitration or return to the bargaining table, unlike the PC's Draft Recommendation 15.7 which allows the employer to put forward its own agreement and have that endorsed for 12 months as one of three options (recalling that this is not going to be a low-paying agreement in any way for resource project work, and would clearly need to meet the BOOT or NDT).
91. While AMMA's suite of greenfields recommendations to the current review included scope for a two-year employer greenfields agreement with no required time period to have elapsed, and while we still press that option, the PC's draft recommendation of allowing a 12-month employer greenfields agreement to

apply is workable and will be a significant improvement for some employers, notwithstanding that AMMA urges the PC to go further in its final report.

92. As the PC points out, the ability for an employer to have its agreement endorsed by the tribunal and apply for 12 months (provided it meets the no-disadvantage test) on p.33 would have pros and cons at the end of that 12 months, so is by no means perfect:

"[at the end of that 12 months] the business would have hired employees, and a normal enterprise bargaining round could occur. The advantage of this menu option is that the employer would have the capacity to negotiate tradeoffs with employees that unions might be unwilling to accept. On the other hand, such bargaining could also lawfully trigger industrial action, with the potential to delay a large already committed project. This would give employees and their representatives a potentially high degree of leverage."

93. AMMA notes the PC says at p.582 that:

"On balance, the Productivity Commission does not recommend a return to wholly unilateral employer greenfields agreements. There is a role for unions in the greenfields process to act as representatives for prospective employees. However ... short term employer greenfields arrangements should be available where greenfields negotiations reach a stalemate."

94. AMMA disagrees that wholly unilateral employer greenfields options are a problem when they contain extremely generous terms and conditions for employees that could be locked in for the longer-term and AMMA urges the PC to consider that as an option in its final report.
95. A unilateral employer agreement is not really unilateral as there are other markets and employers for skilled employees and a necessary premium for working remotely, even in a period of contracting demand for labour as we are seeing now. Even were greenfields agreements to be rendered entirely 'unilateral' in all circumstances, employees would continue to be highly-paid and the agreements would easily pass statutory approval tests.
96. In relation to the three options available to employers under the PC's Draft Recommendation, in AMMA's view these will have a moderating effect on union demands and a positive effect on seeing more greenfields agreements successfully negotiated between employers and unions.
97. Some situations AMMA members are facing at present are simply intractable.
98. AMMA has always said its members do not have a problem with negotiating greenfields and other agreements with unions, but that there must be suitable alternatives in the event that an agreement cannot be reached with a union, or

a workable agreement cannot be reached as is currently the case for WA mining companies trying to start up new projects and counteract the downturn in resource project investment.

99. All in all, AMMA is supportive of the three substantive recommendations the PC has made with regard to greenfields agreement-making. Having said that, there are recommendations AMMA made in its initial submission that the PC has failed to address and which, in AMMA's view, are now essential to implement.

AMMA priorities not addressed

100. Several recommendations from AMMA's original submission to the PC remain important to address from a productivity perspective.
101. The most important of these is AMMA's recommendation for a **"project proponent" greenfields agreement** (p.112 of AMMA's initial submission). If AMMA's recommendation is taken up by the PC in its final report, it would introduce a greenfields agreement that could be negotiated by the head contractor with relevant unions such that other employers on the project could sign up to it if they chose. In light of current extenuating circumstances. Such an agreement should not necessarily have to be negotiated with a union as a default position as long as remuneration is above a certain specified benchmark.
102. A project proponent greenfields agreement would have a five-year standard maximum life with the potential for a construction phase length agreement as per PC Draft Recommendation 15.3.
103. The productivity benefits of having such an agreement available would be huge when considering that some major resource construction projects have upwards of 250 greenfields agreements in place. It would simplify things greatly where it was feasible for projects not to have to have the delays incurred by negotiating hundreds of agreements, and potentially waiting three months for each of those, if project proponent greenfields agreements could be rolled out easily across a project. The safeguards here would be that they offer generous terms and conditions to employees.
104. The other recommendation from AMMA's original submission in the greenfields area that it is important for the PC to reconsider in its final report is that of a **"rollover / continuity of supply" greenfields agreement** (p.127 of AMMA's initial submission).
105. While AMMA welcomes the ability to secure a "life of project" greenfields agreement as per the PC's draft recommendations, this may not be able to be secured in all instances where the business would want it.

106. For instance, the union(s) may only agree to a shorter-term agreement such as three or four years rather than five years or the life of the project.
107. The other possibility is in the event the employer asks the FWC to conduct “last offer” arbitration between the union and employer-proposed agreements, the duration of the agreement may be one of the issues in dispute. As such, the tribunal might decide on a shorter duration than the life of the project. There is also the extra “test” that the PC has advocated that would require businesses to justify a longer term than five years to the satisfaction of the FWC.
108. For the above reasons, AMMA maintains that, given the generous terms and conditions applying in resource industry agreements, the employer and its employees should be able to directly agree, without default union involvement, to roll over an existing agreement that is set to expire prior to the project's construction phase being completed.
109. With the majority support of employees covered by the agreement, AMMA can see no unfairness in allowing the workforce to vote on whether to roll over an existing agreement for a further two years, in the process foregoing a new bargaining round and the prospect of damaging protected industrial action. Such a rollover may see the employer provide additional wage increases not provided for in the previous agreement.
110. The third and final important area of AMMA's recommendations left unaddressed by the PC in its report is that of **“delayed activation”** of greenfields agreements. While this might seem unnecessary given the prospect of a “life of project” agreement, such an agreement will not be available in all cases. As AMMA members have reported, it could take many months to negotiate an agreement and negotiations are started well before the mobilisation deadline.
111. Delayed activation would be of assistance given that work does not always commence on a project immediately after a greenfields agreement is ratified by the federal industrial tribunal.
112. This delayed start date would be particularly important if the PC adopted AMMA's proposal for a project proponent greenfields agreement to which contractors would sign up on an ongoing basis and should have the option of rolling start dates.

How the PC should proceed

AMMA Recommendation

AMMA strongly supports **PC Draft Recommendations 15.3, 15.6 and 15.7** in relation to greenfields agreement making and they should be adopted.

In relation to those recommendations, AMMA has noted some possible areas of concern and variations that should be addressed to improve the final recommendations to government in this critically important area (above).

To the PC's draft recommendations in Chapter 15 of the Draft Report, AMMA would like to see added as a priority, AMMA's previous recommendations for:

- A "project proponent" greenfields agreement as proposed in AMMA's initial submission with the proposed modifications outlined in the current submission¹⁵;
- A "continuity of supply / rollover" greenfields agreement¹⁶;
- Delayed activation of the start-up of approved greenfields agreements¹⁷.

AMMA would also like to see:

- A longer-term "employer greenfields agreement" as outlined in this submission; and
- No default (automatic) union bargaining in greenfields agreement making provided certain other conditions are met given the current environment for greenfields bargaining.

¹⁵ AMMA Submission (#96), p.126

¹⁶ AMMA Submission (#96), p.127

¹⁷ AMMA Submission (#96), p.127

AGREEMENT CONTENT

PC Draft Report - Chapter 15, pp.563-573 and Chapter 20, pp.711-733

Why this must be a priority for reform

113. The issue of enterprise agreement content is one of AMMA's six priority areas for workplace reform identified in 2013, with the particular aim of ensuring that allowable matters in enterprise agreements pertain to the direct relationship between employers and employees and not to third parties.
114. It is also AMMA's view that agreement content should not be allowable in areas which the FW Act already covers, for example, unfair dismissal, protected industrial action and union access to workplaces. While the first two of those are already unlawful matters, the third is not and should be made unlawful.
115. The objects of the FW Act of facilitating greater productivity in enterprise bargaining are not being met under the current framework. Unions are currently using the provisions of the FW Act to include a wide array of matters in agreements as a vehicle to entrench their role at the workplace and deflect the focus away from improving working arrangements.
116. Union bargaining agendas are increasingly focused on promoting union rights and privileges, and providing themselves with greater control over commercial decision-making rather than focusing on wage and condition outcomes for employees and boosting the productivity of an enterprise for everyone's benefit.
117. Provisions in agreements that seek to: restrict the use of contractors and other alternative forms of labour; increase union access to worksites; and require employers to encourage union membership fail to meet any objective test of benefit to the employment relationship or the enterprise.
118. Economic analysis by KPMG¹⁸ estimates that a potential 2% to 5% increase in resource sector labour productivity would result from AMMA's suite of proposed reforms which included an increase in productivity-enhancing content and a reduction in impediments to productivity in agreement content (and its associated on-costs).

¹⁸ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015, p125

119. Further sensible reforms in this area, in addition to what the PC has recommended in its draft report, would be simple to enact and logical to adopt in the context of the inquiry's focus on workplace productivity.

Draft PC report: overview

120. The PC report has made two draft recommendations and one draft finding that will directly impact on the content of enterprise agreements (PC Draft Recommendations 15.1 and 20.1 and Draft Finding 15.1). This chapter of AMMA's submission focuses on Draft Recommendation 20.1, with Draft Recommendation 15.1 and Draft Finding 15.1 explored in separate chapters of this submission.
121. AMMA strongly supports PC Draft Recommendation 20.1, supports Draft Recommendation 15.1 but strongly opposes the observations made in Draft Finding 15.1.
122. The PC has also suggested expanding the scope of flexibility terms in awards and agreements, which is discussed in separate chapters of this submission.
123. AMMA welcomes the following acknowledgements and observations from the PC's Draft Report that relate to enterprise agreement matters:
- a. The range of matters that should be permitted in an enterprise agreement is an area of fierce contention¹⁹.
 - b. It is reasonable and entirely rational for employers to work to reduce costs and lift productivity, even if this does involve moving to the use of alternative forms of employment like casual workers, labour hire or genuine independent contractors²⁰.
 - c. As they are not employees, the pay and conditions of independent contractors are determined outside the FW Act. Rather than have their wage rates specified by an industrial instrument, they negotiate a payment for their services on a job-by-job basis²¹.
 - d. Where there is an imbalance of bargaining power, businesses may have little alternative but to cede some authority over the use of alternative forms of employment to unions²².

¹⁹ PC Draft Report, p.563

²⁰ PC Draft Report, p.720

²¹ PC Draft Report, p.717

²² PC Draft Report, p.730

- e. There is a prima facie case to eliminate terms in enterprise agreements that act to restrict an employer's prerogative to choose the employment mix suited to their business²³.
 - f. Alternative employment arrangements can increase productivity and lower costs, with benefits that ultimately flow to the community as a whole through lower prices²⁴.
 - g. Alternative employment arrangements are unlikely to significantly reduce collective bargaining power²⁵.
124. Examples of the types of clauses the PC has found to be inappropriate in the modern workplace context are as follows:
- a. Under the FW Act, terms in an enterprise agreement that prohibit an employer from engaging with independent contractors, labour hire and casual workers have no legal authority. However, it is lawful to include provisions that permit unions to influence the terms of any engagement²⁶.
 - b. Agreements cannot include an outright prohibition on the engagement of alternative forms of labour, or restrict the engagement of contractors to those who have union agreements, but enterprise agreements can regulate the terms under which independent contractors and labour hire workers are engaged²⁷.
 - c. Clauses may seek to require that as long as independent contractors or labour hire workers remain on the payroll, no ongoing employees can be made redundant²⁸.
 - d. There are "jump up" clauses which ensure that the terms and conditions of engagement of those other types of workers are no less favourable than that of ongoing workers, thus removing the incentives to use that alternative form of labour²⁹.
125. However, AMMA disagrees with the PC's observation that negotiating for productivity gains is inherently a responsibility for employers and if they are not motivated by market forces to seek productivity gains, it is unlikely that regulation will alter their stance³⁰.

²³ PC Draft Report, p.731

²⁴ PC Draft Report, p.733

²⁵ PC Draft Report, p.733

²⁶ PC Draft Report, p.711

²⁷ PC Draft Report, p.729

²⁸ PC Draft Report, p.730

²⁹ PC Draft Report, p.730

³⁰ PC Draft Report, p.572

126. This ignores the fact that while employers may seek to discuss productivity, they are often prevented from doing so, which was revealed as part of AMMA's Workplace Relations Research Project. That research revealed that 82.6% of respondents were not able to negotiate productivity improvements in exchange for wage increases under the FW Act³¹.
127. AMMA notes the PC draft report also points out the FWC will conduct and publish qualitative research to identify clauses in enterprise agreements that enhance productivity or innovation³². This exercise will yield limited benefits.

Draft PC Recommendation 20.1 – Agreement terms

128. The PC specifically addresses agreement content in draft recommendation 20.1, the main recommendation that will directly and specifically impact on the content of enterprise agreements going forward, if enacted by the government as AMMA hopes³³:

DRAFT RECOMMENDATION 20.1

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

AMMA response

129. AMMA strongly supports the above draft recommendation. While AMMA would like the list of terms listed as unlawful content under the FW Act expanded (as detailed below) this is a very important step in the right direction and sends important signals to third parties about the validity of their involvement in the commercial employment arrangements of an enterprise.
130. AMMA has consistently maintained that decisions about whether to use independent contractors, labour hire or casuals, as well as the terms of their employment, should be made by the business. These are, in essence, contractual issues that have no place in enterprise agreements and we welcome the PC's findings in that regard.
131. Having said that, the anti-competitive and productivity-sapping agreement content that proliferates under the FW Act does not stop there and must be systematically addressed.

³¹ AMMA Workplace Relations Research Project – A Survey Based Analysis, Third [Report](#), June 2011, p5

³² Draft PC Report, p.572

³³ Draft PC Report, p.733

AMMA priorities not addressed

132. As AMMA stated in its initial submission to this inquiry, agreement content should be required to pertain to the direct employment relationship as per the *Electrolux* definition (**AMMA Recommendation 3.6.1**)³⁴.
133. AMMA's initial submission also included a list of matters that in our view should be expressly prohibited in agreements for the sake of clarity for all parties involved. These were based in large part on pre-existing prohibitions under the Workplace Relations Regulations but with some modifications taking into account the changed bargaining context and benefits flowing to both parties from the ability for an employee to cash out a proportion of their annual leave on agreement between the parties, for example (**AMMA Recommendation 3.6.2**)³⁵.
134. Of the previously advocated prohibitions, the most important that the PC should recommend be prohibited going forward on the understanding they have no productive role to play in a modern workplace are:
- a. Clauses encouraging or discouraging union membership (which were upheld in the *ADJ Contracting* case).
 - b. Clauses bestowing entry rights on union officials given that the stipulations for union entry are already laid out in the FW Act (such clauses were endorsed in the *Dunlop Foams* and *ADJ Contracting* decisions).
 - c. Clauses advocating that lists of "preferred labour" be used when hiring new employees.
135. AMMA made seven recommendations regarding agreement content in its initial submission to the PC. The most critical for the PC to reconsider in its final report are:
- a. Restricting the 'matters pertaining to the employment relationship' test under [s.172](#) of the FW Act to matters pertaining to the direct employment relationship between employers and employees, not to third parties (**AMMA Recommendation 3.6.1**)³⁶.

³⁴ AMMA Submission (#96), p.161

³⁵ AMMA Submission (#96), p.161

³⁶ AMMA Submission (#96), p.161

- b. Removing the current provision that allows unions to apply for and obtain protected action ballot orders on the assertion they believe they are bargaining for permitted content even if they are not (**AMMA Recommendation 3.6.4**)³⁷.
- c. Limiting the undertakings the FWC can ask of employers in terms of agreement content when submitting agreements for approval (**AMMA Recommendation 3.6.6**)³⁸. This recommendation is partly addressed in **PC Draft Recommendation 15.1**.
- d. Introducing a list of prohibited content applying under the FW Act that includes the matters AMMA specified in its original submission (**AMMA Recommendation 3.6.2**)³⁹.
- e. Rendering casual conversion clauses non-allowable / prohibited matters in bargaining and agreements (**AMMA Recommendation 9.4**)⁴⁰.

Earlier PC findings could have broader application

- 136. AMMA notes that the PC has, in its report for its Public Infrastructure inquiry already recommended that the federal building code retain restrictions on agreement content. As part of that review, the PC conceded those limitations on agreement content were necessary because of the leverage that could be applied by unions to contractors in a building and construction context.
- 137. AMMA's question to the PC is if they could see the need for prohibitions on agreement content in that area, why not more broadly? The fact is that certain terms and conditions are inimical to productivity and for public policy reasons should not be able to be included in enterprise agreements, regardless of the fact that parties might agree to them based on a variety of situations and commercial and industrial pressures.
- 138. These are fundamental arguments that the PC has already accepted, albeit in a different context of building and construction.
- 139. AMMA notes that in its May 2014 report for its Public Infrastructure inquiry⁴¹, the PC said it was a "sensible starting point" for all jurisdictions, including state and federal governments, to deploy the Victorian Code of Practice for the Building and Construction Industry Implementation Guidelines "or something akin to them" for their building codes of practice.

³⁷ AMMA Submission (#96), p.161

³⁸ AMMA Submission (#96), p.162

³⁹ AMMA Submission (#96), p.161

⁴⁰ AMMA Submission (#96), p.416

⁴¹ *Public Infrastructure*, Productivity Commission Inquiry [Report](#), Volume 1, No 71, 27 May 2014, p33

“Adoption of the guidelines and higher penalties would be likely to significantly improve the industrial relations environment and avoid industrial disputes and excessively generous enterprise bargaining agreements.”

140. While those guidelines were removed by the incoming Labor Government in Victoria in January 2015, at the time the PC handed down its infrastructure report in May 2014, those guidelines were in effect and had the effect of prohibiting tenderers for state government-funded construction work from entering into:
- a. Unregistered written agreements with any third party or parties;
 - b. Agreements that constrained the use of independent contractors and the terms of their engagement;
 - c. Agreements to pay to industry super, redundancy and income protection funds that provided in excess of award and legislative matters;
 - d. Any agreement provisions that required, coerced or pressured third parties, including labour hire firms or group apprenticeship schemes, to set particular terms and conditions including over-award payments;
 - e. Requiring a contractor to apply project-specific wages and conditions;
 - f. Imposing a site allowance;
 - g. Provisions that restricted productivity improvements;
 - h. Provisions setting ratios of employees to contractors;
 - i. One-in-all-in arrangements such as having to offer overtime to all workers if it is offered to one;
 - j. Last on first off clauses;
 - k. Restrictions on labour including in relation to employers' short or long-term labour requirements (including restricting casual labour; part-time labour; labour hire or the source of labour);
 - l. Prohibitions on “all-in” payments which allowed employers to include all payments in a single hourly, daily or weekly rate;
 - m. Relaxation of right of entry provisions for officials of industrial organisations, with any industrial instrument containing right of entry clauses required to provide for entry on the same terms as Part 3-4 of the FW Act and / or any relevant state legislation;
 - n. Allowing a person not covered by an instrument to monitor its operation;

- o. Entitling employees to take paid time off to attend union activities;
 - p. Providing for "project" agreements to apply.
141. Under the then-Victorian guidelines, tenderers for state government-funded construction projects were also prevented from including in their industrial agreements:
- a. Dispute settlement provisions denying employees freedom of choice about whether to be represented in disputes and, if so, by whom;
 - b. Anti-freedom of association provisions which included:
 - i Providing the names of new staff, job applicants, contractors or sub-contractors to unions other than as required by law;
 - ii No ticket no start signs;
 - iii Employers unlawfully encouraging or discouraging employees to join a union;
 - iv Using employee representatives, site delegates or other union representatives to administer site induction processes;
 - v Refusing to employ, or terminating an employee's employment, because of their union status;
 - vi Practices that facilitate non-working shop stewards or preferred lists of labour;
 - vii Any requirement that a person pay a bargaining fee;
 - viii Displaying union logos, mottos or indicia on clothing, property or equipment supplied by a contractor;
 - ix Standing invitation clauses for right of entry.
142. As an alternative to the matters listed above that in AMMA's view should be expressly prohibited across the board, and the PC could reconsider the above prohibitions that it endorsed for inclusion in the building industry code, but not just for some building and construction jurisdictions.

How the PC should proceed

AMMA Recommendation

AMMA strongly supports PC Draft Recommendation 20.1 which would prohibit clauses restricting the engagement of independent contractors, labour hire and casuals.

AMMA maintains the PC should in addition to the above recommendation proceed in adopting the following AMMA recommendations from our original submission:

- Recommendation 9.4⁴² - prohibiting casual conversion clauses
- Recommendation 3.6.1⁴³ - prohibiting clauses
- Recommendation 3.6.4⁴⁴ - stopping unions from securing protected industrial action where they merely believe a proposed clause is allowable, when it is not.
- Recommendation 3.6.2, introducing a list of prohibited content including the prohibitions outlined by AMMA in this submission.⁴⁵

Alternatively, the PC should reconsider the prohibitions it deemed appropriate in the building and construction industry to have broader application.

⁴² AMMA Submission (#96), p.416

⁴³ AMMA Submission (#96), p.161

⁴⁴ AMMA Submission (#96), p.161

⁴⁵ AMMA Submission (#96), p.458

ENTERPRISE BARGAINING

PC Draft Report - Chapter 15, pp.534-590, *passim*, Chapter 17, pp.615-628

Why this is a priority area for AMMA

143. AMMA has provided evidence in its primary submission and independently commissioned research from KPMG as to why the bargaining and agreement making framework is a priority for the resource industry, and must be a priority area of reform recommended in this review.
144. The KPMG⁴⁶ evidence supports targeted reforms to:
- a. Provide greater choices for agreement making in the form of the proper range of dedicated and proven agreement making streams, including both collective (union, non-union and greenfield) and individual statutory agreements;
 - b. Ensure agreements have a sufficient nominal expiry date (length) to minimise costs and unnecessary industrial disruption at critical phases of resource sector projects (ie. mid way through the construction of major projects);
 - c. Provide for voluntary agreement making to occur, without coercion from trade unions to compel bargaining;
 - d. Ensure the agreement making framework provides for an active and voluntary choice by workers to be represented by a bargaining agent, and not by default;
 - e. Where bargaining occurs, ensure that the framework provides for voluntary external assistance by an independent expert agency;
 - f. Maximise the opportunity and incentives for agreements to be reached;
 - g. Minimise the costs and length of bargaining negotiations with trade unions, and encourage agreed outcomes;
 - h. Focus and limit the terms and conditions which could be subject to bargaining and the taking of industrial action, whilst recognising that:

⁴⁶ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector"

- i The extent of the existing safety-net of modern awards and the NES already provides for a significant minima of employment conditions;
 - ii Some claims/terms are not about employee needs and interests, nor the operations and competitiveness of employers, but rather are about unions and how their officials want to do their business.
 - iii Some claims/terms are inimical to competition policy goals (ie. restrictions on contractors) or enhancing productivity.
- i. Ensure agreements are subject to speedy approval and commencement; and
 - j. Ensure agreements are subject to a no-disadvantage test and robust oversight by the industrial tribunal and, once in force, relevant agencies such as the FWO.

145. To reiterate, KPMG included in its report the following salient findings:⁴⁷

- a. There are a number of costs associated with negotiating agreements. These costs vary between businesses and depend largely on the duration of the negotiation process⁴⁸.
- b. Negotiations can last from a few months to multiple years⁴⁹, and by implication the costs can increase with negotiation duration;
- c. There are a number of costs associated with negotiating agreements, including⁵⁰:
 - i Management and administrative time spent in planning and in negotiation meetings;
 - ii Professional fees associated with advice on industrial relations;
 - iii Legal costs and representation for bargaining representatives;
 - iv Loss of productive time for bargaining representatives;

⁴⁷ See this Part A: 'Greenfields Agreements' for the relevant and specific findings by KPMG on greenfields agreements.

⁴⁸ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.96

⁴⁹ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.96

⁵⁰ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", pp.108-109

- v Travel and accommodation costs associated with onsite negotiations.
- d. Consultation with industry suggests costs associated with negotiations can range from \$0.5 million to \$2 million per agreement (covering on average 80 to 800 workers) with many resource businesses having multiple agreements covering multiple sites⁵¹.
- e. The agreement making reforms proposed by AMMA have the potential to reduce costs associated with agreement making by⁵²:
 - i Introducing modified registered collective and individual agreements;
 - ii Enabling agreements to be approved by the FWC (or equivalent) based on a No-Disadvantage Test (NDT) against the safety-net;
 - iii Extending the nominal expiry date for agreements and allowing options for extension of agreements;
 - iv Introducing an expedited agreement process for workers above a high income threshold;
- f. Some resource businesses indicate that limited requirements to link enterprise agreement outcomes to productivity improvements limits their ability to achieve efficiency gains⁵³;
- g. Some agreement content proposed and, often conceded to due to flaws in the regulation of bargaining, in negotiations has the potential to have a negative impact on productivity. The content includes⁵⁴:
 - i Inflexible rosters;
 - ii Lockdowns on rostered days off;
 - iii Restrictions on working in inclement weather;
 - iv Mandated engagement of non-working union delegates;

⁵¹ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.109

⁵² AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.109

⁵³ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.109

⁵⁴ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", pp.109-110

- v Restrictions on a contractor's ability to select and deploy sub-contractors;
 - vi Greater access (to the workplace) for union officials.
- h. Consultation with resource sector businesses indicated that the cost associated with collective agreement outcomes are higher than individual agreements. The primary driver of this cost is not wages, rather, it is the conditions included in these agreements⁵⁵;
 - i. Consultation with industry indicate that the reforms proposed by AMMA in our initial submission, and this second submission, have the potential to reduce content in agreements that potentially restricts workplace flexibility. The reforms aim to limit content to matters that pertain to the direct relationship between the employer and the employee⁵⁶;
 - j. The reforms proposed by AMMA aim to increase flexibility in the agreement making framework, which is likely to have a number of implications for employers and employees in the resource sector and more broadly⁵⁷;
 - k. Competitiveness and productivity could be improved through a reduction in the costs associated with negotiating an agreement, the ability to incorporate productivity improvements in agreements and a reduction in the ongoing costs associated with agreement outcomes⁵⁸;
146. CGE analysis was undertaken by KPMG to determine the economic impact of the reform options AMMA is advancing. The analysis is contained in summary format in the KPMG report⁵⁹.
147. KPMG indicated that the economic implications of AMMA's proposed reform options would⁶⁰:
- a. Reduce costs associated with delays during construction of major projects potentially resulting in higher investment.

⁵⁵ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.110

⁵⁶ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.110

⁵⁷ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.108

⁵⁸ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.108

⁵⁹ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", pp.122-129

⁶⁰ AMMA Submission (#96) - Attachment: KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Table 8-1, p.121

- b. Potential future increases in wages and conditions may be less costly improving Australia's competitiveness as an investment destination.
 - c. Increase management control over operational decisions potentially contributing to productivity improvements.
148. The CGE modelling indicates that reforms to the agreement making and bargaining framework contribute to improved outcomes for the resource industry.

Overview of the PC report in this area

149. The PC Issues Paper 1 recognised that parts of the WR framework, *"shapes the powers and distribution of returns to various parties in the system. It can also provoke or mitigate industrial conflicts"*.⁶¹
150. As indicated in Issues Paper 1, the PC has set out a number of expectations to test various reform options. AMMA had regard to the following statements, when formulating its primary submission and commissioning independent evidence:

"The Commission's task is to assess the performance of the WR framework and the need for any changes to it, taking into account Australia's future needs and the merits of possible changes".⁶²

*"Given the weight of history in shaping Australia's current arrangements and its divergence from systems in some other developed countries, a useful question for participants is whether the current system is well suited to contemporary (and evolving) workplace needs for Australia in an increasingly globalised economy."*⁶³

"No nation aspires to be a low-wage economy. The more relevant question is how a workplace relations system, together with other policies and practices, should be designed to achieve high productivity and to allocate labour to its best uses, thereby sustaining higher incomes and enabling greater wellbeing over time".⁶⁴

"The Commission has no presumptions about the desired direction, magnitude or form of changes to the WR system. The Commission is open to lateral suggestions so long as they are practical, beneficial and backed by solid evidence and argument".⁶⁵

151. In relation to agreement making and bargaining specifically, AMMA also noted the following statements in Issues Paper 3:

⁶¹ PC IP 1, at p.2.

⁶² Ibid, at p.5.

⁶³ Ibid, at p.10.

⁶⁴ Ibid, at p.15.

⁶⁵ Ibid.

“As in the other WR inquiry issues papers, the Commission’s approach will be to test alternative bargaining arrangements against the objectives and design criteria identified in Issues Paper 1. An overarching concern will be the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them...”⁶⁶

152. The PC Draft Report makes a number of important draft recommendations and findings, which would generally improve the existing system for employers in the resource industry.
153. AMMA’s overall impression of Chapter 15 of the Draft Report (Enterprise Bargaining) is that the majority of changes are essentially technical in nature, rather than engaging with and seeking to improve the architecture of the agreement making and the bargaining system. The concluding paragraph in the PC draft report states:⁶⁷

“Like so many other features of Australia’s WR system, there are grounds for some important reforms of enterprise bargaining, but not for radical change. The system will never be perfect because it is too costly (or impossible) to constantly fine tune laws to deal with any the defects that arise for some parties. If the system responds to every flaw, it either becomes too complex (raising compliance costs), or it shifts the bargaining pendulum in the wrong direction.”

154. As outlined in AMMA’s primary submission, the resource industry has historically utilised multiple agreement making options, including collective and individual agreements. This is not to say that all companies see benefits in engaging in enterprise agreement making or prefer one type of agreement over another. Firms in the resource industry (as across the entire private sector) are not homogeneous and their workplace strategies and priorities are not homogenous.
155. They have different views of how they should optimise their operations and their workplace arrangements.
156. The needs of a business can change dramatically when new leadership is brought in, there is price adjustment for a product/service or there are changes in the competitive landscape domestically or internationally. The PC should be well aware of the nature of the resource industry, particularly as the KPMG report provides a useful analysis of the resource industry challenges and benefits to the Australian economy.
157. As set out in the introduction to this submission, AMMA invested in significant independent evidence to assist the PC in this review.

⁶⁶ PC IP (3), at p.1.

⁶⁷ PC draft report, at p.589.

158. AMMA attempted to provide independent expertise and evidence (from KPMG) to the task of identify various reform options that would produce tangible benefits both to the resource industry and more widely, the Australian economy.
159. AMMA strongly endorses a number of specific draft recommendations on greenfields agreement making, the test for agreement approval and the length of enterprise agreements. However:
- a. A significant number of reform proposals that are critical to the resource industry have not been engaged with or addressed in draft recommendation at this stage in the PC's Draft Report.
 - b. In other areas, the recommendations are partial, or seek to respond to a concern but address only part of the concerns that have been raised with the PC by industry.
160. Ultimately, the PC has an opportunity and an obligation to consider modifications to the existing agreement and bargaining framework that would improve the framework and its relevance and capacity to deliver on the economic and workplace relations aims of our bargaining system. This means:
- a. Engaging with feedback on what has been recommended in draft form.
 - b. Engaging with additional proposals and priorities from submitting parties where appropriate (and we commend a number to the PC in this submission).
 - c. Looking at experiential evidence, and empirical evidence on the need for change, and in support of particular proposals. AMMA was alone in providing this to the PC through the KPMG research.

Draft Recommendation 15.1 – Discretion to approve agreements

DRAFT RECOMMENDATION 15.1

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

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

AMMA Response

161. AMMA supports this recommendation and provides further responses in relation to the Notice of Employee Representational Rights (NERR) in relation to Draft Recommendation 15.5 (below).
162. This recommendation would minimise costs and disruption. It would also reduce the loss of good will/harm to workplace relations cultures amongst employees, when an agreement is required to be re-voted upon for minor technical defects.

Draft Recommendation 15.2 – Flexibility terms**DRAFT RECOMMENDATION 15.2**

The Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

163. This is addressed under Individual Flexibility, below.

Draft Recommendation 15.3 - Nominal expiry dates**DRAFT RECOMMENDATION 15.3**

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

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

AMMA Response

164. AMMA supports the recommendation to extend the nominal expiry date of enterprise agreements. This is in line with AMMA's reform priorities/proposals outlined in our initial / primary submission.
165. The second half of this draft recommendation is addressed above, under Greenfields Agreements.

Draft Recommendation 15.4 – Tests for agreement approval

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

AMMA Response

166. AMMA supports this recommendation and a No-Disadvantage Test (NDT) applying in the future. The NDT was clear, efficient, equitable and protective in the 15 plus years it was in operation. The post-2009 BOOT test has proved, as with so much of the 2009 changes, politicised, unnecessary and often confusing for users of the system (and with no benefit to the system, employers or employees from this complication).
167. AMMA supports an NDT which is a global (as opposed to a line-by-line) test against the relevant statutory and award safety-net – this is what applied successfully for many years prior to the FW Act, and a return to an NDT would be well received.
168. The detail of any new test:
- a. Would be resolved in the design of specific future amendments.
 - b. Could be addressed based on previous experience with the NDT (1993-2005) and the iterations of it considered to have worked most effectively.
169. AMMA notes the PC's *"view is that, while the award system is in need of repair, there is no case for replacing awards as the safety net ... therefore, awards remain the appropriate benchmark for EA approval purposes"*.⁶⁸
170. AMMA believes that enterprise agreements should also be able to deal with aspects of the National Employment Standards (NES) and therefore be subject to an NDT. In policy terms, if an employee is not disadvantaged as against the relevant modern award, it should also follow that some or all NES should be subject to a similar statutory test.

⁶⁸ Ibid, at p.573.

171. Again discussion of which NES, and which parts of those NES should and should not be subject to agreed flexibility and how this might work are matters for government in implementing (and further consulting on) an NDT based on Draft Recommendation 15.4 in its final form.

Draft Recommendation 15.5 – Bargaining periods & representation

DRAFT RECOMMENDATION 15.5

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that:

- a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted
- a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.

AMMA Response

172. As AMMA's primary submissions indicated, AMMA supports a process of active nomination of bargaining representatives – i.e. employees must make a choice, not have that choice made for them.
173. Currently, if an employer wishes to appoint a bargaining representative, they can do so by an active appointment process. Similarly, AMMA believes that employees should actively appoint a bargaining representative to represent them in bargaining. There should be no capacity in a future WR system for either passive or default bargaining representative status.
174. AMMA supports the intent of Draft Recommendation 15.5 and believes a reasonable time frame to accept nominations should be seven business days (but not more than 14 days). This would mean that the existing timeframe for agreement approval need not change.
175. As AMMA understands this proposal, if within a specified time frame, an employee nominates an individual representing a trade union who is able to represent the industrial interests of the employee, then the employer must recognise and bargain with the employee's representative.
176. In relation to an individual that is not representing a trade union, the bargaining representative (which could also be the same employee) must demonstrate that they represent at least 5% of employees to be covered by the agreement.

177. If the employer does not receive a valid (written) nomination within the specified time frame, then the statutory obligations to bargain with a bargaining representative (and corollary legal rights and obligations) are not triggered.
178. AMMA supports this recommendation if the above is an accurate reflection of the proposal.

Notices of Employee Representation Rights - Problems

179. The form of *Notices of Employee Representation Rights* (NERR), which is required under the FW Act is causing unnecessary and significant impediments for the approval of agreements that have already been voted up by employees.
180. In addition to the infamous decision concerning the stapling of documents (some commentators refer to this as staple-gate), which has been highlighted by the PC in its Issues Paper and draft report, a more recent appeal decision considered a matter where the employer referred to the “Fair Work Commission” as the “Fair Work Australia”, in the NERR. The relevant union supported the company’s appeal in favour of having the agreement approved, which should not have seen any litigation or failure to have the agreement approved.
181. The first two paragraphs of the appeal decision summarise the issue as follows⁶⁹:

“[1] Serco Australia Pty Limited (Serco) has applied for permission to appeal and appealed a decision of Commissioner McKenna issued on 10 July 2015 1 (Decision) in which the Commissioner dismissed an application for approval of an enterprise agreement, the Serco Immigration Services Agreement 2015 (Agreement). The application was dismissed on the basis that the notice of representational rights (Notice) issued by Serco to its employees pursuant to s.173 of the Fair Work Act 2009 (FW Act) did not conform to the prescribed form of the notice, did not therefore comply with the requirements of s.174(1A), and was invalid as a result. Serco contends that the Commissioner erred in reaching that conclusion, and the error resulted in a failure to exercise her jurisdiction in respect of the application to approve the Agreement. The respondent unions support Serco’s appeal.

[2] Senior Counsel for Serco identified the only disconformity between the Notice and the prescribed form (which is set out in Schedule 2.1 of the Fair Work Regulations 2009) as being that where the prescribed form refers to the “Fair Work Commission”, the Notice referred to “Fair Work Australia”. By way of background, this Commission as established by the FW Act was originally named “Fair Work Australia”. The name of the Commission was changed to the “Fair Work Commission” as a result of the Fair Work Amendment Act 2012 (Amendment Act). This appears to be the only

⁶⁹ *Serco Australia Pty Limited v United Voice and the Union of Christmas Island Workers* [2015] FWCFB 5618 (2 September, 2015).

disconformity dealt with in the Decision. We will therefore proceed on the basis that this is the only disconformity."

182. The appeal was successful, in large part by heavy reliance on the *Acts Interpretation Act 1901*.
183. In addition, the FWC has now published a notification on its website alerting employers and stakeholders of the bargaining system, to ensure they do not use any NERR forms that are in public circulation which do not technically comply with current requirements. Some forms in circulation apparently contain an incorrect reference to websites. The FWC's website states:⁷⁰

"The Fair Work Commission is aware that there are a number of different versions of the Notice of Employee Representational Rights (the notice) currently in circulation. Section 174 of the Fair Work Act 2009 was amended in 2012. Since the amendment came into operation the notice must contain the content and be in the form prescribed by the Fair Work Regulations 2009. The notice must not contain any other content. In 2014 a Full Bench of the Commission held that where a notice departs from the template prescribed in the Regulations, the application may be found to be invalid (Peabody Moorvale v CFMEU [2014] FWCFB 2042).

In particular, the Commission notes that there appears to be a number of versions of the notice that erroneously refer to the Commission's (or its predecessor's) website (www.fwc.gov.au external link, opens in a new window or www.fwa.gov.au external link, opens in a new window) in the concluding paragraph. As prescribed by the Regulations, the notice must refer to the website of the Fair Work Ombudsman, which is www.fairwork.gov.au external link, opens in a new window. If the notice refers to a website other than www.fairwork.gov.au external link, opens in a new window, the notice may be found not to comply with s.174 of the Fair Work Act 2009 and therefore be invalid."

184. It should be recalled that the former Australian Government, at the behest of trade unions, changed the requirements in 2012 through the *Fair Work Amendment Act 2012*.
185. The change relied upon a recommendation by the PIR panel (Recommendation 19⁷¹) which unions strongly advocated for during that review process. That recommendation, however, was made in circumstances where even the Panel noted that *"the evidence does not demonstrate that the practice [of employers modifying the content or form of the NERR] is widespread"*.⁷²

⁷⁰ <https://www.fwc.gov.au/about-us/news-and-events/clarification-notice-employee-representational-rights>

⁷¹ <http://ris.dpmpc.gov.au/2012/08/03/review-of-the-fair-work-legislation-%E2%80%93-post-implementation-review-%E2%80%93-department-of-education-employment-and-workplace-relations/>

⁷² PIR report, at p.144.

186. It is questionable whether an NERR of the type mandated under the FW Act is actually required at all. That said, if the requirement to provide a NERR is to remain AMMA believes that the provisions governing the NERR need to be significantly reformed.
187. This could be achieved by simply varying ss.173 and 174 the FW Act. The FW Act should be amended to provide that minor defects of a NERR will not affect its validity or sub-sections 174(1A) and (1B) be deleted.
188. It is beyond comprehension that we currently have a situation where a majority of employees who vote to approve an agreement, which is attenuated by a defective NERR (whether it is a typo, an incorrect website or a staple), can vitiate the will of the majority of employees and render the entire process nugatory.

Other Issues

189. Currently, there is no inhibition on a bargaining representative moving from a passive (default) bargaining representative to an active one. It is also curious that the WR system allows a trade union, who had nothing to do with the bargaining for an enterprise agreement, to be a "party" to the agreement (which has legal consequences).
190. AMMA also considers there should not be a capacity for a trade union to actively oppose the approval of the agreement at the FWC stage, given that the agreement has been voted up by a valid majority of employees and the statutory discretion is required to be discharged by the FWC with the assistance of its own staff and resources (in addition to the material filed in support of the agreement).

Draft Recommendations 15.6 and 15.7 – Greenfields

191. These is addressed under the preceding subsection on Greenfield Agreements.

Information Request: Pattern bargaining⁷³

INFORMATION REQUEST

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

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

⁷³ PC Draft Report, p.53

AMMA's response

192. The current prohibition on pattern bargaining, in the context of prohibiting protected industrial action under s.409(4), should be retained and strengthened, particularly in respect to the existing exception under s.412(3). AMMA's detailed concerns were provided in our submission to the PIR⁷⁴.
193. It is apparent that a number of trade unions seek to impose (sometimes aggressively) industry wide wages and conditions through pattern agreements (mainly in the construction sector). Despite the rhetoric the existing prohibitions appear to be weak, at best, in prohibiting taking of industrial action in support of industry agreements.
194. Furthermore, since the Full Bench decision of *ANF v Trinity Garden Aged Care* ([2006] AIRCFB (21 August)) and other decisions⁷⁵, the existing provisions purportedly outlawing pattern bargaining have been rendered virtually ineffective.
195. The PC is encouraged to consider this decision and recommend that the Australian Government consider amending the legislation to give effect to the policy intention underpinning the current prohibitions.
196. AMMA recommends that:
- a. Section 412(1)(b) of the FW Act should be amended to not require the seeking of "common terms" but rather seeking terms that are "substantially similar", overcoming the technical basis on which the current restrictions on pattern bargaining have proved ineffective.
 - b. Deleting the exception to prohibited pattern bargaining in s.412(2)-(5) of the FW Act.
 - c. Replacing this with the narrower exception previously contained in s.421(2) of the *Workplace Relations Act 1996*, as follows:
 - (2) *The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment determined by the Full Bench in a decision establishing national standards.*

⁷⁴

<https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CC0QFjADahUKewiyzMKxwf3HAhWHj5QKHQYZCm8&url=https%3A%2F%2Fsubmissions.employment.gov.au%2Fempforms%2FArchive%2FFair-Work-Act-Review-2012%2FDocuments%2FAustralianMinesandMetalsAssociation.pdf&usg=AFQjCNEsIragxULHGvEVhgCqplbCooaSIQ&cad=rja>, pp-91-93

⁷⁵ *NTEU v University of Queensland* [2009] FWA 90, (18 August 2009); *AMWU v John Holland Pty Ltd* [2009] FWA 494, (2 October 2009)

Draft Finding 5.1 - Productivity requirements for agreement approval

DRAFT FINDING 15.1

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

AMMA 's response

197. AMMA indicated in our primary submission that resource employers supported the *Fair Work Amendment (Bargaining Processes) Bill 2014*. Resource employers do not generally support additional requirements for agreement approval, but in this case there is a strong case for change.
198. In relation to the Bill's specific proposals to mandate productivity based discussions, as the PC draft report identifies, the Australian Government is only proposing that productivity be discussed, prior to the lodgement of the enterprise agreement. This is to ensure that the bargaining parties turn their mind to it during bargaining.
199. Evidence provided by AMMA illustrates the difficulty that many resource employers have in attempting to get buy-in from trade unions to look at such issues during bargaining negotiations. Indeed, as AMMA pointed out in its primary submission, some union leaders boast about securing higher wages and conditions (the outcomes of which are outliers when viewed against the majority of workers in Australia, and even many CEOs and Government Ministers), without any productivity off-sets or trade-offs amongst existing terms and conditions of employment (including working arrangements and rostering). Union officials have been openly critical of employers for trying to improve productivity through such very high paying agreements, calling employers 'dinosaurs'.
200. Employees generally recognise that beyond cost of living adjustments to wages are often included in agreements. They understand the needs of the business to anchor future improvements in remuneration and working conditions upon off-sets and efficiencies elsewhere. Employees work in businesses and generally understand what it will take to deliver higher wages to them.

201. Difficulty and frustration amongst resource sector employers arises from trade union bargaining representatives, who at least nominally are acting on behalf of employees. The existing WR framework allows a trade union to legally bargain for its preferred set of wages and conditions and not turn their mind to, nor discuss, issues the employer sees as important to its operations and capacity to increase labour costs.
202. Employers wouldn't be supporting this type of regulatory intervention unless it was necessary and there was market failure to warrant it. As indicated elsewhere in this submission, the culture and mentality of some leaders within the trade union movement means that the arm of regulation is required to reach into the private negotiations of the parties involved and shift the mindsets of the bargaining parties to these important issues – they are not required, however, to ensure that clauses are inserted into an enterprise agreement.
203. To be clear, AMMA did not recommend a mandatory requirement for “productivity clauses” in enterprise agreements. AMMA's research suggested that clauses which impact the managerial prerogative of an employer, can impact firm productivity. They are agreed to by employers, in the context of the threats of protected industrial action and future industrial disputation. In the context of greenfields agreement making, the PC has acknowledged the significant leverage that some unions use against employers and that this can lead to less than ideal agreements which then become the basis for and a firm floor under future negotiations.
204. It is difficult to see, based on any objective analysis, why the simple and straightforward proposal in the Bill (to have a conversation of such an important matter) should be seen as carrying more risks than the possible benefits it could deliver. It is a proposal for a disruption, albeit a minor one, to the bureaucratisation of bargaining which is seeing agreements roll over repeatedly with no productivity gains – which it should be recalled was one of the rationales for moving to enterprise bargaining more than two decades ago.
205. AMMA strongly supports the proposed requirements under the Fair Work Amendment (Bargaining Processes) Bill 2014 and believes that it should not be rejected outright by the PC. The PC should not recommend against the passage of these amendments, but rather recommend that the requirement for negotiations to have at least addressed productivity be reviewed after implementation (should it be passed by the Parliament).

Information request – Designing an NDT⁷⁶

INFORMATION REQUEST

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

AMMA's response

- 206. The NDT test should be subject to further consultation with relevant stakeholders.
- 207. At a minimum, the NDT should be a statutory test which flexibly is applied against the relevant statutory safety-net. The safety net could be either the relevant modern award, the NES, a combination of both.
- 208. Alternatively, consideration should be given to applying the NDT against a designated set of statutory terms and conditions which could apply to all workers, instead of referencing the relevant modern award.
- 209. As AMMA's primary submission outlines, the NDT applying under the pre-Work Choices' *Workplace Relations Act 1996* operated generally without any major difficulties for a decade. This should be the starting point for a new NDT, which would also need to articulate with the operation of some elements of the NES.
- 210. Some NES should be inviolate or precluded to bargaining, or at least some elements of some NES, and there would need to be a proper consideration of such matters in the design of a future test. It seems inescapable that an NES will be more complicated in the award plus NES safety net era, than it was in the award safety net era (pre-Work Choices).

Other Matters – Procedural Requirements under s.186 and s.188

- 211. AMMA suggests that in conjunction with Draft Recommendation 15.1, two specific requirements for agreement approval under s.186 and s.188 should be reviewed by the PC in its own right.
- 212. Section 186(2)(a) and s.188 requires that the agreement has been “*genuinely agreed to by the employees covered by the agreement*”. A statutory definition of “*genuinely agreed*” is provided in s.188. This in turn, refers to other statutory pre-conditions in the FW Act. Section 188(c) is a catch-all provision which states

⁷⁶ PC Draft Report, p.54

“there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees”.

213. The second provision is s.186(3) which the FWC to be satisfied that the *“group of employees covered by the agreement was fairly chosen”*.
214. These two provisions alone are generally seen as avenue for a union which opposes the approval of an enterprise agreement to agitate that either the agreement was not genuinely agreed to by employees or the group of employees covered by the agreement was not fairly chosen.
215. It is difficult to understand in policy terms, what the utility is of having these two pre-conditions at the approval stage, when a valid majority of employees is required to have voted to support a proposed enterprise agreement. This is an important point, these provisions are used by unions who often have less than majority support in workplaces, or were unsuccessful in convincing employees to vote against an agreement, to seek to overturn the democratic will of employees who will actually work under an agreement. This is not just paternalistic, it is a serious risk to the right of employees to determine their own future and to agree to the terms and conditions for their work.
216. Further, both these sections of the FW Act inject subjective, inexact, highly contested, and highly unreliable notions into the system in terms of assessing the genuineness and fairness of certain actions and conduct.
217. Whilst the PC's draft recommendation 15.1 could address these issues indirectly, AMMA encourages the PC to review s.186(2)(a), s.186(3) and s.188(C) in their own right and to recommend ideally that they be deleted.
218. At a minimum there should be a review of whether such provisions are actually necessary for the approval of enterprise agreements and serve a purpose which seeks to deal with actual problems it was designed to address in the first place.

ENTERPRISE CONTRACTS

219. Chapter 17 of the Draft Report⁷⁷ canvasses a new addition to the bargaining system, through the creation of what the PC has termed Enterprise Contracts.
220. The culmination of Chapter 17 is the following information request⁷⁸:

INFORMATION REQUEST

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

221. AMMA does not support the proposal for the creation of a new, untested and uncertain form of agreement in the form of the proposed Enterprise Contracts (EC). Rather than create a new form of agreement, the existing options and those previously applying must be made more workable and accessible.
222. The PC draft report states "... any WR framework must provide employees and employers with multiple mutually-beneficial contracting possibilities. The PC considers that enterprise bargaining is one of these, but has explored changes to the FW Act – such as the creation of enterprise contracts".⁷⁹
223. The PC draft report also notes "that there are grounds for some important reforms of enterprise bargaining, but not for radical change."⁸⁰

⁷⁷ PC Draft Report, pp.615-628

⁷⁸ PC Draft Report, p.627

⁷⁹ PC Draft Report, at p.588.

⁸⁰ Ibid, at p.589.

224. It appears that the PC has hesitated to reinstate workable and proven methods of such “contracting possibilities”, including union and non-union collective agreements and individual statutory contracts. And it appears, as set out above that the PC has not gone far enough into what is and is not working in the existing enterprise bargaining rules under the FW Act, notwithstanding that organisations such as AMMA provided the PC with extensive analysis and recommendations for change based on the day to day experiences of employers seeking to use the existing system.
225. Instead the PC has decided to recommend a completely new and unproven form of agreement making (enterprise contracts) in addition to recommending comparatively minor amendments to Individual Flexibility Arrangements (IFA).
226. To be clear, we know the suite of agreement options that needs to be provided under the FW framework – collective (union and non-union) and individual, and we know this from how the system has worked in the recent past.
227. The new, speculative and under-developed concept of Enterprise Contracts does not need to be bolted on to the system, particularly not if this has the effect of somehow avoiding or replacing action to restore well understood and proven agreement options, as those actually using the system recommend.
228. First, it is difficult to see how the reintroduction of workable agreement options which successfully operated from 1997 until the Work Choices amendments could be called radical. The fact that the trade union movement and the ALP have been publicly opposed to statutory individual contracts does not make this a radical change, and it must be recalled that a mature system of individual agreements was in place for more than 8 years prior to Work Choices and more than a million pre-Work Choices individual agreements had been entered into.
229. Second, it is clear from submissions made to the 2012 PIR/FW Review Panel, relevant Parliamentary committee inquiries into the FW system since 2008 and this inquiry, that employers have clearly demonstrated problems with the current agreement making and bargaining system that not only need to be remediated, but that must be remediated if the PC is to deliver what is asked of it in the terms of reference for this inquiry.
230. Employers in the resource sector strongly support a return to proven solutions in the form of greater collective and individual agreement making options, informed by the real experience of employers and backed by independently commissioned evidence.

231. We strongly call on the PC to, in its final report, recommend genuine reforms to the existing bargaining and agreement making rules, as outlined in this preceding section, and as recommended in AMMA's initial submission to this review.
232. Resource employers see the challenge as getting the rules for bargaining right, acting on problems plaguing the system under the flawed mechanisms under the FW Act and providing an appropriate range of bargaining options.
233. This range does not extend to enterprise contracts and the proposal in Chapter 17 risks obscuring the appropriate focus and need for reform.

AMMA Recommendation

The PC not recommend the introduction of Enterprise Contracts as canvassed in Chapter 17 of the PC Draft Report, and instead recommend a return to an expanded range of registered agreement making options as consistently advocated for by AMMA, including:

- Collective bargaining both with and without union involvement.⁸¹
- Greenfields agreements for new projects that are practical and genuinely support the creation of major resource infrastructure in Australia.⁸²
- Individual statutory agreements.⁸³
- A genuinely useable form of Individual Flexibility Arrangements (IFAs).⁸⁴

⁸¹ AMMA Submission (#96), Part 3.5

⁸² AMMA Submission (#96), Part 3.4

⁸³ AMMA Submission (#96), Part 3.2

⁸⁴ AMMA Submission (#96), Part 3.3

INDIVIDUAL FLEXIBILITY

PC Draft Report - Chapter 16, pp.598-613

Why this must be a priority for reform

234. The need for greater individual flexibility is one of AMMA's six priorities for workplace relations reform, particularly the need to ensure agreement-making options are broadened through the re-introduction of a workable form of individual agreement, as well as that currently available individual flexibilities are not hampered by collective pressures.
235. Agreement-making generally, including the need for a statutory individual agreement as part of a suite of agreement-making options for employers and employees, is addressed in separate chapters in this submission.
236. This part of AMMA's submission deals with the role that individual flexibility arrangements (IFAs) could play in enhancing flexibility in the workplace in addition to those other aspects of agreement making canvassed elsewhere in this submission.
237. AMMA notes that at the time of writing, the FW Amendment Bill 2014 was being debated in the Senate and looked set to pass with amendments. In its original form, the Bill contained numerous provisions relating to the operation of IFAs, of which AMMA was broadly supportive with some provisos.
238. A key problem with IFAs in their current form is that they are a subset of a collective agreement or award and therefore entering into one requires another layer of bureaucracy and negotiation on top of the original "parent" instrument. Subsequently, access to IFAs is buried one level down which could be one reason that awareness of how they can be used is low.
239. As the PC itself points out at p.599:

"...unlike AWAs, which could be offered as an alternative to a collective agreement, an IFA stems from, and remains rooted in, the terms and conditions of the relevant award or enterprise agreement. This is because the IFA is made under an overarching 'flexibility term' that must be included in all awards or enterprise agreements. The IFA is taken to be a term of the enterprise agreement or award and takes effect as though it varies the award or enterprise agreement. The IFA does not change the effect of the award or enterprise agreement and is not a contract in its own right."

240. The fact that IFAs are a subset of enterprise agreements is also why IFAs are no substitute for a statutory individual agreement. They cannot really override an enterprise agreement and do not offer the same security for employers as statutory individual agreements did in relation to union access and industrial action.
241. Having said that, IFAs can offer some prospect of more flexible working arrangements for some segments of the labour market.
242. While an IFA will never satisfactorily replace a statutory individual agreement, the PC's draft recommendations regarding IFAs would improve things around the edges and make IFAs more usable, although there may still remain a low take-up of IFAs by AMMA members in the resource industry.
243. In 2012 [research](#), AMMA estimated the take-up rate for IFAs in the resource industry was less than 5% of all employment arrangements, compared with more than 80% for statutory individual agreements at one time.
244. AMMA also compiled an earlier research [paper](#) on IFAs in 2010.

Draft PC report: overview

245. As the PC acknowledges on p.610 of its draft report, its recommendations are primarily aimed at reducing the disincentives to use IFAs (rather than overhauling their architecture in a substantial way).
246. Nevertheless, AMMA welcomes the PC's following observations:
- a. There are obstacles to the wider use of IFAs, including how they are negotiated, the application of the BOOT, their duration, the degree of genuine flexibility available and a lack of awareness (p.529).
 - b. The notice period for terminating an IFA is "exceptionally short" which increases the risks of entering into them, particularly for employers (p.591).
 - c. The BOOT is not simple to apply (p.591).
 - d. Whereas AWAs provided a safety net of minimum pay and conditions, employers must ensure that an IFA makes the employee better off overall than they would have been if there was no IFA (p.599).
 - e. The BOOT for IFAs, unlike the BOOT applied to enterprise agreements, is not specifically compared to the relevant award and can, in theory, take into account intangible non-monetary benefits (p.600).

- f. Enterprise agreement negotiations often can and do act to reduce the scope for IFAs such that future employees and the employer are constrained in using them to improve workplace flexibility outside collective bargaining (p.602).
- g. The risk that IFAs may be terminated soon after they are entered into could undermine the incentives for managerial innovations (p.603).
- h. The BOOT under IFAs differs from that for enterprise agreements. For IFAs, the BOOT could be assessed against the award, enterprise agreement or other above-award arrangement under s.144(4)(c) of the FW Act (p.604).
- i. The amendments to IFAs proposed in 2012 by the post-implementation review are likely to be limited in their effect (p.605).
- j. Many IFAs appear to be formed as a condition of employment, in breach of the FW Act (p.606).

247. In this part of AMMA's submission, we look at the four substantive draft recommendations the PC has made in relation to IFAs. AMMA's response to each recommendation is outlined below.

Draft PC Recommendation 15.2 – Enterprise flexibility terms

248. The below recommendation proposes broader flexibility in mandatory flexibility terms required in enterprise agreements under the FW Act⁸⁵.

DRAFT RECOMMENDATION 15.2

The Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

AMMA response

249. AMMA supports the above recommendation, having long argued that enterprise flexibility terms should permit IFAs to deal with all matters in the "model" term (see **AMMA Recommendation 3.3.7** in our original submission to the PC⁸⁶). In the resource industry, current flexibility terms are made too restrictive

⁸⁵ Draft PC Report, p.568

⁸⁶ AMMA Submission (#96), p.92

by enterprise bargaining with unions and AMMA welcomes the PC's understanding of this.

250. AMMA notes the above PC recommendation is in line with one made by the FW Act Review Panel back in 2012.
251. AMMA welcomes the draft recommendation given that the purpose of the flexibility term is to enhance flexibility, not provide a mechanism to stymie it.

Draft PC Recommendation 16.1 – Termination of IFAs

252. The PC specifically addresses the amount of notice required for terminating IFAs by either party in its recommendation below⁸⁷:

DRAFT RECOMMENDATION 16.1

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

AMMA response

253. AMMA supports the above recommendation for a default 13-week notice period for terminating an IFA by either party (up from the current 28 days) noting this was taken up by the Federal Government in its FW Amendment Bill 2014 which was in the Senate at the time of writing this submission.
254. The PC's further recommendation that parties could agree that the notice period is extended to up to 12 months will provide greater security for the parties given that the business will know its employment arrangements will not be subject to change for at least that amount of time.
255. Of course, there should always be the ability to truncate the notice periods by mutual consent.
256. The longer notice period advocated by the PC is similar to AMMA's advocacy for longer fixed-term IFAs and to that extent AMMA welcomes the above draft recommendation (see **AMMA Recommendation 3.3.1**⁸⁸).

⁸⁷ Draft PC Report, p.604

⁸⁸ AMMA Submission (#96), p.91

Draft PC Recommendation 16.2 – Statutory tests for IFAs

257. The PC specifically addresses the no-disadvantage test for IFAs in the recommendation below⁸⁹:

DRAFT RECOMMENDATION 16.2

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

To encourage compliance the Fair Work Ombudsman should:

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

AMMA response

258. AMMA supports this draft recommendation provided the NDT is in a form that is more workable for industry than the current better off overall test. What AMMA would like the NDT more generally to look like is explored separately under Enterprise Bargaining, above.

259. Under [s.203](#) of the FW Act, a flexibility term must require the employer to ensure that any IFA agreed to results in the employee being better off overall than the employee would have been if no IFA was entered into.

260. As the PC points out, applying the current test is not as easy as it seems:

- a. The BOOT has some intrinsic difficulties, not just in relation to IFAs but more generally to collective agreements⁹⁰.
- b. No code can substitute for clear and consistent legislation⁹¹.
- c. The NDT has an advantage over the BOOT of being an aggregated test⁹².

⁸⁹ Draft PC Report, p.609

⁹⁰ Draft PC Report, p.608

⁹¹ Draft PC Report, p.608

⁹² Draft PC Report, p.608

- d. The NDT is a well-established concept which has been extensively used under federal and state jurisdictions⁹³.
 - e. A new form of NDT should compare the terms and conditions as a whole for employees relative to a benchmark but be able to operate in the context of the FW Act⁹⁴.
 - f. The FWO website provides only limited information on IFAs⁹⁵.
 - g. The decision by employers whether to use IFAs depends on the administrative burden of making them⁹⁶.
 - h. Lodgement of an IFA should not imply, nor require, clearance by the FWO⁹⁷.
 - i. The FWO should conduct random audits of IFAs⁹⁸.
 - j. Compliance and enforcement should be proportionate to IFAs' costs and benefits⁹⁹.
261. AMMA also believes that providing greater information about complying with the NDT in relation to IFAs could only be a positive thing. However, the FWO should not necessarily promote the use of IFAs, merely raise awareness of them and ensure compliance with the NDT where IFAs are used.

Draft PC Recommendation 16.3 – Information on IFAs

262. The PC specifically addresses the information and education role the FWO should play in relation to IFAs at the recommendation below¹⁰⁰:

DRAFT RECOMMENDATION 16.3

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

⁹³ Draft PC Report, p.608

⁹⁴ Draft PC Report, p.608

⁹⁵ Draft PC Report, p.610

⁹⁶ Draft PC Report, p.610

⁹⁷ Draft PC Report, p.611

⁹⁸ Draft PC Report, p.611

⁹⁹ Draft PC Report, p.611

¹⁰⁰ Draft PC Report, p.610

AMMA response

263. AMMA supports the above draft recommendation.
264. AMMA's general view in relation to this recommendation is that increased information to the parties should ensure greater compliance generally along with ensuring the objects of the FW Act are realised.
265. AMMA can see no problem with the FWO's enhanced information-providing role as long as it remains neutral and does not actively encourage the use of particular models of IFAs.
266. AMMA would prefer that the FWO's information provision role be done in conjunction with employer groups such as AMMA given they hold a position of trust with their members.

AMMA priorities not addressed

267. AMMA reiterates sentiments raised in our April 2014 [submission](#) to the FW Amendment Bill 2014 that while the proposed changes to IFAs and flexibility clauses contained in that original Bill are positive, they remain "within an IFA architecture that is flawed and in need of more fundamental re-examination rather than piecemeal amendment".
268. The same could be said of the PC's draft report, in AMMA's view.
269. AMMA made 10 recommendations in its initial submission to the PC relating to IFAs. Those that will be particularly important for the PC to take up in its final report that have not been in its draft report are:
- a. IFAs be able to operate for fixed terms of up to four years but be able to be terminated earlier by mutual consent (**AMMA Recommendation 3.3.1**).
 - b. Parties be able to agree on an IFA prior to employment commencing given the protections that are in place requiring employees to be left better off overall after entering an IFA, even if this is replaced at some point by a NDT (**AMMA Recommendation 3.3.3**).
 - c. Not only employees but employers should be statutorily required to be better off overall, or not disadvantaged, after entering into an IFA. The FW Act should be amended to explicitly require that (**AMMA Recommendation 3.3.5**).
 - d. Union scrutiny of IFAs after they have been entered into should be expressly prohibited (**AMMA Recommendation 3.3.8**).

270. The above AMMA recommendations are largely machinery provisions that should be easy to enact and not cause any great difficulties for the parties.
271. One of AMMA's initial recommendations to the PC was also to be able to have either party to an IFA invite the FWO to make an assessment at any time during the IFA's operation to reduce the risk of employees being better off at the beginning of an arrangement but worse off down the track (**AMMA Recommendation 3.3.4**). This was on the assumption that other AMMA recommendations would also be adopted.

Fair Work Act Review Panel recommendations not yet implemented

272. The FW Act review panel in 2012 made some recommendations in relation to IFAs that AMMA did not support, such as not allowing IFAs to be made a condition of employment and requiring them to be lodged with the FWO.
273. The Review Panel also made the following further recommendations in relation to IFAs:
- a. **Recommendation 9:** That the better off overall test in s144(4)(c) and s203(4) be amended to expressly permit an IFA to confer a non-monetary benefit on an employee in exchange for a monetary benefit. This was taken up by the current government in the FW Amendment Bill 2014 that at the time of writing this submission was before the Senate.
 - b. **Recommendation 11:** That the FW Act be amended to provide a defence to an alleged contravention of a flexibility term where an employer had complied with the notification and believed on reasonable grounds that all other statutory requirements (including the better off overall test) had been met.
 - c. **Recommendation 12:** That s144(4)(d) and s103(6) be amended to require a flexibility term to require an employer to ensure that an IFA provides for termination by either party by giving written notice of 90 days (or a lesser period if agreed between the parties) rather than the current maximum notice period of 28 days.
 - d. **Recommendation 24:** That s203 be amended to require enterprise agreement flexibility terms to permit IFAs to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties (this has been taken up by the PC as a draft recommendation).

274. As noted, some of the FW Act Review Panel recommendations have been taken up in the PC's draft report, and AMMA supports the ones that have been taken up, despite urging the PC to make more substantial recommendations in its final report.

How the PC should proceed

AMMA Recommendation

AMMA supports PC Draft Recommendations 15.2, 16.1, 16.2 and 16.3.

In addition to including those draft recommendations in its final report, the PC should also enact the following AMMA recommendations¹⁰¹ as a matter of priority:

- AMMA Recommendation 3.3.1
- AMMA Recommendation 3.3.3
- AMMA Recommendation 3.3.4
- AMMA Recommendation 3.3.5
- AMMA Recommendation 3.3.8.

¹⁰¹ AMMA Submission (#96), pp.91-92

INDUSTRIAL ACTION AND DISPUTES

PC Draft Report - Chapter 19, pp.649-709

Why this is a priority area for AMMA

275. Industrial action and the threat of industrial action is disproportionately salient in the operation of agreement making under the FW Act, and distorts outcomes of the workplace bargaining process. The impact of actual and threatened industrial action is dragging Australian workplace agreements further and further away from the needs of enterprises for efficiency, productivity and competitiveness.
276. AMMA provided evidence in its primary submission and independently commissioned research from KPMG¹⁰² as to why the regulatory framework governing protected industrial action should be a priority area for reform. This evidence suggests that targeted reforms are required to:
- a. Prevent the incidence of industrial action occurring when an employer has agreed to bargain for an enterprise agreement; and
 - b. Mitigate the damage that protected and unprotected industrial action can cause to employees, the employer and innocent third parties.
277. To reiterate, KPMG indicated in its detailed report:
- a. The threat and incidence of protected industrial action has a significant impact on resource industry businesses and the broader economy by imposing costs and creating uncertainty for businesses, customers, employees and other stakeholders¹⁰³.
 - b. Improving the framework that defines industrial action has the potential to reduce uncertainty and improve the attractiveness of the Australian resources sector for investors. This has implications for the cost of capital and potentially the viability and competitiveness of major resource projects¹⁰⁴.

¹⁰² KPMG report 'Workplace Relations and the Competitiveness of the Australian Resources Sector', Attachment to Submission #96

¹⁰³ KPMG report 'Workplace Relations and the Competitiveness of the Australian Resources Sector', Attachment to Submission #96, p.93

¹⁰⁴ KPMG report 'Workplace Relations and the Competitiveness of the Australian Resources Sector', Attachment to Submission #96, p.93

- c. Consultation with industry suggests that on large resource projects, industrial action by even a small number of workers can have significant financial implications. These costs range from \$1 million to \$10 million per day of industrial action. Consultation with resource sector businesses identified that the proposed AMMA reform options have the potential to reduce the risks of actual and threatened industrial action and the associated risks to project timelines and costs¹⁰⁵.
- d. Strikes and other industrial action can impact productivity and industry competitiveness. In addition, industrial action has adverse impacts for labour productivity and overall competitiveness of the sector through its ability to be used to leverage higher wages and conditions¹⁰⁶.
- e. In addition to protected industrial action, some businesses reported incidents of unlawful industrial action. On one major project, there were numerous incidents of unlawful action that resulted in over 50,000 hours of lost productive time¹⁰⁷.
- f. Actual and threatened industrial action contributes to additional project costs. These costs include: costs of contingency; legal costs and management time associated with managing industrial disputes, direct costs of lost productive activity and downstream costs within the resources sector supply chain. These costs have the potential to be detrimental to the total costs of project delivery¹⁰⁸.
- g. Potential outcomes if AMMA's reforms were adopted, would mean a reduction in the imbalance in negotiations, which is a particular issue when negotiating agreements mid-project as industrial action has significant ramifications¹⁰⁹.
- h. The number and value of working days lost in the mining industry and construction industry correlates with changes to the different workplace relations frameworks¹¹⁰.

¹⁰⁵ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.96

¹⁰⁶ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.96

¹⁰⁷ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.104

¹⁰⁸ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.104

¹⁰⁹ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.104

¹¹⁰ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, (see 8.2.3, p.110)

- i. Disruptions and costs of industrial action flow through to other businesses and consumers. One resource sector business estimated that the direct cost of industrial action was approximately \$1,250 per worker per day. However, the cost to other businesses in the supply chain was estimated to be almost 10 times that cost.
 - j. In two case studies, the direct and indirect costs to the business and third parties were illustrated. In one case study, a vessel operator was the subject of trade union industrial action in the form of two 24 hour stoppages and three 48 hour stoppages (a total of eight full day stoppages) amounted to an exposure to the company of \$5.6M. In addition to the direct costs to the company, there were costs to businesses that relied on the company's services. The claims were considered by relevant companies as "exorbitant" and had no link with productivity increases. In a second case study, which looked at the potential impact of threatened strike action, the cumulative effect of one planned stoppage to one tug boat operator in a crucial resource export hub in WA was estimated to be \$100 M per day¹¹¹.
 - k. Consultation with resource industry businesses indicated that the reform options AMMA proposes have the potential to reduce the levels of industrial action and associated costs. Businesses indicated that this would reduce the ability for industrial action to be used as a tool to leverage above average increases in wages and conditions¹¹².
278. CGE analysis was undertaken by KPMG to determine the economic impact of the reform options AMMA commends to the PC. This analysis is contained in summary format in the KPMG report¹¹³.
279. KPMG indicated that the economic implications of AMMA's proposed reform options would¹¹⁴:
- a. Reduce the risk of actual and threatened industrial action and associated risks to project time lines and costs.
 - b. Reduction in employees' ability to influence the bargaining process through industrial action.

¹¹¹ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, (see Case Study 8-3 and 8-4, p.112).

¹¹² KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, p.112.

¹¹³ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, pp.122–129

¹¹⁴ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Attachment to Submission #96, Table 8-1, p.121

- c. Reduction in days lost to industrial action and associated loss of production.
280. The CGE modelling indicates that AMMA's reforms would have beneficial impacts upon the resource industry, and this would have wider positive benefits for the economy and labour force more generally.
281. AMMA notes that the draft PC report in two separate paragraphs refers to the KPMG report and purports to quote a specific section of the KPMG report which is relevant to understanding the composition of the factors driving the GGE modelling scenarios.¹¹⁵ The quotes are inaccurate and AMMA respectfully requests that this is corrected in the PC's final report. The PC has indicated in the draft report that the PC "*has reservations about these estimates*" and provides further commentary upon the basis of the miss-quote. This is unfortunate and the PC is kindly encouraged to re-consider its observations which are made in the draft report.
282. As can be discerned in the KPMG report and the modelling scenario sections, the reform options are intended to moderate the capacity to use industrial action upon employers to extract higher than average increases in wages and conditions, because of the threat of industrial action.
283. It is this "premium", quite unrelated to productivity, which the leverage of industrial action can have on employers, is what is intended to be captured by the reform options and therefore the modelling scenarios. Moreover, the justifications which KPMG clearly outlines in its report relate to both resource sector *investment*, and not only resource sector *labour productivity*, with further information provided to the reader within the body of the report.
284. To accurately summarise the KPMG CGE modelling, it is important to consider the justifications by reference to the further information provided within the body of the report.
285. Once again we commend the KPMG modelling to the PC, and reiterate that AMMA was the only major submitting party to meet the challenge of assisting the PC's considerations through such independent empirical evidence, and economic modelling of the highest order. This needs to be taken into account and engaged with more widely for the finalisation of this review and the final report and recommendations to government.

¹¹⁵ PC draft report, at p.701. The quote as it appears in the draft report is: "*reduction in the ability of industrial action to contribute to excessive wages and conditions*" (AMMA, sub.96, attach., p.13). In second paragraph on p.702, there appears a similar incorrect reference ("*excessive wages and conditions*"). The actual wording in the KPMG report at p.13 and p.125 is as follows: "*reduction in the ability of industrial action to contribute to excessive inflation in wages and conditions*" (emphasis added). There is also a reference to "Further information" referring the reader to Section 8.2.3 of the report.

Overview of the PC report in this area

286. The PC's Issues Papers identified industrial action as *"one of the most important forms of bargaining muscle flexed by employers, employees and their representatives"* in IP 3.¹¹⁶ The PC draft report indicates that *"[o]nly some minor tweaks are required"*.¹¹⁷
287. The PC Draft Report in its concluding paragraph on industrial action states:¹¹⁸
- "Industrial disputes may potentially harm productivity where employees view their relationship with management as adversarial, and thus have little reason to identify ways to improve their work or avoid shirking. However, cooperative workplace environments are unlikely to be manufactured by a legislative band aid on the taking of protected industrial action. If the underlying causes of a dispute remain, restrictions on protected industrial action are likely to merely encourage more covert forms of action, such as shirking, which may have a more enduring adverse impact on productivity than temporary stoppages or work bans. This highlights a recurring theme in this report — that positive WR outcomes are ultimately the responsibility of firms and their employees, and cannot be obtained merely through attempts to regulate behaviour via legislation."*
288. The statement that industrial action is a form of bargaining *"muscle flexed by employers, employees and their representatives"* seems to imply that all three actors (or participants) have equal *"muscle"* (or power) to wield against the other. This misunderstands, with respect, the way industrial action is actually applied (and strategically threatened) in the real economy and within the resource industry.
289. Second, the overarching finding in the PC draft report that *"only some minor tweaks are required"* unfortunately downplays and ignores the significant impact industrial action (whether threatened or taken) has on employees, the employer and third parties (other businesses, their employees, customers, the community, the public, investors etc).
290. We also note the reference to a *"legislative band-aid"* not creating cooperative workplace environments. Resource employers are not asking for radical change, but nor are we asking for a mere band aid. Through AMMA, resource employers have identified and put before the PC a meaningful and balanced set of recommendations for reform.

¹¹⁶ PC Issues Paper (No 3) at p.10.

¹¹⁷ PC Draft Report, at p.4.

¹¹⁸ Ibid, at p.702

291. “More cooperative workplace environments” will come from rules for bargaining and industrial action which see more workplace agreements driven by employers and employees and their priorities, and will come from more workplace deals being finalised without either industrial action or the threat of action. A system which encourages and rewards strikes and strike threats is the antithesis of encouraging cooperative workplace environments.
292. There are a number of important factors to consider when considering the regulatory framework of industrial action that do not appear to be fully captured/addressed in the PC draft report. A number of important issues the PC should consider, and which need to be engaged with in the PC's final report and recommendations are multi-faceted and summarised as follows:
- a. The availability, threat and actual use of industrial action is in the overwhelming majority of cases only accessible by certain trade unions acting as a bargaining representative. Industrial action is virtually non-existent in a workplace unless a union is the bargaining representative of a worker or group of workers. This is why the PC should focus its analytical examination of the regulatory impact of protected industrial action where it actually does occur. Whilst in aggregate, the official data washes out any individual firm level impacts, this is where firm level evidence and case studies is important to assist in formulating policy responses.
 - b. Industrial action is only a relevant feature in a small number of industry sectors and within certain occupational groupings. Therefore, any genuine interrogation and analysis of data measuring industrial action needs to specifically drill down at the industry and occupational level, rather than at a macro-level (ie. days lost per 1000 workers in Australia).
 - c. Industrial action is a powerful tool which should only be available to employees at an appropriate point in the bargaining process. Currently, this can legally occur at three distinct points on a continuum, namely:
 - i Before bargaining has actually commenced.
 - ii Sometime just after bargaining has occurred, but before any “impasse” has been reached.
 - iii At some point after industrial action has already taken place.
 - d. There is no limit, in theory, to the amount of “muscle” that a union can impose on an employer. The only limitations are contained within the FW Act and subject to orders of the FWC to suspend or terminate industrial

action, the outcomes of any bargaining scenario are uncertain and unpredictable.¹¹⁹

- e. The impact of industrial action needs to be analysed having regard to when it is used in a point of time, how it is used and the costs-benefits, when it is used. As the PC has identified, the FW Act only allows employers to take responsive industrial action. And only one type of action in the form of a “lock out” can be taken.¹²⁰
- f. To understand how industrial action is utilised, it is important to appreciate that the use of industrial action in bargaining is generally determined by the bargaining representative trade union and specific individuals in positions of leadership. Whilst employees ultimately vote on whether to take protected industrial action in a secret ballot, relevant officials, employees and delegates of the trade union are directing the negotiations. Personalities, skills, and negotiation tactics play a significant role in the quality of the bargaining process, whether industrial action is taken and ultimately, the quality of any concluded agreement, should one be reached. Therefore, it is relevant for the PC to understand contributory factors to the incidence and mitigation of industrial action, which requires reference to the bargaining actors and participants. The legal framework for taking industrial action can only be properly scrutinised if the PC engages with what actually drives industrial action and in turn how the law is used.
- g. Whilst most trade union officials engage in a professional, albeit, robust manner, in bargaining, there are many instances of the conduct of bargaining representatives which has a material effect in terms of threats of or the taking of, industrial action. AMMA has directly encountered union negotiators whom purport to relay the status of bargaining negotiations or communicate aspects of employer proposals to union members but do so in a self-serving manner or misleading manner. For example, in a matter involving protracted bargaining in the off-shore vessel sector, the FWC found on numerous occasions that the union's bargaining representative misrepresented a number of issues to its union members.¹²¹ The FWC in its decision made a number of findings in relation to the conduct of the relevant union, including that it:

“[S]trayed from reality and gave a false impression both to its members and the media as to the status of the Vessel Operators' wage offer in Option B.”

¹¹⁹ The infamous and much publicised industrial dispute between Qantas and multiple unions in 2011/12 is a case in point.

¹²⁰ Whilst the FW Act defines a “lock-out” in s. 19, it is unclear what exactly can constitute a lock out.

¹²¹ AMMA vs MUA [2015] FWC 773 (21 July 2015), at [90].

"[M]isrepresented the Vessel Operators' position with respect to the 'foreign labour' clause".¹²² With the FWC stating at [64]: "[w]hatever the motive of the MUA was, I am satisfied that it misrepresented the Vessel Operators' position in bargaining. I consider that the MUA projected to its members an image that did not truly reflect the factual position regarding the extent of which agreement had been reached, in relation to the foreign labour clause."

"[M]isrepresented the Vessel Operators' position regarding communication with its employees, and then proceeded to discredit that alleged position".¹²³

"[O]n a number of occasions, the MUA misrepresented the progress and status of bargaining".¹²⁴

- h. It is also a matter of public record that some union officials at the highest levels have been found to engage in conduct which steps into unlawful territory. In some cases, retaliatory action against union members who do not toe the line and take industrial action has occurred.
 - i. A Federal Court decision which was referenced in AMMA's primary submission, found that senior union leaders engaged in adverse action when they deliberately targeted employees in a "scab poster", who had worked during a period of strike action.¹²⁵
 - ii. The Federal Court found that as a consequence of the employees working during the strike, the objective to bring the operations of the port of Fremantle to a halt, failed. A fifth person named on the poster did not work during the strike, but had fraternised very briefly with those employees coming on shift who worked during the strike.

¹²² Ibid, at [63].

¹²³ Ibid, at [86].

¹²⁴ Ibid, at [72].

¹²⁵ Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814 (11 August 2015). The Court summarising findings in an earlier decision as follows:

[20] I found that Mr Tracey was angry after the strike had failed to bring the operations of the Fremantle port to a halt, and that Mr Tracey had undertaken the scab poster action as an act of vengeance against the four employees who had exercised their right not to go on strike. I found that this was also Mr Tracey's motivation in naming Mr Watson as a "scab" on the scab poster, even though Mr Watson had not worked during the period of the strike, namely, 1 to 3 December 2011.

[21] I also found that Mr Christopher Cain, the secretary of the Western Australia branch of the MUA, and the highest ranking MUA official in Western Australia, shared Mr Tracey's anger and that each of them had the motivation to "exact vengeance" against the named employees. I also found that Mr Cain had authorised Mr Tracey to engage in the scab poster action. Accordingly, I found that the MUA was directly liable for the scab poster action; and I found that the MUA had in respect of each of the named employees, engaged in adverse action in contravention of s 346 of the Fair Work Act.

- iii The court found the union and Assistant Secretary of the Western Australia branch of the union were liable to pay a pecuniary penalty and compensation as a result of the unlawful conduct.
- iv Another example which an AMMA member has raised is currently subject of investigation by the FWO and AMMA is therefore unable to comment as we would like to at this stage.
 - A. The allegations concern a trade union initiating disciplinary proceedings against union members who declined to take part in protected industrial action.
 - B. The union 'charged' the employees pursuant to the relevant union rules and therefore, the union members are subject to union disciplinary action.
- v These examples illustrate that unions do apply pressure on their members, in the context of protected industrial action. This type of pressure (whether unlawful or not) is not insignificant and must be considered by policy makers.
- vi Another recent example, is the enforceable undertaking that the NUW has entered into with the FWO as a result of "naming and shaming" employees who did not take part in protected industrial action and who resigned from the union. The details of the published enforceable undertaking disclose the following agreed matters:¹²⁶
- vii Workers employed by Sigma Pharmaceuticals Pty Ltd (Company) at its Distribution Centre in Belmont, Perth (Distribution Centre), who were members of the NUW attended a union meeting on 6 October 2014 convened by an NUW organiser working in the Western Australian office (Organiser).
- viii At the meeting on 6 October 2014, the majority of workers voted to take protected industrial action in support of a new Enterprise Agreement.
- ix Four of the five workers who voted against taking protected industrial action subsequently resigned from the NUW on 6 October 2014 (the Four Workers).

¹²⁶ Enforceable undertaking Re NUW General Branch (5 November 2015): <http://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings/2014-2015-enforceable-undertakings>

- x On 8 October 2014 the workers who were members of the NUW at the Distribution Centre (not including the Four Workers who had resigned their membership of the NUW) engaged in protected industrial action.
- xi The Organiser wrote the word 'SCAB' on each of the Four Workers' resignation letters and attached each of the resignation letters to an NUW banner. The NUW banner was displayed outside the Distribution Centre when the industrial action was held on 8 October 2014.
- xii The Organiser took photographs of the NUW banner containing the four 'SCAB' resignation letters and uploaded a photograph onto the Organiser's Facebook page titled "Sigma EBA 2014". Workers at the Distribution Centre were able to access the Organiser's Facebook page.
- xiii On discovering that their letters of resignation from membership of the NUW had been placed on an NUW banner and put on the Organiser's Facebook page bearing the word 'SCAB', each of the Four Workers expressed feelings of humiliation and embarrassment.
- xiv The Organiser engaged in the conduct set out above because the Four Workers did not engage in "industrial activity" (within the meaning of that term in s.347(f) of the FW Act), in that the Four Workers did not take part in the protected industrial action at the Distribution Centre.
- xv (We note in passing that this type of abuse by unions and union members against fellow employees needs to also be made explicitly subject to the anti-bullying provisions of the FW Act).
- i. The retaliatory conduct illustrated in the above paragraphs is intended to ensure that workers/union members toe the official line in solidarity and take part in protected industrial action. Whilst it could be argued that existing prohibitions under the FW Act already provides remedies to deter such conduct from happening in the first place, this relies on the will of regulators and witnesses to take action in the face of unlawful conduct. For employees who are members of the union, such vilification can be a life changing event.
- j. An employer can only genuinely bargain in good faith with its workforce and not pre-emptively engage or threaten any form of industrial action. Employers' options to apply leverage is therefore asymmetrical. Employers do not use a threat of response action (ie. a lock-out) as a tool

of leverage in bargaining – whilst theoretically possible, the employers main leverage in the bargaining process is to convince the workforce that the company's position is the more desirable one. This is essential to the shadow game of winning the “hearts and minds” of the workers. The union's objective is to secure its industrial objectives, which is not isolated to the bargaining conducted with one employer.

- k. The union has limited “skin in the game” – claims unions try to secure in agreements (which can sometimes involve trying to just retain conditions in legacy enterprise agreements decades old, rather than genuinely trying to secure new conditions) do not normally impact the union directly. If the union members are not content with the outcome in bargaining (or other conduct of the union), they will decide whether to remain as a member or resign.
- l. AMMA's experience representing companies in particular sectors of the resource industry, such as off-shore vessels, is illustrative that trade union strategies are also to secure its preferred log of claims with one company to then flow-on as an “industry standard” to other companies. This is a common theme within certain trade unions, predominantly within the construction and maritime industry. For example, in a recent publication by one trade union to its members, the industrial objective of seeking to flow-on a template enterprise agreement, because it is considered by the union as the “new industry standard” is extracted as follows:¹²⁷

“Your union has developed a new industry standard agreement for the commercial construction industry to replace existing agreements and for employers without an enterprise agreement to sign up to. It is our goal to see the wages and conditions in this new industry standard be paid across the industry and for workers doing work of equal value to be paid equally, regardless of where they work in the commercial construction industry and who they work for.”
- m. Of course a flow on strategy across an industry must displace the wishes of individual union members and their priorities at the workplace. It allows no room for cooperative and consensual workplace relations based on priorities of the employer and employees concerned.
- n. Bargaining representatives' power, on behalf of member workers, to threaten and take forms of industrial action is essential to understanding the regulatory impact (including both the costs and benefits) of creating

¹²⁷ CFMEU WA C&G publications, “New CFMEU Industry Standard Agreement”, May 2015.

a framework for the taking of protected industrial action under the FW Act, and whether any changes are warranted.

- o. It is also essential to understand the actual dynamic environment of real bargaining situations and not in the abstract or hypothetical. This includes understanding how trade union bargaining representatives (and officials within the upper hierarchy of the trade union) approach bargaining, the cultural and tactical issues at play and why in it can lead to poor bargaining outcomes.
- p. Unfortunately, it is only when a crisis is reached which impacts the future viability of a company, no less, that unions may become amenable to moderate their industrial claims.
- q. By that stage, it can be too late. One only needs to consider the recent situations faced by Australian car manufacturers and in the steel industry to see how unions oppose employer efforts in the tribunal and courts, when they seek to modify existing enterprise agreements to stay in business. The cycle is unfortunately all too common under the existing WR framework / FW Act:
 - i First, the WR system allows significant and asymmetric leverage to be used by some unions against employers in certain unionised sectors of the Australian economy.
 - ii The leverage (in the form of threatened or actual industrial action) is applied and translates into sub-standard enterprise agreements (from the point of view of the employer).
 - iii Terms and conditions in sub-standard agreements are attempted to be retained in future rounds of bargaining (even old industrial award terms, now excised from modernised awards, are retained in successive generations of enterprise agreements).
 - iv Even when a company is considering drastic measures including the possible closing down of operations unless cost savings, higher productivity or new efficiencies can be obtained, there is union resistance to implementing required changes.
 - v The resistance can manifest in the bargaining position taken, or in the courts or tribunal when the company attempts to implement changes to its workplace practice.
 - vi The use of industrial action at a point of time has ongoing effects and impacts in later rounds of bargaining.

- vii Often the threat of industrial action is applied to protect legacy conditions, agreed decades ago, and in different circumstances.
 - viii **Whilst some commentators may say that employers should just say no or walk away, this ignores the damaging costs and impacts of industrial action, as leverage applied in the bargaining process. Unlawful action can manifest and other forms of pressure, are also strategically utilised by trade unions, to achieve the trade union's industrial objectives (which may be firm specific or industry wide in nature).**
- r. The threat or actual taking of industrial action is a blunt instrument which is designed to make an employer capitulate to a trade union's bargaining claims. Its brutality as a form of a legalised tool in bargaining cannot be ignored or glossed over.
- i This is not to say that AMMA has suggested abolishing the capacity for employees to take protected forms of industrial action, but rather to ensure the policy discussion around industrial action is honest enough to confront the devastating effects it can have to the direct parties involved and to third parties.
 - ii In a matter involving AMMA and a member company, in an attempt to stop potential industrial action, the member of the Commission, quoting a well-known passage from a 1915 Harvard Law Review article, commented that "the Commission should respect the role of the legislature in prescribing industrial behaviour which, under the FW Act, allows (arguably encourages) parties engaged in bargaining to engage in the 'rude and barbarous process of strike and lockout', where force displaces reason".¹²⁸
 - iii Whilst some industrial action is relatively minor and a cause of frustration (ie. typing official correspondence in capital letters or wearing a particular coloured tie), other forms of industrial action, such as bans and stoppages, can have a very significant negative impact. It is therefore important for the PC to distinguish between the different levels and grades of employee claim action when considering policy responses to problematic areas of the system.
293. The PC in its Issues Paper 3 also observed that in relation to the effectiveness of industrial action:¹²⁹

¹²⁸ *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia*, [2014] FWC 8130, (unreported, 17 November 2014).at [63].

¹²⁹ PC draft report, at p.11.

Any given industrial dispute reduces efficiency at the time of the dispute, without any corresponding short-term employee benefit (strike pay is unlawful). Therefore, disputes appear superficially to involve pain and no gain. (emphasis added).

294. Notwithstanding, the PC commented that *“disputes are a bargaining tool that may reduce power imbalances between parties, and can therefore result in long-run income redistribution to employees and, in some instances, efficiency gains. Industrial action can also be used as an ‘information gathering’ exercise where a party to a negotiation has incomplete information about the other party.”*¹³⁰
295. The PC draft report also claims that *“[b]argaining is a game in which parties do not have entirely coincidental interests. Each wants a bigger slice of the cake ... Consequently, tactical behaviour is to be expected.”*¹³¹
296. And elsewhere, the PC draft report states that *“[b]argaining should be about the two parties”*.¹³² We entirely agree and this needs to carry through into the final report and recommendations.
297. The deliberate gaming of the system, which the FW Act encourages and rewards, has not been analysed in sufficient detail during this inquiry. There has been no in-depth analysis of the way a trade union acts as a significant institutional and legal actor.
298. This may stem from a perceived lack of evidence. However, this would not impede the PC embarking on its inquiries with companies, employees and trade unions to gather information about how the system actually works in practice.
299. Secondly, the manner in which trade unions seek to tactically use industrial leverage in the form of protected industrial action to secure its own objectives in bargaining cannot be divorced from the quality of the “bargain” which is ultimately reached. In fact once the FW Act commenced, the ACTU drafted a strategic bargaining guide¹³³ to assist trade unions in securing its individual and collective industrial objectives. The guide refers to the new found legal capacities and strategic use of new provisions to secure outcomes in bargaining, including how unions should draft letters to employers to initiate bargaining and oppose the default IFA model clause.
300. The ACTU has recently assisted its affiliated trade unions with tool kits on specific issues, such as superannuation¹³⁴. Trade unions should not just be seen to be providing a skilled service on behalf of union members in the form of negotiation

¹³⁰ Ibid, at pp.11-12.

¹³¹ PC draft report, at p. 557.

¹³² Ibid, at p.560.

¹³³ Provided in confidence to the PC.

¹³⁴ Provided in confidence to the PC.

skills and WR know-how, but should be seen as a much broader political and industrial movement which engages in pursuing its objectives in a sophisticated and strategic manner.

301. Employers in the resource sector simply want to get on with employing the best talent it can, training its workforce, providing the best terms and conditions, creating a safe working environment and ensure its operations are viable, sustainable and profitable. Unlike trade unions, they do not spend their time organising, recruiting, training, and campaigning for political and industrial issues.
302. AMMA believes there should be more analysis of case studies and agreements which are negotiated with employees directly and not with a union acting as a bargaining representative. The PC has to date missed a rare opportunity to consider the decline in union membership, the individualistic preferences of employees and what this means for a WR system for the future. The reality is that almost 90% of private sector employees chose not to join unions, and an even greater proportion of workplaces have no union members or engagement with unions. Our WR framework needs to take this into account, and be shaped for this reality, rather than assuming (and imposing) an approach which puts unions at the centre of the system and which grants them massive representational privileges.
303. The PC draft report makes an interesting observation:¹³⁵
- “Engagement cannot be legislated, and indeed regulatory requirements that attempt to do so within an adversarial bargaining framework undermine the voluntary nature of trust”.*
304. Given the PC recognises the adversarial nature of the bargaining system and the fact that employee engagement cannot be legislated, it must therefore follow, that the purported objects of enterprise bargaining must be re-examined. The FW Act lists a number of objectives of the enterprise bargaining system, such as at s.3(f) and s.171(a) of the FW Act as follows:¹³⁶

“ ... achieving productivity and fairness through an emphasis on enterprise-level collective bargaining ...”

“... provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits ...”

¹³⁵ Ibid, at p.572.

¹³⁶ PC draft report, at p.536.

305. The PC draft report does not appear to accept that the objectives can be met through regulatory intervention, in the form of enterprise agreements under the FW Act. If this is the view of the PC, then at a minimum those statutory objectives quoted above should be amended. There is however no recommendation in the PC draft report to even revise those purported objectives.
306. Related to this issue is the observations / comments about the role of a trade union bargaining representative vis-à-vis the “two parties”. The PC draft report notes that:¹³⁷
- “While some union representatives may be obstructive, many are experienced and pragmatic negotiators who are familiar with the FW Act, and can therefore act as competent and predictable representatives, to the benefit of both principal negotiating parties.” (Emphasis added)*
307. With respect - leaving aside this broad assertion about union representatives' skills as negotiators without citing any evidence - the above paragraph misses the point it makes entirely.
308. Where a union representative is involved in bargaining for one or more workers, the principal negotiating parties are the employer and trade union bargaining representative. This is also recognised and given effect to in the FW Act.
309. For example, under s.228 of the FW Act, the employer must actually recognise and must negotiate in good faith with the bargaining representative – and not with its own employees. When the GFB provision where relatively untested, trade unions even opposed the employer's direct communication with its own employees!¹³⁸
310. It must also be recalled that only a bargaining representative and not an employee or employees (unless they appoint themselves or a third person by written instrument) is able to access the following orders:
- a. GFB orders under s. 229.
 - b. A serious breach declaration under s.234.
 - c. A majority support determination under s.236.
 - d. A scope order under s.238.
 - e. An application for the FWC to deal with a bargaining dispute under s.240.

¹³⁷ Ibid, at p.578.

¹³⁸ See for example: *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442; *NUW v Patties Foods Ltd* [2011] FWA 4103; *ASU v Global Tele Sales Pty Ltd* [2011] FWA 3916; *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510.

311. Under the protected action ballot provisions, the bargaining representative applies for a PABO under s.347.
312. The scheme of the FW Act was not designed by accident, as AMMA's primary submission aptly illustrates. The ACTU and former ALP Government repealed holus bolus, the former WR Act and replaced it with a new legislative framework.
313. Whilst some concepts may appear to be retained in the FW Act, the primacy given to trade unions within the bargaining and industrial action framework deserves greater scrutiny in terms of the transaction costs and where agreement are reached, the quality of the outcomes realised in an enterprise agreement.
314. A major problem appears to stem from the lack of research as to why businesses voluntarily seek to enter into an enterprise agreement. Whilst the PC draft report refers to research conducted by the FWC which the majority of employers in the resources industry (and this would not be isolated to this industry), is the limited gains to be made in bargaining for an enterprise agreement.¹³⁹
315. Without major changes to the existing system, employers in the resource sector will predominantly see the benefits of an enterprise agreement as only providing certainty and stability in its operations for a period of time. This means that protection from industrial action will remain the main benefit of an enterprise agreement. Whilst some benefits can be achieved by employers (ie. flexibility for statutory safety-net minima and linking productivity improvements to remuneration), there are few other major benefits for an employer to agree to bargain for an enterprise agreement.
316. AMMA has provided the PC with PC two redacted logs of claims (that were served on AMMA company members by different unions. They serve to illustrate what a typical log of claims looks like, the breadth and depth of the claims pursued in bargaining and the level of detail particularised by unions when seeking to negotiate a new agreement. They also demonstrate the type of matters sought by unions usually detail claims for higher remuneration and greater benefits for employees and greater rights for unions.
317. There is limited ability for employers to secure any trade-offs to some or all terms and employers spend a considerable amount of time and energy trying to reduce the claims from ambit positions to realistic and sensible propositions, having regard to the commercial realities a company faces. Recalling that bargaining takes place against a significantly expanded set of minimum statutory conditions of modern awards, the NES, compulsory superannuation, in addition to employment terms in the contract of employment.

¹³⁹ PC draft report, at pp. 550-551.

318. Unfortunately, the actual bargaining process is not analysed or tested in any detail in the PC draft report. There is no analysis of union logs of claims and how the process is gamed by the unions to seek ambit claims only to settle on a few realistic matters of core concern. There is no detailed consideration of the type and quantum of claims typically pursued by trade unions. Nor is there any similar consideration as to the potentially damaging industrial action that is applied in pursuit of these and whether the balance is right.
319. Similarly, AMMA believes that the PC draft report does not consider in sufficient detail the costs and benefits of protected industrial action available under the FW Act, and impacts on the employer, relevant employees or innocent third parties (ie. suppliers, customers, and the economy).
320. The draft report appears to gloss over the real impact industrial action has where it is either threatened (in bargaining) or actually used, including the following: *"[g]iven the low current level of disputes, it is an open question whether there is any requirement for changes in the FWA's arrangements for industrial disputes ..."*¹⁴⁰
321. This appears to be the underlying assumption which has informed the various draft findings and recommendations within the PC draft report. Whilst the aggregate level of officially captured industrial action is low, against historical reference points, this does not detract from the argument that there are cogent reasons from a policy perspective for improvements to be made within the architecture of the current WR system to prevent industrial action.
322. Moreover, the lack of a dedicated chapter devoted to industrial action unfortunately downplays the significance of protected industrial action in the real economy, and in critically important industries and occupations.
323. The lack of detailed analysis of the use of protected industrial action (as an industrial leverage tool) by trade unions in bargaining negotiations does not provide any impetus to reduce the capacity for industrial action to occur in the first place. That said, AMMA encourages the PC to continue to critically examine from a policy perspective how targeted reforms to the current provisions can reduce relegate, in its own words, *"welfare-destroying industrial action"*, as a genuinely last resort measure when bargaining has reached an impasse.
324. AMMA believes that the PC should recommend a re-of design the current legal architecture for taking protected industrial action. In other words, AMMA fundamentally disagrees with the PC's provisional view that *"[o]nly minor tweaks are required"* to re-calibrate the system.

¹⁴⁰ PC IP 3, at p.13.

325. The use of industrial action as a blunt object of bargaining strength is not just limited to the resource industry. A number of case studies and detailed information was provided by AMMA in its primary submission to the PC.
326. A more recent and real example of how blunt an instrument industrial action can be has materialised in Victoria in recent weeks.
327. The trade union representing workers employed by Metro Trains staff engaged in a brief period of protected industrial action (in the form of a 4 hour stoppage) on Friday 4 September. The parties had been negotiating for a new enterprise agreement since May this year, with the union making an application for a PABO on 16 July 2015.¹⁴¹ In proceedings to terminate industrial action planned for Friday 4 September, the Commission described the negotiations to date as “protracted”:¹⁴²

“Metro Trains Melbourne Pty Ltd (“Metro Trains”) and the Australian Rail Tram and Bus Industry Union (“the RTBU”) have been involved in protracted negotiations about the establishment of a new enterprise agreement to cover the parties.”

328. Evidence provided to the Commission about the bargaining negotiations indicated that 20 formal meetings had taken place since May.¹⁴³ It appears that the number of meetings may have led to the observation by the Commission that the negotiations had been protracted.
329. Public reporting of the 4 hour stoppage indicated that:¹⁴⁴
- a. The industrial action was to occur between 10am and 2pm on Friday 4 September. However, the employer operator of the public transport train network in Melbourne required all trains to return to the depot well before the stoppage. This meant that train cancellations actually began from approximately 8.30am with trains not able to be serviceable until 4.30pm.
 - b. Approximately 320 replacement buses were required to pick up the services which were cancelled.
 - c. Approximately 300,000 passenger trips were disrupted.
330. The Victorian Public Transport Minister, Jacinta Allan, indicated a day before the scheduled industrial action that the Victorian Government has “done everything

¹⁴¹ *Re Metro Trains Melbourne Pty Ltd* [2015] FWC 6037 (unreported, 2 September 2015).

¹⁴² *Ibid* at [1].

¹⁴³ *Ibid.* at [13].

¹⁴⁴ “Trainwreck: 700 services cancelled as Metro and union wage war over Melbourne rail system”, *The Age*, Adam Carey (3 September 2015).

possible over the last three weeks to keep the parties negotiating – but this is a move that the union has taken not as a last resort, but ... as a first resort”.

331. The head of the relevant trade union reportedly said that the industrial action was *“not just about the quantum [17 per cent]”* wage increase, but to the union *“it’s about our hard one conditions ... We all remember the strikes back in 1997, we’re not prepared for this generation to just let those conditions go away”*.¹⁴⁵
332. On 31 August, the private company operating the public rail network, with the support of the Victorian Government, applied to the FWC to terminate the industrial action under s.424, with the Commission hearing the application on 1 September and refusing the application on the same day.
333. This was despite evidence provided by company representatives that *“school children, the disabled, and concession card holders, who typically use train services during the time of the stoppage and may have limited other travel options available, are groups likely to be particularly impacted”*. Other evidence provided to the Commission about the likely impact of the planned stoppage included:
- a. Mitigation strategies including the use of 250 buses would only assist approximately 17,000 passengers that would otherwise travel by train during the period of the stoppage. Evidence provided was that in excess of 200,000 passengers could actually be impacted.
 - b. Greater risk on the roads due to additional traffic congestion.
 - c. There was a degree of confusion about who will actually be involved in the stoppage. Potential increased absenteeism and the possibility of unexpected disruptions to the network are also likely to exacerbate the impact of the stoppage.
334. As the company failed in its attempt to terminate the industrial action, the trade union commenced the planned stoppage on 4 September. This despite the Commission indicating that *“there is little doubt that if the four hour stoppage proposed by the Australian Rail Tram and Bus Industry Union proceeds on Friday, 4 September it will result in significant disruption and inconvenience”*.¹⁴⁶ Whilst the company made an application to terminate the industrial action, the Commission declined to also suspend the industrial action, which is available as a matter of discretion under s.424 stating:¹⁴⁷

¹⁴⁵ Ibid.

¹⁴⁶ *Re Metro Trains Melbourne Pty Ltd* [2015] FWC 6037 (unreported, 2 September 2015), at [24].

¹⁴⁷ Ibid, at [33].

"It is evident why Metro Trains have made this application. It is obviously concerned to ensure that rail services operate in metropolitan Melbourne in a way that is as close to normal as possible, regardless of any additional concerns they may have about the possible welfare and safety of the population or any part of it. Nevertheless, the scheme of the legislation allows for protected industrial action to be taken in certain circumstances and, as indicated, I am not satisfied having considered all of the circumstances involved in this matter that I am required to suspend or terminate that action in this case."

335. Whilst the direct and indirect costs of the industrial stoppage is difficult to quantify, it was not insignificant for a number of reasons. Commuters were informed to work from home if able to do so on the day of the stoppage and VicRoads cancelled all roadworks within a 15km radius around the CBD.¹⁴⁸ The stoppage impacted the normal trading operations of many businesses within the CBD and other locations in Melbourne who rely customers using the train network. The Mayor for the City of Melbourne estimated the cost of the stoppage would be approximately \$10M.¹⁴⁹
336. The recent experience in Victoria has parallels with the resource industry in two regards. The significant impacts of industrial action has been quantified and analysed by KPMG. Isolated instances of industrial action can have disproportionate and disparate impacts. Also, trade union strategies to take industrial action can be premature. Whilst the draft report makes a significant draft recommendation in terms of requiring majority support determination to commence bargaining (DR 19.1), the PC draft report appears to reject suggestions/recommendations from employers to build into the system more thresholds before industrial action can occur.¹⁵⁰ The PC draft report states in relation to this issue:¹⁵¹

"Only allowing industrial action after negotiations have stalled may encourage a party to refuse to compromise on ambit claims in order to stall negotiations and trigger access to industrial action. Further this ignores the role that industrial action (or the threat of it) can play in preventing negotiations from stalling in the first place, by compelling parties to reach agreement in order to avoid or bring to an end industrial action."

337. It is unclear why the PC believes the first sentence in the above paragraph is a statement of fact which applies in generally in bargaining.

¹⁴⁸ "Trainwreck: 700 services cancelled as Metro and union wage war over Melbourne rail system", The Age, Adam Carey (3 September 2015).

¹⁴⁹ "Melbourne train strike: Metro timetable changes, service cancellations, commuter tips", The Herald Sun, Aleks Devic, Chad Van Estrop, (4 September 2015).

¹⁵⁰ For example, Draft PC report at pp.680-682.

¹⁵¹ Ibid, at p.681.

338. AMMA's direct experience negotiating with unions on behalf resource companies, in addition to feedback from resource companies, would suggest the reverse. That is to say, by allowing protected industrial action to only occur once bargaining has been exhausted (understanding that this is subjective and may be in the eye of the beholder), this would be the legitimate trigger point for employees and an employer to actually consider utilising industrial action as leverage in the bargaining negotiation process. The fact that industrial action can be sanctioned by the FWC (by granting a PABO) without bargaining needing to reach any threshold such as an impasse means industrial action can occur too early in the bargaining process. Given that policy makers generally accept, as a matter of public policy, industrial action should be avoided at all costs, given its devastating impact on both the employer, employees and third parties, it is reasonable that the PC examine ways to mitigate the taking of industrial action where it is not warranted in the bargaining process.
339. The PC's recommendations do not support any changes to the ability for a union to take industrial action – in fact – in information requests, it appears to contemplate watering down existing requirements. With respect, it is difficult to understand that a scenario where two months of bargaining between a union (on behalf of workers) and an employer can mean that protected industrial action, which can cause significant direct and indirect costs to multiple stakeholders and the public, as clearly demonstrated recently in Victoria, meets the PC's own criteria for a system that *"provides balanced bargaining power between the parties, that encourages employment, and that enhances economic efficiency"*.¹⁵²
340. The second sentence in the paragraph actually encapsulates the risks AMMA has indicated to the PC in its primary submission. That is, the threat of industrial action or the taking of industrial action (whether low level bans or actual stoppages), dramatically impacts the dynamic of bargaining and the ability to reach enterprise agreements that are not inimical to a company's commercial objectives. Unfortunately, it can also mean, from an employer perspective that sub-optimal terms and conditions are agreed to, in order for industrial action to stop or not occur in the future. The avoidance of short term pain, can translate into longer term sub-optimal agreements. Hence, the cycle is repeated when the enterprise agreement reaches its nominal expiry date.

¹⁵² PC draft report, at p.3.

Terminating Enterprise Agreements after NED Reached

341. Whilst an employer is able to apply to the FWC to terminate an agreement under s.226 of the FW Act when it has passed its nominal expiry date, this is an uncertain pathway.¹⁵³ The combination of onerous statutory tests that must be satisfied and probable union opposition to an employer application, generally means that many employers opt not to commence proceedings to terminate enterprise agreements.
342. AMMA calls on the PC to consider moderating the existing rules to terminate enterprise agreements, which would allow bargaining negotiations to occur on the basis of an applicable modern award (as a starting point), rather than from legacy enterprise agreement terms and conditions.
343. As has recently occurred in the *Aurizon* case, an employer could provide undertakings that certain terms and conditions be preserved. An employer could provide legal undertakings that they will maintain existing wage rates and guarantee future wage increases, which may provide scope to narrow the issues in dispute and assist with protracted bargaining negotiations. Given the limited options for employers to apply industrial leverage upon a trade union in bargaining negotiations, to moderate their expectations in bargaining, an ability to terminate agreements in a more flexible manner would be an important tool to re-set bargaining negotiations.
344. In relation to the proposed draft recommendations for industrial action, the PC draft report states:¹⁵⁴

"The primary goal of the recommendations in this chapter is to provide parties with appropriately aligned incentives when undertaking industrial action. Ideally, this will lead to fewer industrial disputes because parties will reach mutually satisfactory agreements in the knowledge that industrial action can be taken."

345. AMMA strongly supports the goal of few industrial disputes and AMMA's specific feedback in relation to draft recommendations can be found below. In saying that, it is unclear that fewer industrial disputes will occur *"because parties will reach mutually satisfactory agreements in the knowledge that industrial action can be taken"*. One does not lead to the other, and as AMMA has indicated in its submissions, the cost of industrial action in a pressurised bargaining environment can lead to sub-standard outcomes.

¹⁵³ See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126 (3 September 2015). See *Re Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540 (22 April 2015).

¹⁵⁴ PC draft report, at p.700.

346. AMMA firmly believes that the stated primary goals and objectives as outlined above will be further achieved by addressing the ability to take industrial action in a manner which the draft recommendations do not address.

PC Draft Recommendation 19.1 – Protected Action Ballot Orders

DRAFT RECOMMENDATION 19.1

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

AMMA's response

347. AMMA strongly supports this particular recommendation, which was also recommended by the Fair Work Review Panel / PIR, for the reasons outlined in AMMA's primary submission.¹⁵⁵
348. However, there should also be a similar mechanism where bargaining has occurred by a majority support determination when a majority of employees no longer wish to bargain for an enterprise agreement. There is no public policy reason why an employer who does not wish to continue bargaining in good faith, should be required to continue to bargain for the sake of bargaining. The interpretation of "bargaining" in the context of s.228 of the FW Act was aptly described in a Federal Court judgement by reference to the "haggle scene" in the Monty Python's movie, *Life of Bryan* in AMMA's primary submission.¹⁵⁶
349. A summary of "bargaining" is illustrated by the following extracts of the Federal Court decision (emphasis added):

"GOOD FAITH BARGAINING – SECTION 228(1)

[30] It is concluded that the "good faith bargaining requirements" imposed by s 228 have a wider operation than that contended for by Endeavour Coal.

[31] The outer limits of the conduct which falls within s 228 is largely dependent upon factual matters which will undoubtedly vary from one situation to another. Certainly, it is neither possible nor prudent to attempt any exhaustive statement as to what will constitute compliance with the

¹⁵⁵ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015, at p.180.

¹⁵⁶ *Endeavour Coal Pty Limited v Association Of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764, at [39]. See also Ashurst Australia Employment Alert, "'Good Faith Bargaining' under section 228, as illustrated by Monty Python" (24 July 2012).

“good faith bargaining requirements” in the present statutory context. Clearly enough, whatever the reach of s 228(1), any “requirements” imposed by that provision are limited in scope by the matters contained in s 228(2).

[32] Section 228(1), it will be noted, does not expressly impose upon a “bargaining representative” any duty or obligation to meet the “requirements” there referred to. A failure, however, to meet one or other of those “requirements” may provide the factual foundation for Fair Work Australia being “satisfied” that a “requirement” has not been “met” and may occasion the making of a “bargaining order”: s 230(3). Once a “majority support determination” has been made, an employer who does not then engage in “bargaining” and meet the requirements of s 228(1) faces the prospect of Fair Work Australia making an order pursuant to s 230.

[33] The “requirements” set forth in s 228(1) which a “bargaining representative ... must meet” are thus the touchstone – or the condition precedent for the purposes of s 230 – and the touchstone against which the conduct of a “bargaining representative” is to be assessed.

[34] It is concluded that once a “majority support determination” has been made, Endeavour Coal must thereafter approach “bargaining” with the Association with a genuine (or “good faith”) objective or intention of concluding an “enterprise agreement” – if possible. What is required is that those participating in the “bargaining” must keep an “open mind” as to the prospect of ultimately reaching agreement: cf. *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [156], 153 FLR 236 at 268 per Einstein J. It is further concluded that a “bargaining representative” may be held to have fallen short of the “requirements” set forth in s 228(1) if there is a failure to put forward for consideration a proposal or a counter-proposal or suggested terms which may be acceptable. The manner in which Endeavour Coal approaches “bargaining” is, subject to s 228(1), largely a matter for it to determine. Section 228(1) does not require a party to “bargain” in any particular manner: cf. *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [38], 175 FCR 141 at 148 per Spender, Sundberg and McKerracher JJ. But, within the bounds of the “good faith bargaining requirements” set forth in s 228(1), Endeavour Coal is certainly not required to put self-interest to one side. Indeed, s 228(2) clearly contemplates that no party to the bargaining process is required to do so. Albeit in the context of construing a contractual obligation to act in “good faith”, it has been recognised that “good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party”: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [147] per Hodgson JA. See also: *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 at [62], 41 WAR 318 at 339 per Pullin JA. Newnes JA agreed with Pullin JA.

[35] The putting of a proposal or a counter-proposal, or the suggestion of terms for the purpose of “bargaining” or advancing the “bargaining”

process, does not irrevocably commit Endeavour Coal to ultimately agree to the proposal or to those terms and limit the “bargaining” solely to matters which have not yet been agreed upon. To impose such a constraint upon the bargaining process would be contrary to s 228(2). But, in the course of “bargaining”, if Endeavour Coal sits “mute” and merely reject proposals or terms which are being advanced for its consideration, it may fail to meet the “requirements” set forth in s 228(1). A party who participates in bargaining that is subject to the requirements of s 228(1) must genuinely participate in the bargaining process; it cannot adopt the role of a disinterested suitor, only rejecting offers and proposals made by other “bargaining representatives”.”

...

[39] ... Illustrative of the process of “bargaining” or “haggling” is the exchange between Brian and the street merchant in Monty Python’s Life of Brian.

[40] To the extent that it was faintly suggested that “bargaining” stood in contrast to the term “negotiating”, or that “bargaining” involved less in terms of a willingness to move or to disclose a position than “negotiating”, any such distinction is rejected.

[41] The term “bargaining” involves the parties to the “bargaining” process engaging in a process of “give and take”. Moreover, “bargaining” in the present legislative context does not stand alone. It is to be construed as part of the phrase “good faith bargaining requirements”: cf. *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at 401-402 per Brennan CJ, Dawson, Toohey, Gaudron, and McHugh JJ. Even in the absence of the phrase “good faith”, it may still have been concluded that a legislatively imposed requirement to “bargain” would also incorporate a requirement to do so in “good faith”: *Brownley v Western Australia (No 1)* [1999] FCA 1139 at [20], 95 FCR 152 at 161 per Lee J. Even so, the express inclusion of the phrase “good faith” serves to reinforce the need for those who approach the bargaining process to do so in a genuine or “good faith” manner.

...

[43] Construed in its entirety, the “good faith bargaining requirements” impose conditions which are “called for or demanded ...”. That which will satisfy those “requirements” will vary from case to case. At the outset of bargaining, one party’s “bargaining representative” may consider it in that party’s best interests to merely solicit or determine that which is being sought by another party. It may be that what the other party seeks is less than or within the range and scope of what may be on offer. In such cases, bargaining may well be completed quickly – one party seeking less than the other is prepared to give with both parties presumably happy to reach agreement. In other circumstances, one party’s representative may again attempt at the outset to merely ascertain what the other party is seeking. The bargaining may proceed by one party’s “bargaining

representative" repeatedly making requests which may be repeatedly rejected. But at some stage during the process there may come a time when the combined effect of the "good faith bargaining requirements" requires the proffering of a counter-proposal. To progress "bargaining" in compliance with s 228, a participant may be required to disclose what they may be prepared to tentatively accept – even if all that has so far been put to them for consideration has been rejected. A party may be required to advance for consideration a proposal which it may be prepared to accept, albeit a proposal which may well be subject to qualifications or reservations. The point in time when a "bargaining representative" may be required to positively respond to proposals being advanced for its consideration – or to put its own proposals – will vary from case to case. It is both impossible and imprudent to devise a set course which all bargaining must follow. The manner in which one party may approach bargaining may, in some situations, be such that a failure to put a counter-proposal may not be a failure to meet the requirements imposed by s 228(1). The option, however, of one party sitting mute throughout the entire bargaining process – and not "putting" its own proposals – may in some situations fall short of the requirements imposed by s 228(1)."

350. Currently, the GFB provisions, in combination with majority support determinations, require active participation (by an otherwise reluctant employer) to engage in "bargaining" for an enterprise agreement. However, the scheme of the FW Act does not seem to deal with the situation where protracted and coercive "bargaining" as described by the Federal Court, where there is no longer majority support.
351. A union who obtains majority support is able to control the flow of the bargaining process, including whether to cease bargaining for a period of time and consider applying for a PABO to take industrial action or seeking GFBO. This the result of introducing into the federal workplace relations framework for the first time, an ability to coerce and force bargaining where an employer does not wish to enter into an enterprise agreement. Previous to this change, the only way to compel an employer to engage in bargaining for a collective agreement, has been the threat or taking of industrial action.
352. To reiterate, AMMA's primary submission recommended removing majority support determination from the WR system. However, if it is to remain as an ongoing feature of the WR system, majority support should be determined by a secret ballot at the request of the employer and conducted by the AEC.

Re-Determining Majority Support

353. AMMA notes the PC's comments in relation to a "potential peculiarity in the current bargaining process" in relation to protracted bargaining negotiations (ie. Cochlear Limited).¹⁵⁷ The PC draft report states:¹⁵⁸

"However, the case raises the question of whether it should be possible for employees to retract a majority support determination if the majority of them wish to do so."

354. In response to this issue, AMMA also recommends consideration of a mechanism to determine whether a majority of employees wish to continue to bargain for an enterprise agreement. If a majority of employees no longer wish to bargain for an enterprise agreement, a company should not then need to continue to be subject to GFB, nor subject to threats or the possibility of protected industrial action in perpetuity. Whilst paid lawyers and industrial advocates may keep reaping the rewards from protracted bargaining, it is difficult to conceive on public policy grounds why an employer and union should be locked in GFB for years on end, at least without a safety-valve of re-setting the situation.
355. Currently employers who do not wish to enter into an enterprise agreement (or change their mind after agreeing to bargain), need to expend considerable time and significant costs, to the GFB process even though a bargaining representative is not required under s.228(2)) to:
- a. make concessions during bargaining for the agreement; or
 - b. reach agreement on the terms that are to be included in the agreement.
356. It is reasonable that a trade union or group of workers should be compelled to re-start the bargaining process after a sufficient period of time or ongoing and protracted bargaining. Whilst AMMA is not proposing a hard and fast arbitrary time limit to determine when this juncture has been arrived at, the ability to test majority support by an employer may prove to be the best method to cease bargaining and GFB obligations for a period of time (ie. 6 – 12 months) before re-commencing the process.
357. Whilst this will undoubtedly be strongly opposed by trade unions, the PC should consider the policy and practical benefits for a trade union to continue forcing an employer to bargain for an agreement when there is little or no reasonable prospect of an agreement being reached. If an employer ultimately agrees to an agreement after such a hostile and protracted battle, it is likely to have

¹⁵⁷ Ibid, at p.559.

¹⁵⁸ Ibid, at p.600.

damaged the relationship between the employer and the employees (many of whom may not be in support of an enterprise agreement).

Arbitration of Intractable Disputes

358. AMMA also notes and welcomes the PC's finding that it “does not accept that greater access to arbitration will lead to improved behaviour across the bargaining landscape”.¹⁵⁹ As detailed in AMMA's primary submissions, this is the correct policy position and AMMA continues to support this overall finding.

PC Draft Recommendation 19.2 – Suspending or terminating industrial action

DRAFT RECOMMENDATION 19.2

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

AMMA's response

359. AMMA generally supports this recommendation as there are a number of safeguards within s.423(4) for the FWC to be satisfied before making an order to suspend or terminate the relevant industrial action.

PC Draft Recommendation 19.3 – Withdrawing industrial action

DRAFT RECOMMENDATION 19.3

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

AMMA's response

360. AMMA supports this recommendation. However, the condition precedent that the employer implement a “reasonable contingency plan in response to the notice of industrial action” may set an artificially high statutory threshold which

¹⁵⁹ PC draft report, at p.559.

will be used by unions to challenge an employer's decision. It is foreseeable that unions will challenge the reasonableness or otherwise of the contingency plan (ie. on the grounds that the contingency plan is unreasonable). There will also be arguments about what exactly constitutes a “contingency plan”.

361. To ensure that the policy rationale of this recommendation is given effect to, the employer should be able to legitimately stand down relevant employees, where a notice of industrial action is withdrawn for a tactical basis by the trade union.

PC Draft Recommendation 19.4 – Withholding protected action ballots

DRAFT RECOMMENDATION 19.4

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

AMMA's response

362. AMMA supports this recommendation with one minor change. AMMA suggests that the Commission satisfies itself that a group of employees (or a bargaining representative, acting on their behalf) have repeatedly withdrawn protected action without the agreement of the employer, as an industrial tactic.
363. Once the Commission is satisfied that the facts have been established, it should be mandatory for the Commission to withhold a future protected action ballot for a minimum period of 90 days.

PC Draft Recommendation 19.5 – Deductions for industrial action

DRAFT RECOMMENDATION 19.5

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

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

AMMA's response

364. AMMA suggests the PC adopt a cautious approach to this area by recommending that the Australian Government undertake further consultation with relevant stakeholders to determine what, if any changes, could be made to simplify the existing rules around calculating deductions for periods of industrial action.

PC Draft Recommendation 19.6 – Penalties for unlawful action**DRAFT RECOMMENDATION 19.6**

The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.

AMMA's response

365. AMMA supports increasing the pecuniary penalties that apply to unlawful or unprotected industrial action related orders issued pursuant to s.422 and s.417 of the FW Act. Further consideration as to the quantum of those penalties should be provided by stakeholders to the Australian Government.
366. Moreover, the PC should recommend that the Australian Government give active consideration to introducing a specific provision which allows the court to order the sequestration of assets to deter the occurrence of unlawful or unprotected industrial action. AMMA notes that such a provision is contained in the Australian Government's *Building and Construction Industry (Improving Productivity) Bill 2013*, but that this would only have limited application to the building and construction industry as defined by that proposed legislation.
367. The PC should recommend that the Australian Government give active consideration to introducing a specific provision for unlawful picketing, as this is currently not amenable to sanction under the FW Act (unless it falls within the confines of other parts of the FW Act such as Part 3-1 or is amenable to legal proceedings because the action is an exception to the immunity provision under s.415). This is also contained in the *Building and Construction Industry (Improving Productivity) Bill 2013*, but would only have limited application to the building and construction industry as defined by that proposed legislation.

Information request – Simplifying protection action ballots¹⁶⁰

INFORMATION REQUEST

The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:

- *removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action*
 - *amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared*
 - *granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.*
-

AMMA's response

368. For the reasons outlined in AMMA's primary and reply submission, AMMA does not support removing existing requirements. If implemented in full or in partial, they will potentially result in more instances of industrial action and not fewer, result in more uncertainty and less ability to manage the impact of industrial action. This is inimical to other draft recommendations and findings that the PC draft report proposes. Because of the damaging impact industrial action can have, any watering down of existing requirements, which are understandably stringent, is not supported by the resource industry. It is difficult to see how changing the requirements referred to above will improve the existing system from an employer perspective or for innocent third parties.

Information request – Significant harm¹⁶¹

INFORMATION REQUEST

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

¹⁶⁰ PC Draft Report, p.57

¹⁶¹ PC Draft Report, p.58

AMMA's response

369. AMMA recommends that any statutory definition for the term "significant" should be given its ordinary dictionary meaning. The explanatory materials to the amendments would make clear the mischief the amendment is attempting to address.

Information request – Risks to life, personal safety, health and welfare¹⁶²

INFORMATION REQUEST

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

AMMA's response

370. For the reasons outlined in AMMA's primary and reply submission, AMMA does not support lowering the threshold to make it harder for suspending or terminating industrial action. Currently, it is interpreted by the Commission to be a significantly high threshold and many employers are not even able to satisfy the current statutory test.

Information request – Deductions for partial bans/part performance¹⁶³

INFORMATION REQUEST

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

AMMA's response

371. AMMA welcomes efforts to simplify the existing complexities of calculating deductions of industrial action where they involve partial work bans. The PC should recommend that the Australian Government consider simplifying rules

¹⁶² PC Draft Report, p.58

¹⁶³ PC Draft Report, p.59

around partial work bans including allowing an employer to deduct a minimum of 25 per cent of wages for the duration of any partial work ban.

Information request – Graduated employer industrial action¹⁶⁴

INFORMATION REQUEST

The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.

AMMA's response

372. AMMA supports this recommendation. The blunt instrument of a lock out does not allow for similar types of industrial action by employers that is available and utilised by employees at present. This asymmetry in industrial leverage should be addressed by the PC. The PC should recommend to the Australian Government that a workable definition be developed which allows for a range of employer industrial action. It is difficult to operationalise statutory definitions at this point in time. However, it should also be recommended that industrial action by an employer should not be limited to when employee claim action is actually taken. The employer should be able to take graduated industrial action from the time a notice of industrial action is served.

Key priorities left unaddressed

373. As indicated in AMMA's primary submission, a number of targeted and moderate reforms would dramatically improve the current WR system, whilst ensuring that industrial action is still available as a genuine last resort to both employees and employers.
374. AMMA believes the following reform options, which have been considered in light of the PC's draft recommendations and findings, will go some way to improving the current system of protected industrial action:¹⁶⁵
- a. Introducing an absolute income cut-off point which renders an employee ineligible to take part in protected industrial action. Whilst AMMA raised this matter in its primary submissions and it is addressed in the PC's draft report, AMMA believes this is worthy of further consideration.

¹⁶⁴ PC Draft Report, p.59

¹⁶⁵ AMMA's reform options related to industrial action is contained in AMMA's primary submission (see chapter 4.1).

- i If the current rationale underpinning the ability to take industrial action is *"helping to reduce asymmetries in information and bargaining power"* then by logic, this means that some employees possess more or less bargaining power relative to other employees, and not relative to an employer.¹⁶⁶
- ii As a proxy, an employee's annualised income is the only objective approximation (noting that all regulation, including exemptions and exceptions, are arbitrary) that is equitable and fair to limit the ability of an employee who could otherwise be eligible to take industrial action.
- iii To reiterate, it must be recognised that protected industrial action is available to some employees and not to all employees in the Australian labour market. Where it is currently available in particular industries and occupational groupings, it is because employees are unionised and have a propensity to use industrial action as a tactic in achieving industrial objectives in bargaining.
- iv In heavily unionised workplaces in the resource industry, many employees receive remuneration and conditions well in excess of what other employees in the labour market receive, and well in excess of the award safety-net.¹⁶⁷ These matters are often highlighted in the media, particularly, when bargaining rounds occur and more often than note, trade unions press for more generous wages and/or conditions, without any corresponding change in working arrangements or productivity improvement.¹⁶⁸
- v AMMA recognises the fact that industrial action has been used to secure outcomes which would not otherwise been achievable. However, it defies logic why someone who is able to earn more than many company chief executives or even Government Ministers, are able to seek over time significantly wages and conditions with the threat of protected industrial action.
- vi AMMA recommends that the PC consider recommending to the Australian Government further consideration of a possible exclusion from protected industrial action that is no less than a multiple of the existing high income threshold under the FW Act.

¹⁶⁶ PC draft report, at p.649.

¹⁶⁷ See also KPMG Report, Table 9-1, p.125 which notes that the share of total labour costs is based on current average earnings in the mining industry (approximately \$130,000).

¹⁶⁸ "Laundry staff on \$420k a year", The Australian, Ewin Hannan (25 March 2011):

<http://www.theaustralian.com.au/national-affairs/laundry-staff-on-420k-a-year/story-fn59niix-1226027697866>; "Unions v workers in gas industry", The Australian Financial Review, Ben Potter (21 November 2013): <http://www.afr.com/news/policy/industrial-relations/unions-v-workers-in-gas-industry-20131120-iytnp>

For example, this could be no less than 2 – 2.5 times the existing threshold (which would equate to \$273,400 – 341,750).¹⁶⁹

- vii Noting comments in the draft PC report that such a change would make Australia unique internationally, comments by the PC elsewhere in the draft report on other parts of the WR framework already highlight how unique Australia's system is and that the PC has suggested Australia should remain so in the future.¹⁷⁰
 - viii This should not be a deterrent to considering exempting the highest income earnings in the labour market.
 - ix If the PC has concerns about restricting the ability of employees to take industrial action to secure particular terms and conditions (ie. such as terms going to matters of safety), then this could be sensibly dealt with through further consultation and dialogue with stakeholders.
- b. Requiring bargaining to reach an impasse before being able to access protected industrial action.
- i No industrial action should only be able to be taken if the FWC assesses that bargaining has reached an impasse and there is no reasonable prospects of agreement.
 - ii AMMA recommends that the PC consider recommending that a pre-condition to taking industrial action at the time a PABO is sought, is that the FWC is satisfied that
 - a) bargaining has reached an impasse (viewed from an objective basis and subject to a list of specified matters) and
 - b) there is no reasonable prospect of agreement.
 - iii This would prevent premature instances of industrial action which causes significant damage early in the bargaining process and would ensure industrial action is taken as a last resort, when all other avenues have failed to resolve the dispute.

¹⁶⁹ The current threshold as of July 2015 is \$136,700 per year.

¹⁷⁰ See PC draft report, at p.685.

- c. A mandatory conference before a member of the FWC once a PABO is applied for to assist the parties at an early stage, narrow the range of matters in dispute. Greater opportunities to prevent industrial action and ensure bargaining continues, where it is able to continue, should lead to few instances of industrial action.
- d. Modifications to the existing test that a bargaining representative is “genuinely trying to reach agreement”, which is a pre-condition to the granting of a PABO.
 - i This not a sufficiently onerous test for a trade union to meet. There should be a direct requirement that a union needs to meet the requirements of GFB to be able to demonstrate that it is genuinely trying to reach agreement.
 - ii The existing test also needs to be modified and ensure that a union which seeks non-permitted terms (at any stage in the bargaining process) is prevented from accessing a PABO. The FWC has found that unions can be genuinely trying to reach agreement in making claims during the bargaining process which would not be a permitted term and condition.
 - iii The most recent Full Bench decision (which took a different approach to previous Full Bench authorities) ruled that “[t]he fact that an applicant is, or has been, pursuing a claim about a non-permitted matter is relevant to whether the test posited by s443(1)(b) has been met, but it is not determinative of the issue.”¹⁷¹ Tied to this issue is the existing rules governing permitted matters. Whilst the PC draft report recommended that terms about contractors, for example, should be rendered unlawful, the PC draft report does not provide any draft recommendations to reform the existing definition of permitted content in the FW Act.
- e. Restricting the ability for a union to pursue certain terms and conditions and to take protected industrial action in support of these matters.
- f. Moderating the existing rules to terminate expired enterprise agreements, which would allow bargaining negotiations to occur on the basis of an applicable modern award (as a starting point), rather than from the expired enterprise agreement.

¹⁷¹ *Esso Australia Pty Ltd v AMWU, CEPU and AWU* [2015] FWCFCB 210 (10 February 2015).

- i The PC should recommend that the Australian Government consider amendments to s.226 of the FW Act to allow agreements which have passed their nominal expiry date to be terminated as follows:

At the election of one party, after the effluxion of a specified period of time (ie. 3 months).

Safeguards such as requiring undertakings to be provided by an employer, so that certain terms and conditions are preserved, and providing sufficient written notice to the workforce (ie. 30 - 90 days) should also be considered.

If an agreement is terminated the applicable modern award would apply, in combination with the NES, the employee's contract and applicable company policies.

- g. Creating options for dispute resolution to ensure that independent experts are able to assist employers and employees resolve matters, without escalation and resort to industrial activity.

375. AMMA provided a number of dedicated reform options to the PC in its primary submission, which would encourage parties to consider seeking other options for assistance outside of the confines of the FWC.¹⁷²

376. Whilst the PC draft report does not directly take up these recommendations, AMMA considers them worthy of further consultation with relevant stakeholders. Therefore, AMMA believes the PC should recommend to the Australian Government that it undertake further consultation with relevant stakeholders as to whether alternative dispute resolution options would assist resolve industrial disputation.

¹⁷² See AMMA submission chapter 4.2 (pp. 194 – 201).

UNION ACCESS TO WORKPLACES / RIGHT OF ENTRY

PC Draft Report - Chapter 19, Section 19.5, pp.702-709

Why this must be a priority for reform

377. Union access to workplaces has consistently rated as one of the top if not the top concern of AMMA members since the FW Act took effect. It is fair to say this area has only become more problematic for employers with further expansive changes made to the union access (right of entry) provisions that took effect on 1 January 2014.
378. AMMA's three-year research project with RMIT University consistently revealed in each six-monthly survey that expanded union access was a major impediment to productive operations for resource industry employers under the current workplace relations framework.
379. As one AMMA member respondent to the AMMA Workplace Relations Research Project said:
- "Unions are using the current rules to undertake membership drives and are greatly disrupting to productivity."*
380. Union access to workplaces was one of six priority areas for workplace relations reform identified by AMMA members back in 2012, with the main aim of ensuring the location and frequency of union entry visits is reasonable and takes due account of operational needs and managerial prerogative.
381. In addition to the research project with RMIT University, AMMA undertook substantial further research on the impact of the FW Act's union access laws, producing a major pre-election policy paper on the issue in June 2013¹⁷³, which included compiling a comprehensive suite of proposed reforms, and highlighting this as an area that the next Federal Government needed to address as a priority.
382. Indeed, the *Coalition's Policy to improve the Fair Work laws* advocated significant changes to the union access regime under the FW Act.

¹⁷³ Resource Industry Workplace Relations Election [Paper](#) - Trade union access to workplaces, June 2013

383. Although in AMMA's view they did not go far enough, most of those changes were introduced in a Bill that was later tabled in parliament, the FW Amendment Bill 2014. That Bill was still before the Senate at the time of writing this submission.
384. The issue of union access to workplaces formed a substantial focus of AMMA's initial submission to the PC inquiry, again identifying a raft of very specific improvements that could be made to the current union access system, focusing largely on placing sensible limits around the more discretionary types of entry involved with holding discussions with employees.
385. AMMA made 25 specific recommendations for reform to the PC in Chapter 5 of its initial submission, none of which have been addressed directly or substantially in PC draft recommendations.
386. Many of those recommendations would be extremely simple to execute, with several already contained in the government's FW Amendment Bill 2014. AMMA's recommendations had three main aims:
- a. Limit union entry for discussion purposes to only those unions who are party to an existing agreement or are attempting to reach one (with entry precluded altogether where another union has an agreement covering the site);
 - b. Introduce a code of conduct for union permit holders to ensure reasonable and decent standards of conduct are observed when unions enter commercial premises and engage with employees and management; and
 - c. Expand / clarify the circumstances under which a union entry permit can be suspended or revoked following a breach of the rules.
387. According to AMMA-commissioned analysis by KPMG¹⁷⁴, AMMA's suite of union access reforms could have the effect of reducing the administrative and compliance costs for employers, including reducing productive time lost during visits. As cited in the KPMG report, a recent analysis estimated that each union visit cost business the equivalent of two hours of labour. Across 100 major projects, the cost saving associated with reducing union visits was therefore estimated to be in excess of \$5 million a year¹⁷⁵.
388. The PC's draft report (p.704) has cited AMMA's example that the total costs of union entry are actually around \$200 an hour, with an average duration of four hours per visit.

¹⁷⁴ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015

¹⁷⁵ Fair Work Amendment Bill 2014, Explanatory Memorandum

389. Thus, with one particular employer cited as having 49 entries in the first two months of 2015, the cost to that business would be in the realm of \$39,200. This is clearly a “right” that has a negative impact and could be used more sparingly under more balanced and practical rules.

Draft PC report: overview

390. The PC made just two draft recommendations in its report that related to union access to workplaces (Chapter 19 of the draft report - Draft Recommendations 19.7 and 19.8), as well as putting out a call to employers to provide further evidence in relation to operational difficulties being experienced in relation to default union lunchroom provisions (discussed in more detail later in this chapter).
391. This was disappointing in light of the high priority the industry gives this issue and the real problems, disputes and costs the current entry rules are creating in workplaces.
392. At best, the PC's draft recommendations can be seen as tinkering around the edges, notwithstanding that the two recommendations it has made would be marginally beneficial in balancing the interests of employers and employees.
393. AMMA does, however, appreciate the PC's acknowledgment that:
- a. As Australia's WR system has matured and the resourcing of workplace safety standards has increased over historical norms, it is reasonable to ask whether it is appropriate for private parties to exercise the role of a public interest investigator, normally the responsibility of a government agency (p.160). AMMA would add that in addition to what the PC has noted here, with computerisation and the internet, new generations of workers do not need a union official to bring them specialised knowledge in the workplace.
 - b. It is “unrealistic” to expect a union representative who has the primary duty of representing members' interests to always act in the public interest (p.160).
 - c. Entry to investigate a workplace can impose expenses on the employer through disruptions and administrative costs and thus may be used strategically “as leverage in an industrial dispute” (p.160).
 - d. There is a case for modifying the threshold for the FWC to deal with disputes about the frequency of entry by unions and for limiting union entry for discussion purposes where the union is not covered by an agreement and has no members at the workplace (p.649) although in practice this may capture very few scenarios in the resource industry.

- e. On occasion, right of entry under the FW Act, like industrial action, can be used by unions to disrupt the efficient operation of a workplace, thereby harming productivity (p.702).
 - f. By exercising entry too frequently, unions can impose significant burdens and costs on employers due to the need to prepare for and document the visit, escort the permit holder around the worksite, and due to disruptions to the normal performance of work (p.703).
 - g. In practice, employers' ability to dispute frequency of entry under the current [s505A](#) has proved "a high bar" given employers are required to prove the costs of entry would be "unreasonable and critical, with no consideration of the relative size of the benefits of entry to employees" (p.705).
 - h. It is more likely the ongoing accrual of incremental costs of each entry that will be most damaging to employers, not each individual visit (p.705).
 - i. Frequent union visits might start to resemble "spam mail" (p.707).
 - j. Entry visits can be abused if they become the vehicle for disruptive "turf battles" by competing unions, with such disputes having the potential to damage workplace harmony (p.707).
 - k. Some employees may feel uncomfortable or intimidated by the presence of union officials (p.707).
394. While AMMA endorses the above observations by the PC, AMMA does not support its observations that:
- a. The current provisions providing entry rights by union officials to worksites are "broadly sound" (p.42).
 - b. Union officials may be better-placed than a government inspector to be informed of any potential breaches of workplace laws (p.160). AMMA would note in passing that Australia has obligations under ratified ILO conventions to maintain an independent government inspectorate, quite separate to trade unions and employers.
 - c. The current arrangements appear to minimise scope for strategic or disruptive conduct by either side by providing a default, non-operational location in the event that parties cannot agree. (p.709)

395. While AMMA supports the two draft recommendations the PC has made, they need to go much, much further to address the concerns the PC has acknowledged in Chapter 19 of the draft Report, let alone the full range of negatives the current system throws up.

Draft PC Recommendation 19.7 – Disputes over frequency of entry

396. The first of the PC's draft recommendations attempts to provide employers with somewhat greater opportunities to dispute too frequent entry visits by unions, as outlined in Draft Recommendation 19.7 below.

DRAFT RECOMMENDATION 19.7

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

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

AMMA response

397. AMMA supports the above draft recommendation in that it is an improvement on the current very high bar set under s.505A for employers to dispute the frequency of union entry.
398. At present, under the current [s505A](#)(2) employers can only dispute the frequency with which a permit holder or permit holders "of an organisation" enter premises under s484 for the purpose of holding discussions with members or potential members. However, under s505A(4), the FWC may only deal with a dispute if the frequency of entry would require "an unreasonable diversion of the occupier's critical resources".
399. AMMA members report that they would utilise a bolstered provision in the way proposed in the PC draft recommendation, particularly during the height of construction phases of projects where union visits for the purposes of recruiting members are rife.

400. Having said that, the bolstered ability for employers to challenge frequency of union entry is not without impact on employer's time and resources. This is litigation, and litigation takes time and costs money, including further time for supervisory and chaperoning staff onsite.
401. But AMMA supports the draft recommendation in that it lowers the currently very high hurdles in proving an unreasonable diversion of employers' resources from union entry visits, allowing the combined impact of visits from multiple unions to be taken into account.
402. On large worksites such as many resource industry worksites, it is very often the case that multiple unions seek entry within the same week, often on the same day. These provisions would be useful in assisting employers to more effectively manage such visits if they become too disruptive.
403. Proposing to allow the FWC to take into account other factors such as the combined impact on operations of entries to the premises, the likely benefit to employees of further entries onto the premises and the unions' reason for the frequency of entry would enhance employers' ability to dispute too frequent entry.
404. Having said that, this draft recommendation combined with the only other PC draft recommendation on union access to workplaces (as outlined below) cannot be said to approach the substantial level of reform that is needed to redress the imbalance that currently exists and the drains on management time associated with discretionary entry.
405. Draft Recommendation 19.7 is a sound proposal, but it does not go far enough to address the range of calculated union behaviours that are used to beset sites and non-union members, and which are deliberately designed to navigate the laxity and licence of the post-2009 right of entry rules under the FW Act.

Draft PC Recommendation 19.8 – Limiting union entry

406. The second of the PC's only two draft recommendations regarding union access to workplaces attempts to limit the frequency of entry for discussion purposes in certain situations as outlined below.

DRAFT RECOMMENDATION 19.8

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

AMMA response

407. Again, while this may be a very small step in the right direction, but it does not go nearly far enough in limiting union access to workplaces for discussion purposes. In AMMA's view, this PC draft recommendation should be replaced with **AMMA Recommendation 5.1** in our original submission to this inquiry.
408. Under AMMA's recommendation, where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site for discussion purposes unless it is covered by an agreement operating on that site or is in the process of negotiating one.
409. Entry for discussion purposes to agreement-covered sites (i.e. sites where an agreement made with another union covers the entire site) should be outright prohibited for non-agreement-covered unions. AMMA's recommendation in this regard differs from **PC Draft Recommendation 19.8** (above) in the following ways:
- a. AMMA's recommendation would preclude entry for discussion purposes in particular circumstances whereas the PC recommendation would merely place limits around that type of entry – ie to two occasions within a 90-day period regardless of the justification or legitimacy of such visits.
 - b. The test that the PC limitation hinges on would rarely be met at AMMA members' worksites – namely the requirement that the union has no members onsite AND is also not covered or currently negotiating an agreement at that workplace.
 - c. AMMA's test would simply be that if the union was not covered by an agreement or in the process of negotiating one they would have no entry for discussion purposes, despite potentially having members onsite.
 - d. AMMA's recommendation is also preferable from an administrative point of view because it is generally easy to discern when a union is covered by or is a party to an enterprise agreement, whereas the presence of a union member onsite is often difficult to substantiate. In other words, a union that is not covered by an enterprise agreement on that site or trying to negotiate one could still assert they have members on that site even if they do not, and problems would be perpetuated.
 - e. This was the case in the past so this is not a new idea but a return to a proven approach.

PC comment – expanded role for FWO on union access

410. While not included as a formal draft recommendation, the PC's draft report at p.161 cites the potential need for the FWO to have an expanded role in relation to unions' entry to enterprises if the PC's recommendations are adopted:

"The Productivity Commission has recommended some limitations on the frequency of union entry for discussion purposes, to reduce the use of entries for strategic purposes in industrial demarcation disputes (see chapter 19). This may require the FWO to expand its enforcement role – and would require commensurate funding commitments by the Australian Government – to adequately counteract any resulting loss of union contributions to enforcement."

AMMA response

411. AMMA cannot easily discern a requirement for a bolstered FWO to fill the gap left by the PC's very limited draft reforms in relation to union access to workplaces for discussion purposes.
412. As mentioned, across AMMA's membership the proposed limitation of two visits every 90 days where the union had absolutely no connection to the worksite would rarely apply.
413. In other words, that limitation would apply to situations far removed from the FWO's enforcement activities. Even union visits for the purpose of advancing bargaining would not be affected because if a union is in the process of negotiating an agreement the number of visits is unfettered subject to the current and future "frequency of entry" dispute provisions under s505A.
414. The visits that will be curbed by the PC's draft recommendation will be recruitment visits with the main aim of attracting new members to the union or enticing members away from other unions. AMMA can see no reason why such a role would transfer to the FWO.
415. We also note that many entry problems and some of the union behaviour that tests right of entry rules occurs in building and construction. Were this approach to make it into the final report and recommendations, the role proposed for the FWO would need to go to the FWBC / ABCC for the industries it covers.

Information request – operational impacts of lunch room provisions

416. While not included as a formal information request, at p.708 of the draft report, the PC in relation to recently-enacted default lunch room right of entry provisions says:

“At this stage, the Productivity Commission is not yet convinced that the current rules are more ambiguous or open to disputation than the previous rules. The previous rules allowed for disputes over whether a requested location was unreasonable, not fit for purpose or intended to intimidate.”

417. The PC goes on to say at p.709:

“If employers can put forward tangible evidence of the use of break rooms leading to operational difficulties, the Productivity Commission would be interested in examining this evidence.”

418. And concludes by saying:

“The Productivity Commission is not yet convinced that there is a need for change in this area, but is willing to analyse any further evidence or concerns raised by participants following the draft report.”

AMMA response

419. In responding to the above comments by the PC, AMMA is curious as to why the starting point is that there have to be operational difficulties being experienced in order to revoke the default lunch room provisions in the FW Act that took effect on 1 January 2014.
420. Prior to those provisions taking effect, there was in any case an onus on the employer to designate a reasonable meeting place that was fit for purpose, and it was always open to unions to challenge the reasonableness of that location. AMMA can see no inherent unfairness in automatically returning things to the way they were and urges the PC to address this in its final report.
421. Rather than asking employers to show how default access to employee lunch rooms has caused operational difficulties, and rest assured it has, a better question would be how those new provisions further the objectives of the FW Act.
422. Why don't unions have to show that it would further the objectives of the FW Act to have default access to employee lunch rooms?
423. Why should it be up to the government to legislate the location in which a meeting is held at a private enterprise?

424. If employers cannot show enough cases where extreme operational difficulties have been experienced, does that mean the provisions are not causing any productivity impediments or that things would not be improved if we simply returned to the pre-existing provisions?
425. In AMMA's, view the "reasonableness" test that preceded the 1 January 2014 changes was effective in that it ensured unions were not relegated to sauna-like facilities 10kms from where workers were located, but that employers could designate appropriate locations based on operational needs.
426. Another very serious issue raised by the current legislative provisions is the fact that some crib rooms are located underground or in other unsafe locations. While a number of AMMA members to date have managed to say those are not appropriate meeting places even in the face of union resistance, the legislation as it stands empowers unions to access those rooms in theory even if it is not feasible in practice.
427. The following actual experience applying the current entry rules amply demonstrates the operational difficulties and inherent problems with the current default lunch room provisions given that they divert valuable time and resources away from the business at hand and towards resolving such disputes given that the legislation is open to interpretation.

Lunch room mine site scenario

428. One AMMA member who ran a large mine site received a multitude of right of entry notices from numerous union officials in early 2014. The union was, upon request, given access to the main crib room after which one of the workers complained that their lunch break was disrupted by one of the union officials talking loudly across the meal room (this is a not uncommon occurrence and it is employees who often mostly strongly object to union proselytising during their meal times).
429. The union had previously objected to the meeting room the employer had designated for the purposes of the meetings with workers, which had led to the employer allowing the union access to the main crib room in the employee amenities building. This was a meal room that fulfilled the requirements of the FW Act under [s.492](#).
430. Subsequent correspondence from the union demanded access to three other meal rooms on the mine site. When the employer refused, maintaining that the main crib room met the legislative requirements, the union raised a dispute under [s.505](#) of the FW Act.

431. The employer maintained that the main crib room was in fact the only meal room on site that could be accessed by all employees. Other crib rooms required employees to have specific area inductions. The main crib room was also the largest and best equipped facility for employee meal breaks onsite, comfortably seating more than 60 employees at a time.
432. All crib huts outside the main area complex required a visitor to be escorted and supervised at all times. The closest crib room was more than 300m from reception and required an escort across active roadways carrying heavy vehicles involved in mining operations – that crib room also had only three tables compared with nine tables in the main crib room.
433. The furthest crib room was more than 2km from reception and required motor transport through heavily utilised roadways adjacent to the open cut mine. An appropriately qualified and dedicated driver would be required to remain with the union officials (as with all other visitors) at all times, unlike in the main crib room.
434. Given that union officials were visiting the mine site on almost a weekly basis for five hours each time, the resources required to escort and supervise such entry outside the usual arrangements would be prohibitive and unreasonable.
435. In short, there were specific operational and safety concerns associated with union demands to access crib rooms other than the main meal room. In some cases those crib rooms were adjacent to heavy vehicle operations, active mining activities including blasting, areas where dangerous substances were used, exploratory drilling and in one case the primary explosives magazine.
436. Given the current legislation's openness to disputation, as this example shows, an important recommendation in AMMA's original submission that the PC should address in its final report is that the provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location be removed.
437. The pre-1 January 2014 provisions that allowed employers to designate reasonable meeting locations should be re-legislated (**AMMA Recommendation 5.24**)¹⁷⁶.
438. Other important AMMA recommendations that were not taken up or addressed by the PC in its draft report are detailed below.

¹⁷⁶ AMMA Submission (#96), p.235

AMMA priorities not addressed

439. While AMMA would like to see all 25 of its recommendations in relation to union access to workplaces implemented as a matter of course, the following recommendations are essential for the PC to address in its final report, many of them simply actively applying the rigour that should already be applied to unions accessing workplaces under national legislation:

- a. Where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site for discussion purposes unless it is covered by an agreement operating on that site or is in the process of negotiating one. Entry to agreement-covered sites by non-agreement covered unions for discussion purposes should be prohibited (**AMMA Recommendation 5.1**)¹⁷⁷.
- b. Union officials should be required to carry photo identification at all times in order to enter a worksite under right of entry laws, consistent with the *Coalition's policy to improve the Fair Work laws*. That ID must not be able to be tampered with in any way. It must be required to be produced on attendance at the site, not merely upon request (**AMMA Recommendation 5.8**)¹⁷⁸.
- c. The caveat should be removed from the FW Act that states the requirement for union permit holders not to misrepresent their entry rights does not apply if the permit holder "reasonably believes" their activities are authorised (**AMMA Recommendation 5.9**)¹⁷⁹.
- d. The FW Act should be amended to remove the FWC's discretion not to revoke or suspend an entry permit for misuse if to do so would be "harsh or unreasonable". If any of the conduct specified under s.510 of the FW Act has occurred, there should be automatic suspension or revocation of an entry permit (**AMMA Recommendation 5.11**)¹⁸⁰.
- e. There should be a requirement that any suspension, revocation or conditions imposed on an entry permit are publicly posted to the FWC website, along with all revocations of permits by holder name, for a period of up to 10 years (**AMMA Recommendation 5.13**)¹⁸¹. The FWBC currently posts this type of information on its website which is extremely useful in informing employers of legitimacy of entry.

¹⁷⁷ AMMA Submission (#96), p.231

¹⁷⁸ AMMA Submission (#96), p.232

¹⁷⁹ AMMA Submission (#96), p.232

¹⁸⁰ AMMA Submission (#96), p.233

¹⁸¹ AMMA Submission (#96), p.233

- f. There should be an explicit requirement for the publication of all applications for right of entry permits in advance, giving all interested parties the chance to be heard (**AMMA Recommendation 5.14**¹⁸²).
- g. Notices of entry must contain enough specificity to enable businesses can run their operations with a degree of certainty. Open-ended entry notices or those spanning days or weeks should not be a feature of our system. Notices must specify a particular date and time and those times should be adhered to (**AMMA Recommendation 5.19**¹⁸³).
- h. Enterprise agreement clauses pertaining to union right of entry should be expressly prohibited (**AMMA Recommendation 5.22**¹⁸⁴).
- i. The provisions implemented on 1 January 2014 requiring employers to facilitate union officials' transport and accommodation to remote sites should be removed in their entirety (**AMMA Recommendation 5.23**¹⁸⁵).
- j. The provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location should be removed (**AMMA Recommendation 5.24**¹⁸⁶).
- k. Under no circumstances should entry be extended to private accommodations. Employee protections in that regard must remain in place (**AMMA Recommendation 5.25**¹⁸⁷).

How the PC should proceed

AMMA Recommendation

The PC should carry through its two draft recommendations regarding right of entry into its final report (PC Draft Recommendation 19.7 and 19.8).

In addition to those two recommendations, the PC should also adopt the following important AMMA recommendations detailed in our initial PC submission:

- AMMA Recommendation 5.1¹⁸⁸
- AMMA Recommendation 5.8¹⁸⁹
- AMMA Recommendation 5.9¹⁹⁰

¹⁸² AMMA Submission (#96), p.233

¹⁸³ AMMA Submission (#96), p.234

¹⁸⁴ AMMA Submission (#96), p.235

¹⁸⁵ AMMA Submission (#96), p.235

¹⁸⁶ AMMA Submission (#96), p.235

¹⁸⁷ AMMA Submission (#96), p.235

¹⁸⁸ AMMA Submission (#96), p.231

¹⁸⁹ AMMA Submission (#96), p.232

¹⁹⁰ AMMA Submission (#96), p.232

- AMMA Recommendation 5.11¹⁹¹
- AMMA Recommendation 5.13¹⁹²
- AMMA Recommendation 5.14¹⁹³
- AMMA Recommendation 5.19¹⁹⁴
- AMMA Recommendation 5.22¹⁹⁵
- AMMA Recommendation 5.23¹⁹⁶
- AMMA Recommendation 5.24¹⁹⁷

AMMA has also provided comments in relation to the PC's informal information requests for examples where employers are experiencing operational difficulties as a result of the default lunch room provisions and to the PC's observations regarding the FWO's powers.

¹⁹¹ AMMA Submission (#96), p.233

¹⁹² AMMA Submission (#96), p.233

¹⁹³ AMMA Submission (#96), p.233

¹⁹⁴ AMMA Submission (#96), p.234

¹⁹⁵ AMMA Submission (#96), p.235

¹⁹⁶ AMMA Submission (#96), p.235

¹⁹⁷ AMMA Submission (#96), p.235

ADVERSE ACTION / GENERAL PROTECTIONS

PC Draft Report - Chapter 6, pp.241-266

Overview of the PC report in this area

440. The PC's Issues Paper 4 identified general protection and adverse action provisions as establishing a “*complex scope of protections*”.¹⁹⁸
441. The PC draft report generally accepts the justification for the general protections framework in Part 3-1, however, “*the practical effect of the complicated structure and absence of active guidance on defences and coverage is causing unnecessary contention*”.¹⁹⁹
442. As AMMA pointed out in our initial submission, there is strong support for the protections included in the general protections as there was for the unlawful dismissal protections they replaced. The questions is whether they are being protected effectively and appropriately.

Why this is a priority area for AMMA

443. AMMA provided evidence in its primary submission and independently commissioned report by KPMG as to why reforming the regulatory framework governing adverse action is a priority for the resource industry.
444. Through the KPMG report, AMMA provided independent research evidence which finds that targeted reforms are required to:
- a. Provide clarity and certainty for employers and employees.
 - b. Reduce costs, unnecessary litigation and restrictions on employers undertaking legitimate managerial and operational actions.
445. To reiterate, KPMG observed in its detailed report:
- a. Consultation with industry suggested that adverse action or unfair dismissal claims are received for between 20 and 40% of termination²⁰⁰;

¹⁹⁸ PC Issues Paper (Number 4), at p.5.

¹⁹⁹ PC Draft Report, at p.241.

²⁰⁰ KPMG report “Workplace Relations and the Competitiveness of the Australian Resources Sector”, p.114

- b. Employee protections result in legal, compensation and administrative costs to businesses²⁰¹, which AMMA argues exceed any balanced or protective function.
 - c. Resource sector businesses have identified a number of issues associated with the framework including²⁰²:
 - i. Ambiguity regarding scope of adverse action provisions.
 - ii. Regulatory costs associated with the reverse onus of proof.
 - iii. Inability to take legitimate action of OHS issues.
446. CGE analysis was undertaken by KPMG to determine the economic impact of the reform options AMMA members have developed. The analysis is contained in summary format in the KPMG report²⁰³.
447. KPMG indicated that the economic implications of AMMA's proposed reform options would lead to²⁰⁴:
- a. Reduction in employee ability to make a claim for employee protections;
 - b. Reduction in costs associated with managing employee protections.
448. The CGE modelling indicates that AMMA's reforms would have beneficial impacts upon the resource industry, and the wider economy and job creation.

Draft Recommendation 6.1 – Discovery

DRAFT RECOMMENDATION 6.1

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

AMMA's response

449. Whilst AMMA does not oppose this recommendation, the process of discovery is governed by the rules of the court where the cause of action is initiated. It is a technical and legal issue which does not alter the substantive causes of action

²⁰¹ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.114

²⁰² KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", p.89

²⁰³ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", pp.122-129

²⁰⁴ KPMG report "Workplace Relations and the Competitiveness of the Australian Resources Sector", Table 8-1, p.121

under the FW Act, nor alleviate the problems with the operation of the general protections provisions of the FW Act that are impacting on employers.

Draft Recommendation 6.2 – Defining Workplace Rights

DRAFT RECOMMENDATION 6.2

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

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

AMMA's response

450. AMMA supports this intent of the recommendation. Given the complexity of the statutory protections and definitions of a "workplace right" under s.341,
451. AMMA believes that the PC should recommend that the Australian Government undertake consultation with stakeholders on the existing statutory definitions, including s.341(1)(c).
452. It may be useful if in future there was clear identification in legislation of what is and is not a workplace right. We also reiterate that this should not be a *de facto* mechanism to create whistle blower protection, and that an employee does not exercise a workplace right by reporting their employer to industry regulator, which is unrelated to employment.

Draft Recommendation 6.3 – Frivolous and vexatious complaints

DRAFT RECOMMENDATION 6.3

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

AMMA's response

453. AMMA supports the intent of this recommendation.

Draft Recommendation 6.4 – Compensation cap

DRAFT RECOMMENDATION 6.4

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

AMMA's response

- 454. AMMA supports the intent of this recommendation.
- 455. However, there are a range of statutory causes of action under Part 3-1 of the FW Act.
- 456. AMMA's concern is that a statutory cap on compensation for breaches of all provisions within Part 3-1, includes those provisions governing freedom of association (ie Division 4 of the FW Act).
- 457. The intent should be to provide a cap on compensation for individual claims under the adverse action provisions that are analogous to unfair dismissal and anti-discrimination provisions (ie. Division 3 and s.351).
- 458. AMMA would support further consultation with stakeholders as to what the cap on compensation should look like. The PC should recommend that the Australian Government undertake further consultation with relevant stakeholders to progress towards such a cap.

Draft Recommendation 6.5 – Information and reporting

DRAFT RECOMMENDATION 6.5

The Australian Government should amend Schedule 5.2 of the *Fair Work Regulations 2009* (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.

AMMA's response

- 459. This is largely an administrative and not a substantive change to the framework. AMMA makes no response as a result.

AMMA priorities left unaddressed

460. The PC has made some worthwhile recommendations in this area, and importantly has recognised that problems do exist in how what should be an uncontroversial and well understood set of precepts is operating.
461. However, as with many areas of the Draft Report, the recommendations need to go further to genuinely address the problems that the PC has recognised.
462. AMMA's primary submission advanced a number of reform options in relation to the operation of the general protection provisions of the FW Act. Whilst a number of the PC's draft recommendations will improve the current framework, they will not address substantive problems identified by AMMA and KPMG.²⁰⁵
463. To reiterate, AMMA encourages the PC to consider AMMA's reform options that would:
- a. Introduce a high income threshold for adverse action claims²⁰⁶.
 - b. Introduce a genuine reasons defence²⁰⁷.
 - c. Remove the reverse onus of proof for adverse action claims²⁰⁸.
 - d. Removing the additional protections covering anti-discrimination²⁰⁹.
464. AMMA encourages the PC to reconsider the positive impact these reform options will have in delivering overall certainty for employers and lead to a reduction in litigation.
465. We call on the PC to address these matters in its final report, and importantly in its final recommendations, which should see the PC take up the ideas and proposals advanced by resource employers throughout this review.

How the PC should proceed

AMMA Recommendation

The PC should progress its Draft Recommendations 6.1, 6.2, 6.3, and 6.4 as set out above, and subject to:

²⁰⁵ AMMA's primary submission, see Chapter 7.

²⁰⁶ AMMA Submission (#96), Recommendation 7.4.4, p.339

²⁰⁷ AMMA Submission (#96), Recommendation 7.4.1, p. 339

²⁰⁸ AMMA Submission (#96), Recommendation 7.4.5, p.339

²⁰⁹ AMMA Submission (#96), Recommendation 7.4.3, p. 339

- Recommending a listing mechanism of what are and are not workplace rights be added to the FW Act, amending Draft Recommendation 6.2.
- Further consultation on which workplace rights should be protected and which 'rights' should be expressly excluded from the general protections, amending Draft Recommendation 6.2.
- A recommendation for further consultation on any cap on compensation, amending Draft Recommendation 6.4.

The PC should also recommend in its final report:

- A high income threshold for adverse action claims²¹⁰.
- An increase in fees for applications and hearings²¹¹.
- Introducing a genuine reasons defence²¹².
- Removing the reverse onus of proof for adverse action claims²¹³.
- Removing the additional protections covering anti-discrimination²¹⁴.

²¹⁰ AMMA Submission (#96), p.339

²¹¹ AMMA Submission (#96), p.339

²¹² AMMA Submission (#96), p.339

²¹³ AMMA Submission (#96), Recommendation 7.4.5, p.339

²¹⁴ AMMA Submission (#96), p.339

PART B: OTHER KEY AREAS COVERED IN THE DRAFT PC REPORT

TRANSFER OF BUSINESS

PC Draft Report - Chapter 22, pp.751-759

Why this area is important

466. As demonstrated in AMMA's primary submission in great detail there are problems with the current transfer of business rules from a productivity and efficiency perspective primarily through the requirement that employers take on the industrial instruments of existing employees if they employ them within three months of taking over a business or service contract.
467. The problem is that very rarely will those instruments have any "synergies" with, or relevance to, the operational requirements and strategies of the new business. This is particularly the case where public sector agreements become transferring instruments by virtue of the FW Amendment (Transfer of Business) [Act](#) 2012 which captured public sector to private sector transfers under the transfer of business provisions when it took effect.
468. KPMG's report noted (p.109):
- "The current transfer of business arrangements also result in upfront costs and ongoing workplace tension for some resources sector businesses. The transfer of business processes can cost in excess of \$100,000 in legal and management advice. In addition, the disparity between agreements can cause tension among workers who receive different wages and conditions."*
469. In an ideal world, AMMA would prefer that no industrial instruments transfer to any businesses in the event that a new business or contractor takes on existing employees from the old business.
470. Donning a practical hat, AMMA can see the "wrong" the original transfer / transmission of business provisions were trying to "right" was the potential for employees to have their wages and conditions cut as a result of their employment changing vehicles (ie the commercial transfer of their employer). The rules were originally focused on making sure employees were not earning \$100,000 one day and \$60,000 the next for doing exactly the same work just because a business or contract changed hands.
471. As AMMA pointed out in our original submission to this inquiry, most of the expense for employers arising from these rules is at the front end in the transition to taking on transferring employees and in the first few weeks or months of their

employment. These expenses serve no purpose in cases where a transferring instrument is eventually set aside, varied or terminated by the FWC with the employees' full blessing. However, that transition can cost hundreds of thousands of dollars to employers (as detailed below).

Draft PC report: overview

472. The PC made just one draft recommendation in relation to transfer of business (**PC Draft Recommendation 22.1**)²¹⁵, the same recommendation the FW Act Review Panel made back in 2012 which was taken up by the current government under the FW Amendment Bill 2014 that was still before the Senate at the time of writing this submission.
473. While AMMA supports this draft recommendation, as previously pointed out, it will have very limited application and must be added to if inefficiencies and unnecessary business costs are to be minimised and employment maximised in situations where the employer changes through a transmission of business.
474. AMMA can see from the draft report that the PC has weighed up issues regarding the protection of employee entitlements against the need for business efficiencies and productivity.
475. While AMMA would like to see the PC's final report go further to address critical gaps in this area that are causing unnecessary costs for business, we welcome the following acknowledgements by the PC in its draft report:
- a. There is a "vein of discontent" with how the FW Act treats transfers of business (p.752).
 - b. There are questions around the effectiveness of those provisions (p.755).
 - c. While protecting transferring employees is the primary focus of the transfer of business provisions, it should not occur at all costs (p.755).
 - d. Excessively generous entitlements do not come for free. They can adversely affect employers, consumer prices and future wage increases and there may be some instances where the cost to the employee of exempting them or varying a transferable instrument yields greater benefits to the broader community (p.755).
 - e. Employers might "balk" at taking on transferring employees with "cumbersome" terms and conditions of employment (p.756).

²¹⁵ PC Draft Report, p.759

- f. Adverse effects on employers may be more pronounced in transfers from the state system because state public sector awards and agreements contain work practices that may be incompatible with work in the private sector (p.757).
- g. Assuming a state-based instrument is particularly generous, the less flexible the provisions, the greater the threat of job losses in the transfer (p.757).

476. AMMA particularly welcomes the PC's observation at p.754 that:

"Even where they decide to take on some transferring employees, there are costs for business. In addition to higher unit labour costs, there may be issues with productivity and morale associated with having multiple instruments covering the same workforce. Differences in the nominal expiry date of the agreements can also lead to multiple, costly agreement negotiations."

477. While AMMA believes the PC has an opportunity to go further in this area, and should do so in its final report, we respond to the PC's draft recommendation and informal information requests below.

Draft PC Recommendation 22.1 – Instrument does not transfer in certain circumstances

478. The PC recommends limited exemptions from the transfer of business provisions in draft recommendation 22.1²¹⁶:

DRAFT RECOMMENDATION 22.1

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

AMMA response

- 479. When taking this recommendation at face value, it appears to be a broad-ranging exemption from the current transfer of business provisions in all cases where employees transfer at their own instigation.
- 480. However, upon reading the full section on transfer of business in the PC's draft report, it becomes clear this is a limited exemption in the same form as exemptions that have been recommended previously. Namely, the exemption

²¹⁶ Draft PC Report, p.759

would only apply where the transfer is akin to an “intracompany transfer” between related entities.

481. While AMMA supports this recommendation as it represents an improvement on the current situation in a minority of cases, it fails to address the core issue of protecting employers from unnecessary costs and the regulatory burden in cases where employees' wages and conditions are not reduced and where employees support being covered by the new employer's existing instrument rather than their own.
482. The limited draft recommendation also fails to maximise job opportunities for employees and the disincentives to take on existing staff that are built into the current transfer of business provisions of the FW Act.

Information request – the ease of obtaining exemptions

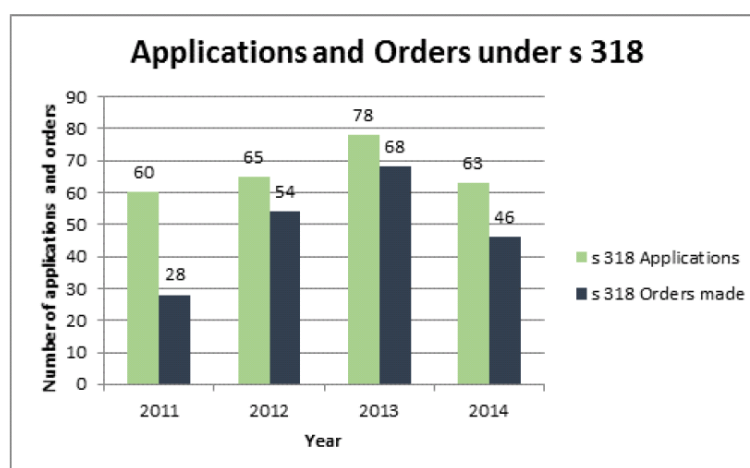
483. At p.756, the PC says in light of concerns raised in relation to the impacts of transfer of business provisions, it would welcome more information on the ease (or otherwise) of obtaining exemptions from those provisions and variations to transferrable instruments, including how the criteria for approval are weighted by the FWC.
484. As the PC points out (p754), [s.318](#) of the FW Act is not infrequently used. Since 2009, 366 applications have been brought under s.318 plus 36 applications under [s.320](#) applying for variations to agreements, which according to the PC indicates a “broad awareness of their usefulness”.
485. AMMA welcomes the PC putting out this informal information request seeking further views from employers on the ease of obtaining exemptions and responds below.

AMMA response

486. In a case study that AMMA included in our original submission²¹⁷, we documented how one particular business had spent \$76,450 on one application to terminate an enterprise agreement under [s.222](#) of the FW Act, and another \$43,700 on an application for orders that a transferring instrument not apply ([s.318](#)).
487. Legal costs alone for those two applications totalled \$120,000, not including the costs of outsourcing payroll functions for several months until the exemptions, terminations or variations were approved.

²¹⁷ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015, p356

488. If the transfer of business provisions are to remain in the FW Act, aside from the limited exemption the PC advocates (**PC Draft Recommendation 22.1**), those types of applications must be made more efficient and accessible so that the huge costs associated with what will in the end be successful applications with full employee support are eradicated.
489. Given the costs associated with any delays in such applications, there are strong grounds to introduce fast-tracking of those applications and reduce as far as possible the regulatory burden associated with them.
490. While it is true that a high proportion of transfer of business exemption applications under s.318 are granted, as shown in the graph below, that does not make them “easy” to obtain to supportive of job retention.



491. Typically, such applications take several weeks to several months for an outcome from the time the application is made, which often ends up being several months from when employees are taken on given the time it takes to get paperwork together and, in some cases, hold the necessary employee vote for an agreement to terminate.
492. In the meantime, new employers incur the costs of not only legal and administrative expenses and time associated with tribunal processes, but outsourced payroll systems given that a common lack of synergy between agreements is the time between pay cycles.
493. While many applications made under [s.318](#) will succeed if the employees and unions involved support the application, they take time and money to pursue.
494. The FWC processes are only a part of the story, albeit an important part.
495. In a recent example, one AMMA member was advised that an application under s.318 may be unlikely to succeed so they went through the process of attempting to terminate the agreement of the transferring employees.

496. Again, that is expensive and time-consuming even where employees voluntarily want to be covered by the new employer's agreement.
497. In the resource industry, the reasons employers apply under s.318 or seek to terminate an industrial instrument are not to undercut employees' terms and conditions, but rather because some of the provisions in transferring agreements will be incompatible with the new business and its people policy, operational and commercial strategies.
498. This can be as basic as an incompatibility with payroll arrangements – the new business may pay weekly while the old business paid monthly, which must carry over for transferring employees. Employees may actually prefer to be paid weekly but the employer must still go to the time and expense of applying for that exemption and outsourcing a monthly payroll in the meantime.
499. If the PC decides to recommend no further changes to the transfer of business area of the existing FW Act, other than the very limited recommendation it has made, it should as a priority turn its attention to simplifying and fast-tracking applications made under [s.318](#), [s.320](#) and [s.222](#) to minimise the cost and regulatory burden on employers which would also retain existing very high levels of protections for employees.
500. Those three sections of the FW Act must be streamlined, fast-tracked and made more accessible if businesses are not to be unduly punished for taking on the experienced employees of a former business.
501. AMMA is reliably informed by its members that have been through it that preparing to make applications due to the transfer of business provisions more often than not involves a team of lawyers, along with a team of consultants to advise on how to reconfigure their business in the short term until the fate of the applications to set aside, vary or terminate instruments is decided. It also involves detailed communications plans and powerpoint presentations to workers explaining to them the difference between the agreements.
502. Differences between industrial instruments that make them incompatible with new businesses in even the very short term include things like payroll frequency, how leave is accrued, how timesheets are filled out which can be incredibly administratively complex. Other complexities might include the fact that some employers have an annual salary that compensates for reasonable additional overtime while others pay overtime separately, all of which must be maintained in the transition.
503. Some options for reducing the sheer weight of the administrative and legal burden that AMMA urges the PC to explore ahead of handing down its final report include:

- a. The potential for an employer to make a statutory declaration that they will maintain the existing remuneration of transferring employees assessed via a BOOT or a NDT. This should allow for things such as super dropping 2% (while staying above the statutory minimum) while wages increase by 3%, for example.
 - b. Other ways for an employer to provide the necessary information to the FWC about retaining terms and conditions without going to the expense of making applications under the current requirements.
504. The PC should remember that it is still up to employees whether they choose to take a job with a new employer. As long as employers can provide satisfactory evidence that they will retain existing remuneration levels for a period, say six months following a transfer, after that time those workers are considered employees of the new enterprise. That means that any reductions in pay after that time should be considered a demotion or a "termination" and would be protected under the FW Act's termination provisions and / or the common law.
505. Those protections should be more than enough to satisfy the FWC, and the PC, that employees will be protected in any transfer, while also making the process of taking on existing employees less burdensome and more attractive for employers.

Information request – evidence of widespread job losses

506. At p758, the PC says it is not aware of any data that may substantiate or refute the claim of widespread job losses attributable to the FW Act's transfer of business provisions but welcomes further input in that regard.

AMMA response

507. As the PC pointed out, any evidence in this area will tend to be anecdotal because there are no official records kept of all those times an employer decides not to take over a contract or business due to the transferring industrial instruments at play; or alternatively decides to take over the business but not take on any of the existing employees.
508. However, AMMA members continue to report that a lack of practical synergies between industrial instruments will cause new business owners to have serious discussions about whether they really want to look at "insourcing" certain functions because pragmatically the industrial arrangements will not suit, thus making it counter-intuitive to take that workforce on. This sees employees not taken across into the incoming entities, resulting in job losses.
509. In particular, a public sector enterprise agreement simply would not work in a private enterprise and many AMMA members who would otherwise take on such

workers have put in place hard and fast policies of not taking on transferable instruments (and therefore employees) from the public sector due to their rigidities.

510. While evidence is anecdotal, resource businesses are adopting policies of not taking on existing staff from public sector organisations. This means any impacts on employment will be more keenly felt by public sector employees whose functions have been outsourced, which is directly contrary to what the 2012 FW Act amendments were designed to achieve.
511. This may become a greater issue in future with the privatisation of aspects of the National Disability Insurance Scheme. This could see more private providers entering that space to provide services, and the issue of whether to take on former public sector employees and their industrial instruments will increasingly come to the fore.

AMMA priorities not addressed

512. AMMA made seven recommendations relating to transfer of business in our original submission to the PC as part of this inquiry, with the PC choosing to take up just one of those recommendations (**AMMA Recommendation 7.5.4**)²¹⁸.
513. Outstanding AMMA recommendations that have not been properly engaged with or addressed include:
- a. Returning the test for transfer of business to the transmission of business rules under the pre-2009 WR Act (**AMMA Recommendation 7.5.1**)²¹⁹.
 - b. Reducing the period that a transferring industrial instrument applies to a new business, if adopting the above recommendation, from 12 months to six months, ie the pre-2009 approach (**AMMA Recommendation 7.5.2**)²²⁰.
 - c. Repealing the changes made in the FW Amendment (Transfer of Business) Act 2012 that roped in state public sector instruments to the transfer of business provisions (**AMMA Recommendation 7.5.3**)²²¹.
 - d. Expressly excluding outsourcing and insourcing arrangements from the transfer of business provisions of the FW Act (**AMMA Recommendation 7.5.5**)²²².

²¹⁸ AMMA submission (#96), p.349

²¹⁹ AMMA submission (#96), p.347

²²⁰ AMMA submission (#96), p.347

²²¹ AMMA submission (#96), p.348

²²² AMMA submission (#96), p.351

- e. Expressly allowing employees to voluntarily opt out of having their old agreement cover them in their new employment with immediate or swift effect when agreed (**AMMA Recommendation 7.5.6**)²²³.
- f. Clarifying the rules so that no transfer of business provisions are enlivened where an employee resigns from one employer to take up work with another (**AMMA Recommendation 7.5.7**)²²⁴.

514. AMMA maintains that the above recommendations are worthy of reconsideration by the PC and urges it to engage with the full range of concerns we raised regarding transmission / transfer of business in our initial submission.

515. However, given the limited change advanced in the PC's draft report, in lieu of any more broad-ranging changes, AMMA maintains that at a minimum the existing provisions relating to exemptions, variations and terminations of transferring industrial instruments should be streamlined to minimise unnecessary costs to employers and unfortunate employment outcomes.

How the PC should proceed

AMMA Recommendation

The PC include Draft Recommendation 22.1 among its final recommendations despite it being destined to have limited application and therefore limited positive effects on productivity and employment.

The PC look anew at AMMA's remaining six recommendations on transfer of business to assess whether further efficiencies and incentives for job retention could be delivered while also taking into account fairness and efficiency considerations.

The PC look at streamlining, making more accessible, and fast-tracking applications under s.318, s.320 and s.222 in order to minimise the cost and regulatory burden on employers in situations where employees are happy to be covered by the new employer's industrial instrument. Such options are detailed in this submission but could include allowing employers to complete a statutory declaration guaranteeing maintenance of earnings against a BOOT or an NDT for a specified time.

²²³ AMMA submission (#96), p.353

²²⁴ AMMA submission (#96), p.353

COMPETITION POLICY & WORKPLACE RELATIONS

PC Draft Report - Chapter 24, pp.769-783

516. AMMA's initial submission addressed the various competition policy questions raised by the PC in its Issues Paper 5, and the Secondary Boycott questions in Issues Paper 3 on Industrial Action²²⁵.
517. AMMA supports the proposed approach of continuing to separate the regulation of labour from the regulation of markets for goods and services²²⁶.

Anti-competitive provisions in agreements

518. AMMA supports PC Draft Recommendation 20.1, which would see agreement terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, constitute unlawful terms under the FW Act.
519. This would address some of the key concerns regarding the anti-competitive impact of how the FW system is being used by some trade unions and employers (i.e. some of the concerns canvassed in Chapter 24 of the Draft Report).

Market power

520. Chapter 24 includes a discussion of the relevance of market power to the operation of the WR framework. This is an interesting discussion, but AMMA does not see the need to change competition laws or WR laws on this basis.
521. We see no basis to change the existing delineation between WR and competition matters, and we agree with the PC that *"notwithstanding some of their congruent goals, there are strong reasons for separating (many aspects of) the WR system and competition policy"*²²⁷.

Competition and Efficiency

522. The PC indicates that:

...there is a case for increasing the prominence of competition policy principles in the framework of the WR system itself. Exclusion from competition laws should not preclude WR regulation being informed by principles of competition and efficiency — especially as this would also

²²⁵ AMMA Submission (#96), pp.444-450

²²⁶ PC Draft Report, p.769

²²⁷ PC Draft Report, p.776

improve the consistency of regulations across labour and product markets, while still remaining separate.

523. It is not sufficiently clear precisely what the PC has in mind in terms of importing competition principles into the WR system. In saying that, AMMA's reform options have the clear goal of achieving a high level of policy coherence and this includes ensuring, to the extent possible, that the goals of competition policy are also aligned with the WR framework.

Secondary Boycotts²²⁸

524. AMMA has consistently argued for effective prohibition on secondary boycotts, not just on paper, but in practice through rapid prosecutorial action by the regulator or regulators charged with responsibility to enforce these provisions of the *Competition and Consumer Act 2010*.
525. AMMA and its members were very concerned at the failure of the ACCC to take prompt action in the CFMEU/Boral/Grocon matter outlined in Box 24.1²²⁹, and consider this revealed a problem with the regulator, rather than the regulation.
526. The ACCC may receive what it views as few complaints in this area²³⁰, but that is a positive indictment on the regulation and the cultural change it has wrought over decades. We have few secondary boycotts in Australia and it is a weapon that sensible and law abiding unions don't even consider using, precisely because the existing laws have worked as intended, which supports retaining the status quo.
527. However, to continue to have this strong disincentive effect, where an alleged secondary boycott is complained of or otherwise comes to light, the regulator needs to act quickly and decisively and take prosecutorial action where merited.

AMMA Recommendation

The PC should conclude in the same terms as the Harper Review on Secondary Boycotts, finding that there is no case to change the substantive prohibitions, but should indicate that more vigorous education, investigation and enforcement is needed.

528. The PC needs to go further, and recommend to government how more rigorous enforcement could be achieved:

²²⁸ PC Draft Report, pp.780-783

²²⁹ PC Draft Report, p.781

²³⁰ PC Draft Report, p.781

AMMA Recommendation

The PC should recommend an independent review of the resources the ACCC devotes to discharging its secondary functions and its investigatory and prosecutorial protocols and practices, with the reviewers be make recommendations for more rapid and transparent ACCC enforcement in this area.

529. The PC also makes an information request on secondary boycotts:

INFORMATION REQUEST

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

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

Amending or removing s.45DD(1) and (2) of the Competition and Consumer Act 2010.

530. These provisions identify situations in which secondary boycotts are permitted and not actionable under the CCA. In essence a boycott cannot be a secondary boycott if the dominant purpose for which the conduct is engaged in is “substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person”.
531. Secondary boycotts have always been a complex area of the law requiring specialist advice and representation (and specialist enforcement skills) and this is not going to change. AMMA notes the Harper Review considered these matters in great detail. AMMA also notes that the ACCC has provided written submissions in response to the Harper Inquiry.²³¹
532. In a recent speech, Commissioner Rod Sims outlined the complex challenges in navigating the existing laws and the exceptions/exemptions (both general and specific) to parts of the existing CCA's covering industrial relations/employment matters.²³²

²³¹ ACCC Supplementary Submission, (15 August 2014) at pp.5-8:

<http://www.accc.gov.au/system/files/Harper%20Review%20-%20supplementary%20submission%20-%20Further%20Matters%20-%2015%20August%202015.pdf> and ACCC Submission to Treasury (29 May 2015): <http://www.accc.gov.au/system/files/Letter%20and%20Competition%20Policy%20Review%20Submission%20to%20Treasury.pdf>

²³² <http://www.accc.gov.au/speech/meeting-expectations-industrial-relations-as-a-case-study>

533. Rodd Sims has also indicated that the ACCC would respond to the Trade Union Royal Commission into Union Governance and Corruption Reform Options Paper.

AMMA Recommendation

At this stage, AMMA conditionally supports amending existing s.45DD(1) and (2) of the *Competition and Consumer Act 2010* by repealing the current exemption. However, given the complex nature of the provisions, the PC should recommend that the Australian Government give active consideration to these issues and engage in further consultation with relevant stakeholders.

Role of the ABCC / FWBC

534. On the second element of the information request, resource employers agree that gathering evidence is a key challenge, and support the approach canvassed in the final two paragraphs of p.782 of the Draft Report, including:
- a. The powers of the ABCC (which should replace the existing FWBC) should be able to be used to investigate alleged or suspected secondary boycotts in or affecting that industry, and this evidence should be used by the ACCC to take action.
 - b. This should apply to both alleged or suspected secondary boycott conduct within the building and construction industry, and in relation to, in connection to, or impacting on that industry. There should be no bar to the ABCC/FWBC assisting in the collection of evidence in the Boral/Grocon/CFMEU matter even though Boral is a manufacturer and supplier to the industry, not a constructor *per se*.
 - c. The identified advantage of this approach "*that parties or activities that are potentially in breach of the secondary boycott prohibitions can also be the subject of other concurrent investigations by FWBC [or preferably the ABCC] into potential breaches of WR laws*" appears a valid and material improvement for the key industry at risk of secondary boycotts.
535. The PC queries whether this would add complexity²³³. We do not see this a concern for employers and employees who need to be protected from secondary boycott conduct. Protocols and MOUs between the ABCC/FWBC and the ACCC would ensure evidence would be collected efficiently and

²³³ PC Draft Report, p.781

reliably and that the two agencies would work together towards prosecutions where appropriate.

AMMA Recommendation

The PC should recommend that FWBC (and in due course a restored ABCC) have a shared jurisdiction to investigate and enforce secondary boycott prohibitions in and in connection with the building and construction industry.

The PC should also recommend that the FWBC have the same investigative/enforcement capacities as the ACCC (i.e. s.155 powers under the CCA).

UNFAIR DISMISSAL

PC Draft Report - Chapter 5, pp.199-229

Why this area is important

536. Unfair dismissal is a very important part of our labour market regulation given its impacts on businesses' hiring and firing practices.
537. As highlighted in AMMA's primary submission and the KPMG Report²³⁴, employers' costs under the FW Act to respond to and manage claims for unfair dismissal are not insignificant.
538. Unfair dismissal regulation also potentially impacts on employer confidence to hire. This is not simply a question of the impact of employment protection *per se* (a subject much traversed in economic research) but the quality and impact of Australia's particular approach to employment protection.
539. To the extent that the current system forces employers to respond to and potentially compensate unmeritorious claims, or reinstate non-performing or "delinquent" employees, the system needs fundamental reform. Equally, inefficiency and design flaws in our unfair dismissal system also harm employees, and are contrary to the public interest generally, particularly when decisions of FWC members do not reflect, or accord with community expectations.
540. In some parts of AMMA's membership in the resource industry, it is estimated that unfair dismissal applications are lodged for between 20% and 40% of dismissals²³⁵, which is much higher than the 4.5% cited across all industries in the PC report²³⁶.
541. Unfair dismissal claims, even unsuccessful ones, result in legal, compensation and administrative costs to business which must be controlled to the greatest extent possible while at the same time not rewarding bad behaviour by either party, and ensuring that parties understand their rights and obligations.
542. Inefficiencies and flaws in the unfair dismissal system also impose costs and impacts on employers that are not observable from examining litigation and claim rates alone.

²³⁴ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015

²³⁵ *Workplace relations and the competitiveness of the Australian resources sector*, [report](#) prepared for the Australian Mines & Metals Association by KPMG, 12 March 2015, p12

²³⁶ PC Draft Report, p.212

543. The system also impacts on employers' capacity to manage, to counsel, to discipline and to terminate employment, which in turn can impact on efficiency, competitiveness and costs. Not acting on performance and conduct issues, or feeling precluded from doing so, and not managing optimally due to risk perceptions or unclear precedents, all have an impact on doing business in Australia.

544. As the KPMG analysis we commissioned for the PC pointed out (p73):

"The current framework governing unfair dismissal and adverse action presents challenges to employers due to ambiguity regarding what is and is not permitted. There is a lack of understanding regarding definitions, what constitutes a valid reason for termination and what is an adverse action. This has resulted in an increase in the level of applications relating to unfair dismissals and adverse treatment being submitted to the FWC for review, which costs employers time and money to address. It can also negatively impact employer-employee relationships and lead to unproductive workplaces."

545. AMMA's key concerns with the unfair dismissal jurisdiction as it currently stands fall into the following two areas:

- a. Removing inbuilt incentives for employers to pay "go away" money and for employees to pursue speculative claims, minimising incentives and capacities to pursue such claims to the extent possible; and
- b. Inconsistent decision-making by the FWC based on subjective factors being taken into account when arbitrating unfair dismissal claims.

Draft PC report: overview

546. The PC made four draft recommendations directly related to unfair dismissal and one information request in Chapter 5 of its draft report.

547. AMMA supports all four draft recommendations in Chapter 5 of the Draft Report and the thrust of the information request, which indicates that the PC is considering a proportional unfair dismissal application fee based on salary and an additional fee for cases that proceed to arbitration²³⁷.

548. The PC has also recommended retaining reinstatement as an objective but not as the primary objective of the unfair dismissal scheme²³⁸.

²³⁷ PC Draft Report, p.231

²³⁸ PC Draft Report, p.235

549. AMMA welcomes the following acknowledgements by the PC in its draft report:

- a. The FWC can sometimes give too much weight to procedure and too little to substance, leading to compliance costs and in some cases poor outcomes²³⁹.
- b. There is good statistical evidence that the findings in unfair dismissal cases have allowed inconsistencies to creep into judgments²⁴⁰.
- c. Businesses can only function efficiently if managers have the power to demand behavioural change by poorly performing employees or, in lieu of that, to dismiss or penalise them²⁴¹.
- d. Conciliation processes may sometimes be "rough justice" in that the full circumstances of a case are not tested meticulously²⁴².
- e. Conciliation and arbitration of unfair dismissal cases provides businesses with incentives to pay "go away" money and this undoubtedly occurs²⁴³.
- f. The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer²⁴⁴.
- g. There should be more up-front filters that focus on the merits of claims (p28)²⁴⁵.
- h. Higher lodgement fees, tailored to an employee's income, may assist in limiting speculative claims²⁴⁶.
- i. Reinstatement is often not in the interests of the parties involved²⁴⁷.
- j. Regulation can create barriers to businesses hiring employees²⁴⁸.

²³⁹ PC Draft Report, p.3

²⁴⁰ PC Draft Report, p.12

²⁴¹ PC Draft Report, p.27

²⁴² PC Draft Report, p.27

²⁴³ PC Draft Report, p.27

²⁴⁴ PC Draft Report, pp.27-28

²⁴⁵ PC Draft Report, p.28

²⁴⁶ PC Draft Report, p.28

²⁴⁷ PC Draft Report, p.28

²⁴⁸ PC Draft Report, p.113

- k. At “pinch points” in decision-making, the past professional history of decision-makers can be a significant predictor of outcomes²⁴⁹.
 - l. Further incremental reform is needed to prevent spurious cases from resulting in financial settlement, to ensure form is not favoured over substance, and to reform some aspects of the FWC's conciliation and arbitration processes²⁵⁰.
 - m. For employers in particular, involvement in unfair dismissal cases is likely to incur time and administrative costs on top of any compensation costs²⁵¹.
 - n. Unfair dismissal regulations can be productivity-reducing if they require employers to follow costly processes to dismiss a less productive employee and thereby retain less productive workers for longer periods²⁵².
 - o. Employers' perceptions of the unfair dismissal system could impact on hiring behaviour even if those perceptions are not necessarily founded in reality (p218)²⁵³.
 - p. Several key design elements of the current system create incentives for settlements such as the absence of a requirement for the loser in arbitrated cases to pay the winner's costs²⁵⁴.
 - q. The current Small Business Fair Dismissal Code does not appear to be a sufficient safeguard for small businesses against a claim of unfair dismissal, although firms may erroneously relying on it²⁵⁵.
550. These are very positive foundations for an improved system for the future, which better serves employees, employers and the community.

Information request – changes to lodgement fees

551. The PC addresses the issue of unfair dismissal lodgement fees in its information request below²⁵⁶:

²⁴⁹ PC Draft Report, p.151

²⁵⁰ PC Draft Report, p.199

²⁵¹ PC Draft Report, p.214

²⁵² PC Draft Report, p.217

²⁵³ PC Draft Report, p.218

²⁵⁴ PC Draft Report, p.230

²⁵⁵ PC Draft Report, p.239

²⁵⁶ PC Draft Report, p.232

INFORMATION REQUEST

The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.

AMMA response

552. It is worth noting from the outset that the unfair dismissal application fee has fallen as a proportion of the minimum wage in recent years.
553. AMMA recommended in its initial submission to the PC that applicants be required to pay an unfair dismissal application fee that is commensurate with their salary (see later in this chapter for further details of AMMA's recommendations).
554. The above suggestion seems to resource employers to be a sensible yet fair way to weed out unmeritorious applications while not imposing unreasonably high fees on applicants compared with their earnings. We note at p231 of the draft report that the PC is only proposing a "modest" application fee increase along with the potential for an additional fee for cases that go to arbitration, both of which AMMA supports.
555. Options that the PC could consider in recommending a proportional fee include the following:
- a. Given that the current unfair dismissal application fee (which is currently a flat fee for everyone) is approximately 10.5% of the weekly minimum wage (currently \$656.90 per week) that proportion could be maintained to set new application fees for employees earning the minimum wage, or in the lowest band of earnings.
 - b. Above that, there could be several salary bands where the proportion is roughly 10.5% for the lowest salary point within that band, or a flat rate of 10.5% of weekly salary could be set for each applicant, depending on how difficult that would be to calculate / verify at the point of lodgement.
556. Whilst some mechanical issues may have to be worked out, AMMA supports the thrust of the PC's information request in relation to proportional and additional fees.

Draft Recommendation 5.1 – consider applications ‘on the papers’

557. The PC addresses the issue of the FWC’s discretion in relation to unfair dismissal claims in Draft Recommendation 5.1²⁵⁷:

DRAFT RECOMMENDATION 5.1

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

AMMA response

558. AMMA supports both features described in the draft recommendation:

- a. Greater discretion for the FWC to consider unfair dismissal claims on the papers prior to conciliation
- b. More merit-focused conciliation processes.

559. We do not, however, see them as mutually exclusive or as an either / or proposition as suggested in the above recommendation. AMMA sees both features as working synergistically together and believes they should both be recommended in the PC’s final report.

560. The first part of the recommendation would lead to greater efficiencies and reduced costs and for that reason AMMA supports it. Where it is deemed there does not need to be a conciliation conference or hearing, provided this does not unfairly prejudice the applicant, AMMA supports that capacity being introduced.

561. With regard to the second part of the above recommendation - introducing a more merit-focused conciliation process rather than the current process which in AMMA’s view is unduly weighted towards procedural considerations²⁵⁸.

562. This would allow the FWC the discretion to choose between advice to the employer to educate them where they have not followed due process, or the capacity to levy a penalty within the present cap.

²⁵⁷ Draft PC Report, p.233

²⁵⁸ Draft PC Report, p.233

563. AMMA supports modifications to the existing dismissal provisions of the FW Act that would see more of a focus on the merits of an application before the FWC attempts to conciliate and settle a matter given the resources that conferences and hearings entail for the employer. This is consistent with the tenor and stated aims of the current FW Act and AMMA sees this as little more than increasing the rigour applied to the current features of the FW Act by way of modifying the FWC's processes.
564. Perhaps to operationalise the second part of the draft recommendation a mechanism could be introduced, either via legislation, regulation or another mode that requires an appropriate apportionment or weighting between the substantive reasons for termination versus procedural considerations.
565. For example, the substance or merits of a dismissal could constitute 75% or 80% of the considerations in determining a matter, and procedural requirements the remainder.
566. AMMA envisages such a weighted process would be particularly important for small business.

Draft Recommendation 5.2 – compensation for unfair dismissal

567. The PC addresses the issue of compensation for unfair dismissal claims in the following draft recommendation²⁵⁹:

DRAFT RECOMMENDATION 5.2

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

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

AMMA response

568. AMMA strongly supports both parts of the above recommendation which would have the effect of only allowing an employee to receive compensation when they have been dismissed without reasonable evidence of persistent

²⁵⁹ Draft PC Report, p.233

underperformance or serious misconduct; and ensuring that an employer's procedural errors alone do not result in reinstatement or compensation of a former employee.

569. The only reservations AMMA has with the first part of the recommendation is the word "persistent" in relation to underperformance, and clarity that the reference to "compensation" also includes reinstatement. A recent FWC decision highlights the problems if that is not the case²⁶⁰.
570. Aside from that, this is a very sound recommendation. In AMMA's view it is not appropriate to reward otherwise "delinquent" former employees purely on the grounds of an employer's procedural failings under a system which has been acknowledged as unclear. This is particularly the case where the remedy is a transfer of monies and / or reinstatement against the wishes of the employer.
571. This picks up the principles of AMMA's recommendation to the PC in which AMMA advocated that in all such cases where a valid reason for termination exists, the FWC should be prevented from ordering reinstatement (**AMMA Recommendation 7.2.2**)²⁶¹.

Draft Recommendation 5.3 – emphasis on reinstatement

572. The PC addresses the issue of reinstatement as the primary remedy in unfair dismissal cases in the following draft recommendation²⁶²:

DRAFT RECOMMENDATION 5.3

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

AMMA response

573. AMMA supports this recommendation but would like to state at the outset that any changes in this area must be enacted in such a way as to not encourage employees to seek compensation when they are not interested in being reinstated, or "game" reinstatement as a strategic tool to get money, or vice versa. That is, any legislative change must be enacted in such a way as to not encourage speculative claims or litigation games.

²⁶⁰ *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156

²⁶¹ AMMA Submission (#96), p.472

²⁶² Draft PC Report, p.235

574. AMMA notes that reinstatement is not precluded by the draft recommendation but would remain one of a suite of outcomes depending on the parties' wishes and the merits of the case. As the PC notes²⁶³, reinstatement rarely eventuates from an arbitrated unfair dismissal outcome, so it makes sense for the objectives of that part of the Act to reflect this.
575. AMMA's long-held view is that, particularly in relation to dismissals over serious safety breaches, it sends a very bad signal to other employees to reinstate that person, in effect undermining the seriousness of safety at the workplace.
576. AMMA supports Draft Recommendation 5.3 as long as it does not encourage speculative claims for financial gain only.
577. In AMMA's view, reinstatement should only occur where there are compelling reasons in favour of it and where trust in the employment relationship has not irrevocably broken down. In all cases where reinstatement is sought, the applicant should have to put cogent arguments forward as to why it is appropriate, with the FWC taking into account the reasons for the termination along with the employer's duty of care for the safety of other employees. An applicant seeking reinstatement should bear the onus of proving this is the appropriate remedy.
578. Where the employer opposes reinstatement, the FWC should consider that persuasive evidence in support of an outcome against reinstatement unless very strong arguments to the contrary have been made out.
579. In practical terms, there are very few, if any, situations where an employer who has chosen to dismiss an employee for poor performance or misconduct would want that employee back.
580. The other consideration weighing against reinstatement as the primary remedy is that, where it is ordered, it is usually accompanied by an order for payment for lost wages in the meantime, adding to the potential costs for employers under this jurisdiction.

Draft Recommendation 5.4 – Small Business Fair Dismissal Code

581. The PC addresses the issue of the Small Business Fair Dismissal Code in the following draft recommendation²⁶⁴:

²⁶³ Draft PC Report, p.235

²⁶⁴ Draft PC Report, p.240

DRAFT RECOMMENDATION 5.4

Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the *Fair Work Act 2009* (Cth).

AMMA response

582. AMMA supports the above recommendation to remove the reliance on the Small Business Fair Dismissal [Code](#), noting the longer qualifying period for employees of small businesses to access the unfair dismissal jurisdiction will remain set at 12 months as opposed to six months for larger businesses.
583. As the PC points out²⁶⁵, at present the code is “neither fish nor fowl” and does not guarantee protection to small employers (those with fewer than 15 employees) against unfair dismissal claims, even if it is meticulously complied with. This was an idea from the 2007 Forward with Fairness policy of the ALP, and its origins lie in the previous exemption of smaller employers from unfair dismissal claims.
584. As with so much of that 2007 policy, experience has exposed the flaws in the thinking and change is needed.
585. While the code can act as a checklist as to what the employer should be taking into account, it can be misleading as it may encourage employers to think they are immune from future claims if they follow the code, but the veracity of their processes may nonetheless be challenged by an applicant or the FWC.
586. At present, the code is of little concrete use to employers because even if an employer asserts they have relied on it, that can be challenged by an ex-employee and the business will have to respond to allegations in the same way as any larger business would. The code seems a pretty unreliable fig leaf of protection.
587. AMMA had in our initial submission recommended that the code apply to all businesses, regardless of size, but on the proviso it functioned as an exemption from unfair dismissal claims (**AMMA Recommendation 7.2.4**)²⁶⁶. If that is not going to be the case, it is as well to remove the reliance on it so as not to give businesses a false sense of security, or mislead employees, distracting from the capacity to settle claims amicably and in reflection of their merits.

²⁶⁵ PC Draft Report, p.239

²⁶⁶ AMMA Submission (#96), p.472

588. AMMA supports the size of a business and its access to HR expertise remaining key factors in weighing up their liabilities in terms of the unfair dismissal jurisdiction.
589. However, given that the code at present functions as little more than guidance, AMMA sees no problem with that guidance coming from an education program by the Fair Work Ombudsman as the PC proposes. AMMA further supports the suggestion that more targeted materials for small and other businesses regarding unfair dismissal be published on the FWO website.

AMMA priorities not addressed

590. AMMA made nine recommendations relating to unfair dismissal under the FW Act broadly consistent with the thrust of the PC's draft recommendations, i.e. ensuring the merits of a case are the major consideration when the FWC goes about its business, rather than any procedural defects.
591. AMMA also sought a more limited obligation regarding redundancy and redeployment along with a "true" high-income threshold, as well as application fees that are proportionate to salary and an extra fee if matters proceed to a hearing (the latter two have been taken up by the PC by way of an information request, which AMMA supports).
592. AMMA's recommendations, whilst noted by the PC, has not been satisfactorily adopted, the following recommendations would invoke some balance on behalf of the interests of employers and employees:
- a. The question of whether an employer had a valid reason to dismiss should be the FWC's primary consideration (**AMMA Recommendation 7.2.1**)²⁶⁷.
 - b. In all cases where a valid reason for termination exists, the FWC should be prevented from ordering reinstatement (**AMMA Recommendation 7.2.2**)²⁶⁸.
 - c. At the very least, the FWC should not be empowered to reinstate employees dismissed for breaches of work health and safety procedures; sexual harassment; bullying; serious misconduct; or acts of violence (**AMMA Recommendation 7.2.3**)²⁶⁹.

²⁶⁷ AMMA Submission (#96) p.472

²⁶⁸ AMMA Submission (#96) p. 472

²⁶⁹ AMMA Submission (#96) p. 472

- d. Issues related to the impact of the dismissal on the applicant and their family should have no bearing on the tribunal's decision making, with each case resting on its merits (**AMMA Recommendation 7.2.5**)²⁷⁰.
 - e. Applicants should be required to pay an application fee that is commensurate with their salary (**AMMA Recommendation 7.2.8**)²⁷¹.
 - f. If the claim proceeds to a hearing, the applicant should be required to pay a hearing fee to the FWC before the matter is listed (**AMMA Recommendation 7.2.9**)²⁷².
593. AMMA maintains it is also important for the PC to reconsider the below AMMA recommendations as these will have a significant impact on productivity without eroding the tenets of fairness or the purpose of unfair dismissal protection:
- a. The only redeployment options an employer should be required to canvas as part of a genuine redundancy are options within its own enterprise, not within associated entities over which they may have no control (**AMMA Recommendation 7.2.6**)²⁷³.
 - b. There be a true high-income threshold above which there are no unfair dismissal rights, regardless of whether someone is covered by an award (**AMMA Recommendation 7.2.7**)²⁷⁴.
594. Additionally, since AMMA lodged our submission to the PC in March 2015, a persistent issue with FWC conciliation processes is again coming to the fore and deserves attention in the PC's final report.
595. This relates to unfair dismissal cases that are allocated to a conciliator, and the problem arises from an inappropriate level of delegation within the FWC
596. AMMA maintains that the legislation should specify that an employer respondent can request an unfair dismissal matter be conciliated by a member of the FWC rather than by a conciliator from the registry.
597. AMMA maintains there must be an ability to request a conference before a member of the commission where that is considered important to the employer in responding to the claim. AMMA and its members have experienced impediments to this in recent times.

²⁷⁰ AMMA Submission (#96) p. 472 (AMMA is pleased this is picked-up in the PC draft information request at p. 232)

²⁷¹ AMMA Submission (#96) p. 472

²⁷² AMMA Submission (#96) p. 473

²⁷³ AMMA Submission (#96) p. 473

²⁷⁴ AMMA Submission (#96) p. 473

Fair Work Act Review Panel recommendations not yet implemented

598. There remain two recommendations from the 2012 FW Act Review Panel on unfair dismissal that are yet to be implemented, although the first one below was taken up by the current Federal Government in the FW Amendment Bill 2014 that is currently before the parliament at the time of writing this submission.

599. The FW Act Review Panel at Recommendation 43 said:

"The panel recommends that the FW Act be amended to provide that Fair Work Australia is not required to hold a hearing when exercising powers to dismiss an application under [s.587](#), nor when exercising powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not."

600. The above recommendation has been taken up to some extent in **PC Draft Recommendation 5.1**²⁷⁵, which AMMA supports.

601. The FW Act Review Panel at Recommendation 44 also recommended:

"The panel recommends that the Fair Work Australia President give consideration to requiring applicants to provide more information about the circumstances of the dismissal in the initial documentation lodged with FWA."

602. This recommendation has been alluded to in **PC Draft Recommendation 5.1**²⁷⁶ which suggests a greater focus on merit during conciliation processes although AMMA maintains the FW Act Review Panel recommendation should be taken up more stringently by the PC in its final report.

603. This would reduce a lot of the costs for employers associated with turning up to conciliation conferences to defend allegations that are completely without merit.

How the PC should proceed

AMMA Recommendation

AMMA strongly supports **PC Draft Recommendation 5.2** but does not see the two alternatives proposed within it as mutually exclusive and would like to see them both adopted.

²⁷⁵ PC Draft Report, p.48

²⁷⁶ PC Draft Report, p.48

AMMA supports the other three draft recommendations the PC has made in relation to unfair dismissal (**Draft Recommendations 5.1, 5.3 and 5.4**) and has provided further information as to how those might best be “operationalised” and identifies further issues the PC needs to take into consideration in implementing them.

FW Act Review Panel Recommendation 44 could be addressed more precisely by the PC in its final report.

Key AMMA recommendations that have not been taken up by the PC that should be in its final report include:

- Only requiring employers to canvass redeployment options in the case of genuine redundancy within their business, not within related entities (**AMMA Recommendation 7.2.6**).
- That there be a “true” high-income threshold for unfair dismissal, regardless of whether someone is covered by an award (**AMMA Recommendation 7.2.7**).
- The question of whether an employer had a valid reason to dismiss should be the FWC’s primary consideration (**AMMA Recommendation 7.2.1**).
- In all cases where a valid reason for termination exists, the FWC should be prevented from ordering reinstatement (**AMMA Recommendation 7.2.2**).
- At the very least, the FWC should not be empowered to reinstate employees dismissed for breaches of work health and safety procedures; sexual harassment; bullying; serious misconduct; or acts of violence (**AMMA Recommendation 7.2.3**).
- Issues related to the impact of the dismissal on the applicant and their family should have no bearing on the tribunal’s decision making, with each case resting on its merits (**AMMA Recommendation 7.2.5**).
- If the claim proceeds to a hearing, the applicant should be required to pay a hearing fee to the FWC before the matter is listed (**AMMA Recommendation 7.2.9**).

ANTI-BULLYING

PC Draft Report - Chapter 7, pp.267-283

Why this area is important

604. As employers have consistently recognised throughout both debate leading up to the anti-bullying jurisdiction and this review, there are genuine and serious cases of workplace bullying that can cause significant harm to those involved as well as the businesses they work for.
605. However, it is also true to say that the majority of the very few decisions to date that have been handed down under the FWC's anti-bullying jurisdiction have tended to deal with what might be described as personal grievances rather than genuine workplace bullying.
606. As AMMA said in its original submission to this review, employment protection measures, including those relating to workplace bullying, must be balanced, proportionate, practical and navigable by employers.
607. There is little case law arising from the FWC's new anti-bullying jurisdiction, and the extent of potential liabilities and obligations for businesses are no clearer as a result of what has been published.
608. AMMA has long maintained that the FW Act's anti-bullying legislation is wrongly-located in the workplace relations jurisdiction to begin with and that it is properly the preserve of the OHS system²⁷⁷.
609. Notwithstanding the lower than expected number of applications and orders in the first 18 months of the FWC's anti-bullying jurisdiction, or perhaps in light of it, the jurisdiction remains an unnecessary extra mode of third-party interference for employers which has added little or nothing to existing protections for employees.
610. Although there is no monetary compensation available, addressing concerns through FWC processes requires more time and resources from both employers and employees than it does to address them internally via company procedures.

²⁷⁷ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015, p288

611. A key part of AMMA's initial recommendations to this review was therefore that applicants should have to follow internal company processes, where they exist, before taking an application to the FWC²⁷⁸. We strongly maintain that view.
612. While the case law generates little in the way of lessons for employers given each case rests on its own unique and very particular mix of circumstances and personalities, AMMA members report an emerging reluctance by line managers to appropriately discipline or performance-manage poor performers due to a fear of bullying claims being made in retaliation. Some managers fear personal orders or findings against them and this compounds their incapacity to do what the employer requires of them.
613. These trends are not necessarily reflected in the published data on applications under the jurisdiction but signal the deleterious impacts on business productivity, the extent of which is hard to quantify, that have arisen since the jurisdiction first took effect. We fear that the jurisdiction has done little to counteract bullying, and its main impact lies in further tying employers' hands in addressing genuine issues.
614. AMMA maintains that the FWC should focus on its core area of business (workplace relations) without duplicating another already well-covered area of regulation in the form of workplace bullying.

Draft PC report: overview

615. The PC has made no formal draft recommendations or information requests to improve the operation of the FW Act's anti-bullying jurisdiction in Chapter 7 of its draft report. However, AMMA is pleased to note if nothing else that the PC has taken on board AMMA's suggestion that applicants should follow internal processes first.
616. This should become a formal recommendation to government in the PC's final report, which in the current report structure would become Recommendation 7.1.
617. AMMA also welcomes the following acknowledgements by the PC:
- a. There are multiple avenues for addressing bullying such as through various anti-discrimination and workplace health and safety laws, separate to the FW Act's jurisdiction²⁷⁹.

²⁷⁸ *Getting back on track: delivering the workplace relations framework Australia needs – The resource industry's submission to the Productivity Commission review of the workplace relations framework*, [submission](#) prepared by Australian Mines & Metals Association, 13 March 2015, p311

²⁷⁹ PC Draft Report, p.30

- b. While the “expected barrage of claims” has not materialised, the provision is resource intensive for the FWC because evidence provided by applicants can be extensive²⁸⁰.
- c. Some key matters relating to working conditions have been shifted to dedicated laws and institutions outside the WR system although in the case of anti-bullying, the shift has been the other way²⁸¹.
- d. There is overlap between the anti-bullying jurisdiction in the FW Act and a number of other avenues for recourse at Commonwealth and state levels, particularly workplace safety regulation²⁸².
- e. A further independent review of the performance of the jurisdiction has been scheduled (a post-implementation review) and will be useful in monitoring its effectiveness²⁸³.

Information request – internal review processes

618. The PC in its draft report, while not issuing a formal information request regarding anti-bullying, had the following to say²⁸⁴:

As an example, currently laws do not require that internal review processes within firms should be the first means of response by employees experiencing bullying. The FWC could encourage this, while not denying applicants their right under the law. If it does not, a powerful incentive for better management could be lost.

AMMA response

619. AMMA supports the PC's suggestion in making the observation above and would welcome formalising a requirement for the FWC to encourage or require applicants to first go through internal processes before filing a claim with the FWC to “stop the bullying”.
620. As indicated above, this should become a formal recommendation to government in the final PC report.

AMMA priorities not addressed

621. AMMA made four recommendations relating to the anti-bullying jurisdiction in our initial submission to the PC:

²⁸⁰ Draft PC Report, p.30

²⁸¹ Draft PC Report, p.73

²⁸² Draft PC Report, p.267

²⁸³ Draft PC Report, p.267

²⁸⁴ Draft PC Report, p.282

- a. Repealing the FW Act's anti-bullying provisions that took effect on 1 January 2014 given there are already numerous other avenues in place, including under work health and safety laws (**AMMA Recommendation 7.3.1**)²⁸⁵.
- b. In the event the jurisdiction remains, applications be dealt with via AMMA's proposed Australian Employment Conciliation & Advice Service (AECAS) but only after bullying allegations have been raised internally with the employer and company processes have been followed first (**AMMA Recommendation 7.3.2**)²⁸⁶.

AMMA requests the PC look again at the AECAS proposal in our initial submission and what it could offer the Australian WR framework.

- c. Among other things, it be made explicitly clear that bullying in relation to individuals' participation or non-participation in the union and its business is not protected and is subject to the FWC's anti-bullying jurisdiction (**AMMA Recommendation 7.3.3**)²⁸⁷.
 - d. Clarifying in legislation that bullying conduct within what would otherwise be legitimate industrial activities is not protected. Bullying conduct, regardless of the context, should remain actionable against the perpetrator (**AMMA Recommendation 7.3.4**)²⁸⁸.
622. On those last two points, AMMA laid out in great detail some very serious examples of bullying over union-related or industrial activities in its original submission. At the very least, these should be addressed by the PC in the form of a recommendation for a note to be added to the FW Act clarifying that no matter what context bullying occurs in, it is not permissible in the workplace and can be actioned using the provisions. This note should particularly mention bullying or abuse in relation to participation or non-participation in an industrial organisation or industrial action.

How the PC should proceed

AMMA Recommendation

The PC's informal observation that the FWC could encourage potential applicants to go through internal company processes first should be formalised as a recommendation to government in the PC's final report.

²⁸⁵ AMMA Submission (#96), p.326

²⁸⁶ AMMA Submission (#96), p.326

²⁸⁷ AMMA Submission (#96), p.327

²⁸⁸ AMMA Submission (#96), p.328

AMMA further recommends that in line with AMMA's original recommendations:

- It be clarified in legislation that bullying conduct within the context of industrial activities not be protected (**AMMA Recommendation 7.3.4**).
- Should the yet-to-be-undertaken post-implementation review find no justification for the continuation of the jurisdiction, the PC recommend it be repealed as per **AMMA Recommendation 7.3.2** or subject to substantial amendment.

NES – THE PC’S RECOMMENDATIONS

PC Draft Report: Chapter 4 (pp.163-197)

623. This subsection addresses those specific elements of the NES that the PC examines in Chapter 4 of its Draft Report.

Long Service Leave – A National Scheme in the NES

624. The PC States that:

A compelling case has yet to be made that the benefits of such a scheme, at a national level (and in addition to those currently in place), would be sufficient to offset the costs.²⁸⁹

625. Reviewing PC Draft Recommendation, what others have argued and the PC's supporting reasons, we do not agree and ask that this be reconsidered. We maintain that this review is an opportunity to move towards a non-portable national LSL scheme through the NES, and that this should appear in the PC's final recommendations to government.
626. The PC characterises the current LSL situation as a 'farrago'. AMMA and other employer representatives call it a 'mess' that makes it very difficult for employers operating nationally (and posting employers overseas) to accurately and consistently administer employee entitlements.
627. Reading Box 4.5 of the Draft Report²⁹⁰, there is a pretty interesting range of bodies with a common view of at least attempting to create such a scheme, and this should be harnessed rather than rebuffed. This was also recommended by the Fair Work Review Panel²⁹¹.
628. The fact that nothing has been done to date after recommendations for a national LSL scheme does not mean it cannot or should not be done, nor that the PC should not recommend embarking on this course. It may require "considerable political commitment, and bureaucratic, business and union resources"²⁹², but this review and recommendations the PC makes represents the best chance to get this moving, and it is an opportunity that should not be lost.

²⁸⁹ PC Draft Report, p.163, and Subsection 4.2, pp.172-182

²⁹⁰ PC Draft Report, p.175

²⁹¹ PC Draft Report, p.180

²⁹² PC Draft Report, p.181

629. We note the PC's discussion on complexity of moving to a single system and grandfathering. These are hard issues, but they are not going to become any easier to resolve by waiting.
630. The terms of reference of this review did not ask the PC to be cautious or limited, but rather asked PC to:
- "Examine the current operation of the Fair Work Laws..."
 - "Identify future options to improve the laws..."
 - "Make recommendations about how the (WR) laws can be improved to maximise outcomes for Australian employers, employees and the economy..."
631. Based on these precepts we ask the PC to look again at options to move to a national LSL scheme through the NES.
632. The PC should recommend the best approach it can identify to move to a single national scheme and recommend that be put to the federal, state and territory ministers through COAG or the WRMC and NWRCC for further consideration.
633. Then in due course participants in this review can make recommendations to the government based on the PC recommendations on a LSL NES in this review.
634. AMMA therefore repeats our earlier call to the PC to proceed as follows²⁹³ and asks that this be reconsidered as an additional recommendation for the PC's final report:

AMMA Recommendation

The PC should recommend the Australian, state and territory governments jointly examine scope to move, over time, to a single national standard for non-portable LSL, to be contained in the NES.

This should be by way of a recommendation that this be included on the COAG agenda / the WR Ministers Council (WRMC) agenda for an urgent report to COAG.

635. The PC analyses the costs and benefits of moving to a national scheme, observing that:

²⁹³ AMMA Submission (#96), pp.278-284

The costs of higher entitlements in various states may be costs to businesses, but some of these are transfers to employees. From an economic perspective, the relevant cost is the net cost.²⁹⁴

636. We also need to take into account that LSL complication is simply one more part of a difficult and challenging WR system in which to employ.
637. Differences between state and territory LSL systems are simply one more oddity that Australian managers need to explain to international owners and investors, and navigate in managing work in this country.
638. In addition, employers in the resources industry do regularly seek to move people between states and territories, and whilst they do have sophisticated HR capacities, they are often strategically trying to implement consistent remuneration and compliance practices across their businesses.

Portability:

AMMA Recommendation

For the reasons set out at pp.174-179 of the Draft PC report, and in the previous AMMA submission from p.283-284, AMMA supports the PC's draft approach which is to not recommend any further spread of LSL portability on the basis that:

"it is not clear that the benefits of either the typical model of portable LSL or the alternative proposed above, would be sufficient to justify the costs and complications entailed. Submissions to this inquiry are yet to provide compelling evidence of major and widespread concern about the present non-portability of most LSL arrangements."

This approach should be carried over to the final report and recommendations.

Exchanging LSL for annual leave – Information request

639. On p.179 of the Draft Report, the PC asks the following:

The PC would welcome comment on, not only portability of LSL, but the costs, benefits and practicality of providing all national system employees with additional days of annual leave in exchange for their long service leave entitlements. In particular, how such a scheme could be designed to extend the entitlement to employees who would not otherwise receive LSL while reducing complexity and limiting any additional cost to business.

²⁹⁴ PC Draft Report, p.181

640. Average job tenure already sees many employees not achieve the cumulative service with a single employer that triggers LSL, and with generational change the proportion of employees achieving the LSL threshold (particularly for taking leave rather than a pro-rata pay-out) can only fall further.
641. Most employees leaving a job already do so in the knowledge that their accruing LSL will be lost to them as they have not achieved the threshold service for it to be paid out. This is a calculation employees already make.
642. We see no difficulty with employers agreeing to make a liability that is naturally contingent on extended service into an absolute liability payable on all service, to gain the advantage of paying it out at present wage rates and cutting future leave liabilities. This is a calculation employers should be able to make.
643. Equally, an employee choosing to take LSL as annual leave reduces their risk of never getting LSL (i.e. if they leave prior to the service threshold for LSL or pro rata payout). The employee mitigates their risk of never reaching the LSL trigger point.
644. This is not a theoretical question. There are two experiences the PC can look to in making a final recommendation to allow agreed taking of LSL as annual leave:
 - a. Under previous NDT arrangements it was possible to break down the taking of LSL by agreement into shorter blocks – such as an extra week a year in the years leading up to an entitlement becoming payable. AMMA does not recall any particular problems with this, as it was only possible by agreement between employer and employee.
 - b. It is already possible to purchase additional annual leave by agreement, for example where an employee agreed to proportionate reduction to their weekly wage to purchase additional annual leave (for example the 48/52 arrangement). Where able to be agreed, this can be very useful to employees who prioritise an extended annual break over a single sabbatical they may never reach the threshold to take, and may lack the money to use for a major holiday.
 - i Consider for example parents working in Melbourne or Sydney, whose family is in WA. They may be very interested in arrangement that enabled them to take an extended holiday in WA each year with the grandparents, and may find this more useful than an extended sabbatical years off into the future.
 - ii They might propose to their employers that they be paid 50/52 (96%) of their present wage, and accrue 6 rather than 4 weeks of annual leave per year.

645. We also recall a point made in AMMA's earlier submission that contemporary working parents often cannot synchronise leave to take an extended break as a family, particularly where a mother has had a career interruption due to child raising (so males are inherently more likely to accrue a LSL entitlement during prime child raising years than female employees).
646. If one partner has a LSL entitlement to perhaps 10 or 13 weeks off, this may not be very useful if the other has only annual leave which is already used to cover school holidays, and the couple could not take their children out of school for an extended period anyway.
647. It is increasingly improbable that two working parents can take LSL together, and they should have options to make their leave work entitlements for them where this can be agreed with their employers.
648. Such a family may be far more interested in using LSL as extra annual leave to support school holiday care, plus scope to take a shorter holiday together as a family. Such a family may also be interested in throwing some degree of LSL cashing out into their personal leave mix. This is really the point; why shouldn't contemporary employees be able to pursue the leave mix which best suits them and their family and seek to have that agreed with their employer?

Design Considerations

649. Some practical issues need to be considered in designing such a scheme :
- a. Such a capacity should only ever apply by agreement between the employer and employee, not as an employee right. Employers must have a right to withhold agreement. Some may not want the record keeping complications, or to treat employees differently in this area, or may have existing high annual leave balances they are striving to reduce (which is a real issue for Australian businesses which can only get worse as employees seek to hedge their leave against a possible labour market downturn).
 - b. And operating strictly by agreement may justify protections for employees. If there need to be additional protections against any employee being compelled to enter into such an arrangement, they should be considered.
 - c. However, it should be possible for new employment to be made contingent on such an arrangement, and for it to be made a condition of taking up a new job. The employee can then make a calculation on whether such terms of employment match their personal interests and priorities, and anticipated job tenure.

- d. An employer should be able to manage their LSL liabilities through an agreed annual leave substitution for all new employees, provided that is clearly communicated and understood at the point of engagement.
- e. There should be no annual leave loading payable on any additional annual leave which is created in lieu of LSL. The principal of pro rata should be applied – and the annual leave should be calculated/payable strictly in proportion to the payment that would have been receivable for the LSL, with no additional loading.
 - i. There is no 17½% loading on LSL, and equivalently and consistently, there should not be any leave loading on LSL exchanged for annual leave.
 - ii. Note, where a substitution of LSL for annual leave is agreed the employer is inherently incurring the impact of making a contingent cost (which may not become payable) into an absolute cost (payable in 100% of cases for all employees). To add an additional loading would likely render this potentially useful flexibility inherently unattractive and see employers refuse virtually all requests.
 - iii. There are existing problems with the application of leave loading to annual leave under the NES in particular circumstances. Thus, the PC should be recommending amendments to the leave provisions of the NES regarding loadings, to which a small tweak to allow no loading on LSL exchanged leave would not be difficult.
- f. If this dictates somehow that LSL exchanged for leave must not become annual leave, but some new specie of leave, so be it. This would also be a legitimate and manageable arrangement to make a sensible change to the system.
- g. LSL is largely regulated by state and territory law. States and territories should be encouraged through the National WR Ministers Council (WRMC) to agree to such an arrangement and amend LSL legislation accordingly (if actually required).
- h. If this is not forthcoming or is not able to progress by agreement, Commonwealth legislation should be used to override inconsistent state regulation. In fact, overriding state and territory LSL laws and replacing them with a fleshed out NES for LSL would be positive, and should be triggered rapidly if the federal, state and territory ministers cannot reach agreement within a set period.

650. These are navigable concerns and such a national LSL scheme in the NES should be entirely achievable. AMMA therefore suggests the following additional recommendation be included in the PC's final recommendations to the government:

AMMA Recommendation

The NES be amended to allow employers to agree to employee requests to exchange accrued and/or accruing days of LSL for additional days of annual leave, provided that no annual leave loading would be payable on such additional days of annual leave.

Such agreements should be recorded in time and wages records. Beyond that there should be no restrictions or qualifications on which employees could agree to such an arrangement, nor the proportion of their contingent LSL entitlements that can be taken as annual leave.

Employers and employees should also be able to agree to the cashing out of LSL either as it accrues or as it falls due, if that is what the employee prioritises.

Public holidays

651. The PC included the following Draft Recommendation in its Draft Report:

DRAFT RECOMMENDATION 4.1

The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the *Fair Work Act 2009* (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.

652. AMMA strongly supports this recommendation, but stresses that:
- a. The PC correctly states that *"because it would require their consent, employers could not be compelled to agree to a substituted public holiday that greatly inconveniences them. By this logic, businesses can only benefit from this proposal"*²⁹⁵.

²⁹⁵ PC Draft Report, p.187

- b. Such a scheme must only ever operate by agreement between employer and employees, and in many resource activities shift arrangements and rosters will preclude any individual changes to holidays (i.e. the employer cannot practically agree to such substitution).

653. AMMA also strongly supports PC recommendation 4.2:

DRAFT RECOMMENDATION 4.2

The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.

654. Victoria's Labor government is set to create two new public holidays, which are estimated by the Victorian Employers' Chamber of Commerce and Industry to have the following impact:

On grand final Friday, the cost to pay Victoria's almost 2 million full time employees not to come to work could reach \$543 million for the day.

Additional wages for the retail, accommodation, food services and recreation industries are estimated to cost small business owners \$105 million for the two holidays as wages can be 50 per cent higher on Easter Sunday and 150 per cent higher on grand final eve.²⁹⁶

655. We could add to this, as all Victorians know, that not a great deal gets done on the Monday preceding Melbourne Cup Day, so a further *de facto* public holiday has already been having an impact on the Victorian economy for decades.
656. Draft recommendation 4.2 is a very suitable approach to overcoming a very poor policy approach, and frankly rank populism, by the Victorian government. Australia does not need more public holidays, and greater flexibility to agree bespoke leave arrangements can provide the claimed flexibilities without economic damage.

Quantum of Annual Leave

657. Resource employers are however very concerned by the discussion on pp.194 and 195 of the PC Draft Report, and Draft Recommendation 4.3.

²⁹⁶ <http://www.vecci.org.au/policy-and-advocacy/news/media-releases/2015/07/08/vecci-statement-new-public-holidays-in-victoria>

DRAFT RECOMMENDATION 4.3

Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated tradeoff between wage increases and extra paid leave.

- 658. This would create a problem and generate disputes without any basis to do so, and apparently without being sought by any submitting party.
- 659. The ACTU has not pursued a test case for additional annual leave for decades and nor has it sought to increase the NES/National Employment Standard on annual leave in the near decade it has been in operation. Where annual leave has been raised in test cases claims were not for additional leave, but flexibility in how it is used.
- 660. Four weeks annual leave has been the national standard for decades. Whilst incomes grow and employee preferences become more heterogeneous, the Gregorian calendar has not changed from 52 weeks and 365¼ days for almost 500 years. More annual leave means less days worked, *de facto* wage and labour cost increases, and increasing the productivity and labour cost demands for Australian employers to be competitive.
- 661. Resource employers therefore strongly oppose the first component of this recommendation, and think that a programmed review of a long standing and uncontroversial national standard as fundamental as four weeks annual leave is without foundation and a recipe for harming the national interest and the interests of employers and employees.
- 662. The PC should be concentrating on the problems with the existing NES and the particular problems arising from the overlap between the NES and awards, and should not be unnecessarily opening up quantum claims where there is no basis to do so.
- 663. This also has nothing to do with state and territory governments, whose systems cover only a rump of employment in the area of annual leave. As we have previously recommended, the states and territories should instead be urged to complete the national system and refer their remaining private sector coverage to the Commonwealth.

AMMA Recommendation

PC Draft Recommendation 4.3 not be progressed.

664. Where the PC is on the right track is identifying additional scope for employers and employees to agree on how annual leave is taken, which is a quite separate consideration to any increase in the quantum of leave, which employers strongly opposed.
665. Where an employee seeks extra leave, and the employer agrees, this can be achieved by a form salary sacrifice, under a purchased leave arrangement. This can for example see an employee receive a marginally reduced proportion of their wage in exchange for additional leave (for example the employee would receive $48 \div 52$ of their wage and be entitled to 8 weeks annual leave per year instead of 4).
666. There need to be controls around this and many employers are already plagued by employees hoarding leave and maintaining excessive balances, but strictly on a mutually agreed basis, this would be a more valid direction to canvass reform than Draft Recommendation 4.3.

AMMA Recommendation

In place of PC Draft Recommendation 4.3, the PC should recommend an amendment to the NES to allow employers and employees to agree to purchase leave arrangements on an individual basis for up to four weeks per year of annual leave.

This recommendation should include the following:

- This must at all times be an individual matter between employee and employer, not be able to be overridden by any collective enterprise agreement (either to compel purchased leave, force an employer to offer it, or preclude its use).
- Any additional purchased leave should not attract annual leave loading under an award (this should be clarified in the NES).
- Purchasing additional annual leave should not be able to be made a condition of employment (which is different for how we say any interaction between LSL and Annual Leave should operate).

Sick and annual leave for casual workers²⁹⁷

667. Chapter 4 of the Draft Report also includes the following information request:

²⁹⁷ PC Draft Report, pp.195-197

INFORMATION REQUEST

The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.

668. Casual employees get an additional loading on their pay to compensate for conditions available to ongoing employees to which they are not entitled. There is already and has long been specific recompense for the unique nature of their employment.

669. The PC clearly traverses this ground and notes:

...there is not a strong case for extending the NES paid annual and sick leave entitlements to casual workers so long as casual loadings adequately reflect these forgone benefits. Imposing any significant additional regulations may reduce employers' willingness to provide such jobs.

670. The PC is correct, and the further a casual employee moves to be indistinguishable from an ongoing, non-casual employee, the less utility such arrangements will offer to employers and employees. As the PC makes clear there is no increase in casual employment that could even begin to justify such a move (in no way conceding that casual work is somehow a wrong to be righted).

671. There is also a fundamental logical and legal problem with thinking casual employees can be given personal or carers leave.

672. Casual employment is engagement by the day or shift. At the end of each shift the employment relationship technically ends, and a new one commences in any further or repeat shifts.

673. Unions may have pursued an agenda of artificially grafting things on to casual employment, but you cannot graft entitlements predicted on entirely different modes of employment particularly those that are predicted on daily or hourly engagement. Casual employees do not accrue anything, and their hours can vary markedly from shift to shift and week to week – meaning it would be quite unclear how many hours and how many hours pay could be used to attempt to make this work.

674. It is hard to escape the conclusion that the actual impact of trying to move in this direction would be to render casual employment undesirable to employers. Unions may support this outcome, but making the labour market less flexible and

reducing avenues into work is scarcely a measure that should be taken in the face of a possible recession (i.e. where Australia finds itself). We know the students, young people and families would not thank a government that reduced their casual employment options, and reduced their capacity to secure both higher weekly pay and flexibility.

675. The terms of reference direct the PC to consider the future of our workplace relations laws and labour market, and changes in the needs and demands on both employers and employees. Making casual work more costly and complex, and creating administrative complexity would scarcely deliver on what has been asked.
676. We are also very concerned at the use of the words 'if they so wish' which renders the kite being flown by the PC on this particularly problematic. If a casual employee could elect at any time to change the nature of their employment this would impose an additional compliance burden on their employer and change how the employer choses to structure work and rosters – and this would not occur on any commercial or operational basis, but because the employee has changed their mind on being a casual. This would be unacceptable and damaging, and contrary to both what the PC has been asked to do in its terms of reference and how its Act direct it to consider matters.
677. On the face of this information request, employers could no longer choose to structure their work/rosters on a genuinely casual basis, and nor could they make a commercial or operational decision to not accrue leave for their employees and to instead pay a loading. Such a strategy could be undone by a single casual employee electing that they wanted to accrue and take leave (a concept which is antithetical to being a casual).
678. Employers very strongly oppose the question being asked in this information request and any recommendation in the terms being canvassed. It would not be practical, nor merited, and it would have a negative effect on job opportunities for young people, students, parents and others for whom causal employment is presently an attractive option.
679. This would be neither practical nor worthwhile, and should not appear in the final PC recommendations.

AMMA Recommendation

There should be no change to the application of the NES for casual workers.

In particular, casual workers should not gain additional powers or rights to choose to exchange part of their loading for additional leave.

NES – OTHER MATTERS

NES and awards

680. In our initial submission AMMA stepped through in detail the overlap, repetition, confusion and lack of clarity being created by Australia's dual safety net of awards and the NES.
681. We noted the incapacity of the FWO to provide binding and reliable advice on the NES as currently regulated, and stressed that the interrelationship between the NES and awards needed to be taken into account as a key matter for the future effectiveness of the Australian WR framework., and in particular for the effective protection of both minimum standards and compliance.
682. Chapter 6 of AMMA's first submission stepped though in detail rationalising awards and the NES, more clearly delineating the two and cleaning up what is a mess. This mess arises from forcing together two quite separate ways of regulating work, and is a neat representation of many of the fundamental problems with the Australian safety net system.
683. The PC has dealt separately with the NES and Awards in its draft report, and thereby seems to have failed to address the problems being created by interaction, uncertainty and overlap between the two.
684. The ad hoc evolution of parallel safety nets through awards and the NES is precisely the kind of evolutionary problem in the development of the system that the PC is being asked to identify and chart a future system to redress.
685. We urge the PC to look not just to the NES and Awards as stand-alone parts of the safety net, but also at problems being created by the interaction and overlap between the two. This demands a 'joined up' rather than ad hoc consideration by the PC, and holistic and systemic recommendations to fix systemic problems.

AMMA Recommendation

The PC should not treat the NES and Awards separately and should make recommendations to address the problems created by the overlap and interaction between the safety nets contained in awards and the NES.

This should see the Commission look again at Chapter 6 of AMMA's initial PC submission and the recommendations contained therein.

At a minimum, the PC should recommend that the Australian Government undertake a review of the NES and awards to ensure that it is meeting its policy goals and objectives in consultation with relevant stakeholders.

NES: What has been missed

686. In its initial submission AMMA stepped through in detail the overlap, repetition, confusion and lack of clarity being created by Australia's dual safety net of awards and the NES. We also ran through what the terms of reference ask of the PC in terms of the safety net. Reviewing the draft report and its limited approach, it appears that the PC has not addressed the range of considerations the terms directed it to²⁹⁸. A passing reference to the 2012 PIR, the views of parties in some submissions and a general vibe about the NES is not sufficient for a root and branch review of the WR safety net.
687. In regard to the NES, AMMA raised significant issues which have not been addressed and need to be addressed by the PC in its final report. Foremost is having a purpose for the NES and a purpose for awards and resolving tensions and confusions between the two. There is no analysis as to the merits of allowing employers and employees to modify aspects of the NES through enterprise agreements. There is not even a recommendation on the merits or otherwise of forcing employers to provide every new employee a one page document, which can be found online!
688. However, close on the heels of this, AMMA raised specific problems with the NES which are presenting real difficulties for employers, employees and for enforcement. These concerns do not appear to be addressed in the draft report, and they need to be addressed in the final report and what is recommended to government.
689. These are not grand structural issues, but specific matters directly comparable to those that have been addressed in Chapter 4 of the Draft Report. These key areas of confusion are:
- a. How annual leave should be paid out on termination of employment under the NES and when leave loading is and is not payable. This is a direct confusion between award terms on leave loading and the NES on annual leave²⁹⁹.
 - b. Capacity to cash out high annual leave balances³⁰⁰.

²⁹⁸ AMMA Submission (#96), pp.236-237

²⁹⁹ AMMA Submission (#96), pp.255-256

³⁰⁰ AMMA Submission (#96), pp.256-257

- c. The scope and application of the NES to higher earning employees³⁰¹.
690. There are some very real problems with both the NES and awards, and this review would be remiss if it did not address them in its final recommendations.

³⁰¹ AMMA Submission (#96), Section 6.

AWARDS – ROLE OF AWARDS

PC Draft Report: Chapter 11 (pp.391-426)

691. A great deal of history is recited in Chapter 11, but what is missing from Chapters 11 and 12 is engagement with more fundamental questions, not of what awards do and have done, but what they should do in the current system and their role and focus into the future.
692. The Draft Report seems to become mired in the minutiae of awards without properly critiquing and analysing, omitting to:
- a. Identify a guiding or overall vision for the role of awards in a future WR system.
 - b. Address key problems with modern awards, including those raised by AMMA and other employer participants in this review.
693. The PC appears to have taken a decision to recommend repair not replacement of the award system. We accept that the PC may not be mindful to recommend the abolition of awards, or the determination of whether Australia should have a statutory or an award based safety net.
694. However, even without contesting the logic that takes the PC there, a repair approach must be genuine rather than superficial and must genuinely improve the system.
695. If we are to continue to have a unique approach in which our safety net is delivered through both awards and the NES, key questions need to be answered, such as:
- a. Which parts of the safety net should appear in awards and which in the NES?
 - b. Which matters should be subject to dual coverage by both awards and the NES, and how tensions and inconsistencies can be avoided?
 - c. How can the system most clearly support compliance and an understanding of rights and obligations, by minimising overlap between awards and the NES?
 - d. How the system can be made simpler, more explicable and promotable to employers and employees?

- e. Which parts of the labour market are not award reliant and do they need protection of a modern award and the NES.
696. Too much of Chapter 11 is directed to where we are and the history of how we got here, rather than identifying and addressing what the current problems are and canvassing where we should go next for the future. Only in section 11.6 in the final pages of this chapter do we get to a few of the core issues.
697. Chapter 11 seems to proceed on the basis that we have always had awards, and we don't have a model to replace them, but it omits to identify and commend to government a guiding policy or paradigm for the future of awards.
698. Employer users of the current system are looking for the PC to break this impasse, and to identify options for awards to play a genuine safety net role and to cease to be treated as market rate instruments or prescription of market conditions.
699. There is no, or little analysis, of award reliance in 2015 and what it may look like in a decade or 20 years' time. There is also no consideration in the PC draft report as to the relevance for having an award for certain sectors of the labour market. This is the type of research which should have been undertaken by the PC. There is already a rich source of available data to draw upon.
700. For example the FWO have indicated that only a handful of inquiries were made in relation to maritime offshore oil and gas award (6), and hydrocarbons industry (upstream) award 2010 (10) in 2013.³⁰²

APPENDIX B – Modern Award Selections in Pay Check Plus

2013 Calendar Year (includes internal and external searches)			
MA Code	MA Title	Totals	Rank
MA000004	General Retail Industry Award 2010	196914	1
MA000119	Restaurant Industry Award 2010	96104	2
MA000005	Hair and Beauty Industry Award 2010	90572	3
MA000003	Fast Food Industry Award 2010	87834	4
MA000002	Clerks Private Sector Award 2010	85082	5
MA000009	Hospitality Industry (General) Award 2010	80529	6
MA000020	Building and Construction General On-site Award 2010	79057	7
MA000089	Vehicle Manufacturing, Repair, Services and Retail Award 2010	52608	8
MA000025	Electrical, Electronic and Communications Contracting Award 2010	35455	9
MA000027	Health Professionals and Support Services Award 2010	34220	10



MA000109	Professional Diving Industry (Recreational) Award 2010	9	107
MA000111	Fire Fighting Industry Award 2010	7	108
MA000086	Maritime Offshore Oil and Gas Award 2010	6	109
MA000108	Professional Diving Industry (Industrial) Award 2010	5	110
MA000110	Corrections And Detention (Private Sector) Award 2010	4	111
		Total: 1,188,966	

³⁰² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141-corr-FWO-110414.pdf>

Awards are to be a safety net not market rates

701. There was a fundamental change in the role of awards from the 1990s onwards which the PC seems to have failed to properly engage with.
- a. Awards are supposed to be a safety net of genuine minima not market rate or transformative or redistributive instruments.
 - b. New conditions and entitlements for employees are not supposed to come from variations to awards, but from agreement making – that is the point of a safety net approach, rather than seeing awards as market instruments (which was the role of awards in the 1970s and 1980s).
 - c. The role of awards was deliberately changed in the early 1990s away from the centralised period of test cases applying to all employees.
 - d. Awards are not only to provide a safety net of minima but also encourage more employees and employers to bargain on the terms and conditions of work. As society, employee and employer needs evolve, bargaining not awards was to address this.
702. This is Keating era stuff on which there was wide consensus. We are disappointed the PC approach in Chapters 11 and 12 do not appear to have taken into account what should be one of the accepted foundations of our WR system.
703. Chapters 11 and 12 seem to miss these points entirely and to be pursuing a model for awards to be market instruments that can significantly change terms and conditions in workplaces. If this is to be the MSD process, it could not be supported.
704. For more than two decades we have paying lip service awards being a safety net and a springboard for above award bargaining, but have not yet found a way to deliver this in most industries. An unmet challenge remains in making awards the genuine safety net that users of the system have been promised since the Keating government.
705. This means charting a course to make awards less relevant to the pay and conditions of employees in workplaces and see fewer and fewer employees covered by awards. Awards need to play a protective and direct role for a declining proportion of employees and not be asked to pay a redistributive or market rates role in all but a few industries. The PC needs to grapple with this challenge.

Bargaining power and awards

706. The PC argues that awards “rectify some of the imbalance in bargaining power that can exist in employee-employer relationships”, and that this helps income redistribution.³⁰³
707. But as the PC then goes on to almost acknowledge, this is true of minimum wages and conditions regulation in all countries. This is a justification for having a safety net, not for including particular elements of it in modern awards rather than in statute.
708. No party is arguing for a *laissez faire* system or for no safety net of terms and conditions, and therefore it is unnecessary to spend too much time on justifying regulating employment. As no one is arguing for no safety net, this becomes a little meaningless.
709. The key question is how Australia should regulate employment into the future, and most germane for Chapter 11, what this means for the role and form of awards. Reciting historical justifications for minimum wages and prescribed conditions doesn't answer this question.
710. Without such an answer, the PC is not delivering on what is being asked of it in the terms of reference, and more importantly an opportunity will have been missed to do better by both employees and employers.

Don't be seduced by change

711. We also note the comparison between the pre-modernisation and post modernisation award systems, but caution against being too congratulatory of the degree of change wrought.
712. The question is not how many awards were consolidated down to 122, but whether 122 awards are required and contain the right safety net to support bargaining now and in future. **AMMA notes that there are now 134 modern awards which span over 10,000 pages of “modern” regulation.**
713. In addition, since the PC draft was published we now have additional regulation including re-inserting accident make-up pay terms, and district allowances for employees working in the County of Yancowinna for some awards! There is no cost benefit analysis as to the 10,000 pages of rules employees must follow.

³⁰³ PC Draft Report, p.417

714. In a way, the more we have attempted to simplify and modernise awards, the more we have entrenched them, added more prescription and left little for bargaining to achieve.
715. Australia still has millions of words of award regulation and thousands of minimum wages, and the question should be whether we could provide a superior and more effective safety net.
716. Unfortunately when we look at Chapter 12, it seems to recommend a process which will necessarily yield more regulation and prescription in awards, and more attention, time and money sunk into award reviews.

Modernisation or crude consolidation

717. We note with approval the comments of various submitting parties on the need for real reform in what awards do, how they relate to other standards, and what they need to do in future:

Others submit that award modernisation failed (Housing Industry Association sub. 169 and HopgoodGanim sub. 225), and that due to the tight timeframe, the process consolidated and rationalised awards rather than modernised and adapted awards to contemporary settings (ACCI sub. 161, Chamber of Commerce and Industry of Western Australia sub. 134, and VECCI sub. 79).³⁰⁴

718. The PC should engage with and address these questions in its final report and make recommendations to government for genuine reforms in the award system.
719. If interested parties are telling the PC they are disappointed in award modernisation or exhausted by it³⁰⁵, the PC should address this and not assume because there are fewer awards or that significant time and money have been invested that this process is complete or that awards are "fixed".
720. The PC should in particular not implement the approach outlined in Chapter 12 of MSD reviews which risks taking some of the worst elements of the modern award reviews and perpetuating them.

Adversarialism cannot be eliminated, nor should it

721. Page 411 the PC Draft Report contains the following:

...despite their detail, modern awards are much simpler, and provide more room for enterprise level flexibility than their earlier incarnations. Moreover, their adjustment need no longer be born in dispute. The

³⁰⁴ PC Draft Report, p.416

³⁰⁵ PC Draft Report, p.416

modernisation and subsequent review process allows for change without first creating conflict. This may be a deeply underestimated benefit of changes in the last two decades.

722. The point is not whether modern awards are simpler or provide more room for enterprise level flexibility than the products of decades of preceding arbitration; the point is whether they offer sufficient simplicity and flexibility for the future and how they stack up against employment safety net arrangements in other countries.
723. Global markets are not going to cut Australian enterprises a break because we have come a long way in reforming our employment safety net, if it is unduly prescriptive and discourages employment, employers and employees will suffer.
724. This review is a generational opportunity genuinely improve how we regulate work in this country and chart future directions – simply observing we have come a long way doesn't deliver on this opportunity or meet the requirements of the terms of reference.

AMMA Recommendation

The PC articulate a future vision and purpose for the role of awards in an evolving WR system, and address and make recommendations to resolve tensions between the NES and awards in the dual safety net regulated by the FW Act.

AWARDS – REPAIRING AWARDS

PC Draft Report: Chapter 12 (pp.427-456)³⁰⁶

AMMA has a vision for repairing awards

725. Modern awards in many cases require further repair and refinement, not to ensure their relevance or to play the instrumental role the PC charts for them in Chapter 12, but to be a genuine safety net of effective minima.
726. This has been the goal for awards for more than 20 years, and it is time awards fulfilled that role. We are looking to the PC to chart a course to realising this aim, and neither Chapter 11 or 12 of the draft report deliver this outcome.
727. Resource employers addressed the future role and content of awards from in Chapter 6 of our initial submission to this review³⁰⁷. This AMMA submission stepped through what should and should not be in awards in future in some detail, including a set of existing award matters that could be codified into the NES and those which could be excised from awards on the basis they are dealt with (e.g. superannuation, something the FWC has dealt with particularly poorly in its award review process).
728. We ask the PC to look again at our analysis of the challenges of award reform and how they should be met.

The PC's approach is flawed

729. The PC indicates that:

This chapter [Chapter 12] does not seek to make an assessment of the merit or costs of various conditions and entitlements in awards. Rather, this chapter suggests an approach that would have the MSD examine conditions and entitlements across awards using detailed, empirical research to identify problematic conditions or entitlements in awards ('hotspots'), and then make a determination that relies on a considered and detailed assessment of the evidence of the effects of these provisions in different industries and types of businesses, and on their employees.

730. This is a very disappointing approach and one that should not appear in the final PC recommendations.

³⁰⁶ Chapter 12 addresses the proposed Minimum Standards Division of the FWC, and focusses on the process for repairing awards in the future. As such, it covers such of the same ground as Chapter 3 (also addressed in this part of our submission) and Chapters 8, 9 and 10 on minimum wages (addressed in Part C).

³⁰⁷ AMMA Submission (#96), pp.261-273

731. Awards are not a major positive priority for resource employers, but they could rapidly become a major negative or defensive priority were this ever recommended or implemented.
732. The PC needed to examine what is and is not in awards, and definitely did not need to recommend some autonomous process in which a government body rather than employers or employees address “hotspots” to be addressed through possible award variations.
733. This is a recipe for the MSD to become a massive and self-perpetuating bureaucracy and to make award reviews the primary activity of our WR system – an outcome that would not generate a single job or make a single enterprise more productive or competitive.

Award scope and content has to come before process

734. The PC frames Chapter 12 as addressing the process for varying awards. But before looking at structures and institutions, there needs to be greater clarity on what awards are to do, and what they are to contain.
735. The PC should:
- a. Consider and make recommendations on whether Part 2-3 of the existing FW Act on the content of modern awards is appropriate for the future.
 - b. Identify areas that would benefit from reform.
 - c. Only then should it address the future variation of awards, and the operation of the proposed minimum standards division.
736. We commend the PC again our recommendations on awards in Chapter 6 of AMMA's initial submissions³⁰⁸, and encourage the PC to make recommendations about what should and should not be in awards into the future as well as process considerations.
737. The PC is correct that awards contain undesirable features, but it does not identify what needs to be in awards and what needs to be omitted from awards.
738. The PC's draft model of the MSD doing this and continuously defining and redefining its task is simply kicking the can down the road, and should not be included in the final report.

³⁰⁸ AMMA Submission (#96), from p.261

AMMA Recommendation

The PC properly analyse and recommend changes to Part 2-3 of the FW Act, including a review of what may be included in modern awards, what must be included in modern awards, and what may not be included in modern awards.

739. The MSD cannot achieve what the PC would have it achieve in term of award review and reform without proper guidance through the legislation on what awards should and should not contain.
740. The lesson of previous award reviews, the history of which the PC charts, is that even where there is some statutory guidance, and the arbitrator has long familiarity with the preceding award and the industry, award reform can be long running, time consuming, expensive and can fail to meet expectations.
741. We strongly caution the PC against setting the proposed MSD up to fail by not providing sufficient guidance through the legislation on the scope of the task and the scope of future awards.

Clarify the objective

742. The PC addresses the modern award objective in Ch.11 of its Draft Report³⁰⁹, but does so entirely descriptively.
743. This seems a major omission, and the starting point for any reform of awards should not be creating a new institution (the MSD), but thinking before that about what task it needs to achieve, and whether the current framing of that task (s.134 of the FW Act) is the right one for a future WR system. We understand this to be what the terms of reference ask of the PC.

Myth of objectivity

744. On p.429 of its report the PC discusses the partiality and lack of objectivity of unions and employers, and then seems to proceed on the basis that truly objective evidence could be gathered by the MSD.
745. Employers greet this with a great deal of scepticism. What the PC choses to research will be inherently political and controversial, and will trigger opposition from either one side (union or employer) or often both.
746. Employers also face, with rare exceptions, an academic community with greater ties to and sympathy for the trade union movement, and academics that can be reticent to be seen to undertake research in support of an employer position.

³⁰⁹ PC Draft Report, p.393-394

747. We also note that the evidence and research proposals made by the PC in Chapter 12 would potentially be very costly. If ever there was a disparity of economic power, it will be between the research the ACTU and claimant unions can commission and what employers can bring to the table.
748. The PC needs to take care that in pursuit of objectivity it does not unwittingly create an information divide and entrench a new unfairness.
749. If the MSD is to convene its own research³¹⁰, this should be done after hearing from unions and employers to frame what is disputed and the focus of the research.
750. **We recall with regret that AMMA commissioned very major economic evidence for this review from KPMG, of precisely the type the PC wants to see guide the future work of the MSD and the FWC, and it seems to have been little regarded by the PC in making its draft recommendations. It is not even referenced in the “research” part of the draft at pages 82-83 of the draft PC report.**
751. We also note that research will not determine merit matters for non-wage employment conditions, particularly where you move beyond minimum wages to what should and should not be in modern awards. This is not going to be amenable to easily researchable or quantifiable propositions.
752. We also question the scale, if there are 122 modern awards by perhaps 5 or so areas of potential contention and division between unions and employers. That would potentially require hundreds of different pieces of research. How would this be funded?

The award review process

753. The PC acknowledges problems with the 4 year award reviews and makes the following recommendation:

³¹⁰ PC Draft Report, p.429

DRAFT RECOMMENDATION 12.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards
- add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective.

To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- obtain public guidance on reform options.

754. Resource employers strongly support bringing to an end the automatic or scheduled process of 4 yearly modern award reviews.
755. However, the alternative proposed (a requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective) seems very confusing and raises more questions than it answers, including:
 - a. If this is a requirement on the MSD, how often must it do this?
 - b. Triggered by what / whom? What does "as necessary" mean?
 - c. What does the PC mean by continuously improving modern awards?
756. Draft Recommendation 12.1 seems dangerously close to replacing the soul destroying and widely opposed 4 year review process with a continuous review process – a little akin to painting the Sydney Harbour Bridge – in which all awards would be under a continuous process of review, and when one end is completed the MSD would start at the other all over again. This sounds even worse than the 4 year reviews which are being universally panned.
757. At some point awards need to be settled in regard to the conditions they prescribe. Minimum wages and allowance levels may vary regularly, but the other terms and conditions in awards should not be in a continuous state of flux and revision, and it would be a serious step backwards for workplace focussed bargaining and the role of awards as a safety net were this to occur.

AMMA Recommendation

Automatic or scheduled reviews of the conditions and non-wage terms of modern awards, including the 4 year modern award review process, be removed from the system as recommended in Draft Recommendation 12.1.

The remainder of Draft Recommendation 12.1 should not however be progressed.

A review of a single award could be sought by an employer or union with coverage of those working under the award provided appropriate threshold criteria were met, and there was some attempt at discussions towards varying the award by consent.

Any review of multiple (or all awards) or award provisions on a particular topic should only be triggered at the instigation of the Minister for Employment, through a Ministerial request to the MSD for such a review.

Don't bypass representative organisations through 'Public Guidance' or unilateral MSD inquiries

758. AMMA is very concerned at any assumption that anyone apart from employers and unions are going to participate in the future shaping of modern awards for particular industries.

759. Test cases and wage reviews are one thing, but so-called community organisations or academics (for example) would have no legitimate role in shaping the future of awards for the mining and hydrocarbons industries, and their participation would be strongly opposed by AMMA and we would seek the support of our existing union counterparts for such a view.

760. One of the options the PC canvasses is:

One method might include carrying out a detailed, independently-undertaken survey of employers to identify which aspects of each award affect their operations most, and garner suggestions for change.³¹¹

761. Unions and employers organisations very reason for existence is channelling the needs of their members into processes such as varying awards. This is not difficult, unions and employers organisations are quite capable of identifying where and when awards need to change, within parameters and processes prescribed by legislation.

762. We are sure this was not the intention of the PC, but were any government body (such as the proposed MSD) to seek to bypass representative organisations of employers by seeking to survey their members and seek their views independently of their chosen representative body, Australian employers would

³¹¹ PC Draft Report, p.439

give serious consideration to making a complaint to the International Labour Organisation that Australian law and practice was not in accordance with Australia's treaty obligations under ILO Convention 87 on *Freedom of Association and Protection of the Right to Organise Convention*, of 1948.

763. It is also not the proper role of a standard setter to "identify hotspots" and trigger reviews³¹² – this is a recipe for an even bigger time sink for employers and unions than the 4 yearly reviews.
764. It is those representing the key users of awards, employers and employees, that should initiate any reviews, and ideally this should be subject to a process of the Minister directing the MSD to examine a matter, award or awards, and not otherwise.

Operation of the MSD

765. Draft PC Recommendation 12.2 is as follows:

DRAFT RECOMMENDATION 12.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.

766. This is really an institutional recommendation that belongs in Chapter 3 of the Draft Report.
767. We recommend tighter language differentiating and separating the regular exercise of varying minimum wages and allowances, and the irregular exercise of reviewing other award content. A minimum wage review and an award review need to be treated as entirely separate things to avoid confusion and this becoming a bureaucratic time sink.
768. We do not therefore agree with the following from the PC:

While the discussion below separates wages and classifications from other conditions in awards, any assessment of awards should not consider changes to one of these without reference to the other. Awards provide a set of wages and conditions that determine the terms of employment relationships. Sometimes new terms are added to awards to reflect changing societal expectations about what employment relationships

³¹² PC Draft Report, p.440

*should look like. The addition of parental leave might serve as an example.*³¹³

769. An annual wage review is entirely separate from a review of parental leave, the later should be triggered by a separate and non-automatic part of the Act, and should only be triggered by a referral by the Minister for Employment.

Clear away the confusion before applying scientific method

770. If the PC wishes to see scientific method applied to setting minimum wages and varying modern awards, surely a first step is cleaning away the confusing and superfluous guff and overlap from the system.
771. A scientist embarks on a clear and defined task, and her or his first step is to ensure their bench is clean and ordered, and the task they are tackling is the right one (i.e. getting the experimental design right).
772. The WR framework is not an inescapably complex system, and sound scientific method would see the system first shorn of unnecessary repetition and complication prior to applying a scientific method to core and fundamental tasks, actually required under the system.
773. To torture the scientific analogy one step further, medicines are refined over time via experiments that seek to centre in on the genuinely efficacious drug compounds to make them effective at the minimum possible dosage level.
774. This is precisely the approach the PC should take to regulation, seeking to zero in on what is genuinely required, and omitting extraneous regulation and detail.
775. We cannot resist noting that when bio chemists seek to remove the non-efficacious elements of a medicine to refine it (in this case superfluous regulatory detail and prescription), they often do so to remove unintended and damaging side effects!

³¹³ PC Draft Report, p.440

INSTITUTIONS – THE FWC

PC Draft Report: Chapter 3 (pp.139-161)

776. AMMA is a key national voice on the operation and composition of the FWC and how it does its work, but also clearly recognises that what is enforced and how we shape our WR laws is more important than institutions.
777. We urge the PC to take this approach. It should firstly focus on reforming the substance and operation of our WR laws, and how they do and do not support employment, doing business and securing investment in Australia, and only then arising from that, address institutional structures.
778. Reform must start from what our laws should do, what they should proscribe, what they should require and what they should permit, only from there do institutions come into the picture to support these foundation blocks of any system.
779. This was the basis on which we called on the PC to consider moving away from the Fair Work concept towards an employment focussed tribunal. This wasn't window dressing or a mere change of names and titles – it was a proposal to put employment at the centre of our tribunal system and its work with employers, employees and organisations.

Draft PC Recommendation 3.1 – Minimum Standards Division³¹⁴

DRAFT RECOMMENDATION 3.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

780. The PC appears to have picked up part of the AMMA model for a revised tribunal structure, but it has adopted the component of our model which is of least relevance and least priority to resource industry employers and their engagement with the FWC.

³¹⁴ PC Draft Report , p.150

781. AMMA asked the PC to engage with fundamentally different tasks and expertise which the FWC is asked to exercise, particularly in assisting parties to settle disputes and how this differs from determining individual claims, such as for unfair dismissal.
782. The PC has also only gone part way in what it has recommended. The new body can only do its work differently and inquisitorially if it can clearly divorce itself from the quasi court environment of the FWC, and have an entirely separate membership and capacity to conduct its affairs to that of the FWC.
783. If the PC wishes minimum wages and awards to be subject to a broader range of expertise beyond that of lawyers, this requires a clearer severing from the FWC than appears on the face of Draft Recommendation 3.1.
784. It was a little unclear from Chapter 3 and Draft PC Recommendation whether a proper separation was proposed between minimum wage and award making and the residual functions of the Tribunal Division. Resource employers strongly support such a separation if this is to proceed.

AMMA Recommendation

The PC should recommend not a minimum standards division of the FWC, but instead a stand-alone Minimum Employment Standards Commission, which is not part of the FWC structure or in any way subject to the administrative or procedural authority of the President of the FWC.

- The MSC should have its own President and be a stand-alone statutory body.
- FWC / Tribunal Division members should be expressly barred from sitting on the Minimum Standards Commission.
- 5 year term appointments are appropriate for such a Minimum Standards Commission, but not for the FWC/Tribunal Division which exercises quite different powers.
- As a cost saving however the new tribunal could share premises and back office operations with the FWC. This could be summarised as two tribunals occupying one set of premises with shared registry and administrative support.

Draft PC Recommendation 3.2 – Appointments and Merit Review³¹⁵

DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the *Fair Work Act 2009* (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.

785. AMMA has been a key critic of some appointment trends for the FWC and the quality and consistency of some FWC decision making. We do not however support a move from tenured or career appointments to fixed term appointments.
786. The PC correctly identifies some of the key arguments for tenured or career appointments:
- a. *"Longer appointments allow the development of expertise and knowledge across the broad swathe of matters considered by the FWC."*
 - i It can take five or more years on the tribunal and working with an industry, even with substantial prior WR experience to be an effective tribunal member.
 - b. *"Tenure for judicial appointments is also intended to remove the risk of influence regarding reappointments."*
 - i This is a very significant point. WR is the most politicised of areas, and there would be a very real risk in limited term appointments of governments wanting to excise appointees that were not awarding decisions to the satisfaction of their affiliates or supporters.
 - ii There is also a risk that appointees needing to secure reappointment will shape their decisions to keep their jobs, and not exercise the independence all users of the system are entitled to

³¹⁵ PC Draft Report, p.157

expect. Someone seeking to keep their jobs may calculate what is required to keep a Labor or Coalition government happy in regard to union or employer applications which come before them – meaning this could increase rather than alleviate suggestions of bias.

- iii There is also a related problem of some tribunal members seeking to over prove their independence from their former employers / unions and to demonstrate their acceptability to a government of the opposite stripe.
- iv There is also the risk of tit for tat – Labor comes in and clears out the most effective Coalition appointees, and then a political cycle later, the Coalition comes in clears out what it considers to be unduly pro-union decision makers.
- v More crudely, what would stop an incoming government not reappointing any of the union or employer of the previous government, or anyone they don't approve of, and then making mass replacements more acceptable to them?
- vi The consequence of this would be threats to the independence of decision making, Appointees would come under pressure to deliver for their perceived constituency on the basis that its *'its our time now and we need to make the most of it'* – and again there would in due course be tit-for-tat as a new regime takes over.

787. At present FWC members are judged on what they do, and over time less and less on their affiliations prior to appointment. This is critical to their effectiveness and independence. As an example, AMMA members and staff have the highest of respect for the capacities of various FWC members retiring in 2015 who were union officials prior to their appointment.

788. Draft Recommendation would have the effect of making the FWC like the US civil service when the presidency changes. When a Labor government is elected, it would risk moving on the Coalition appointees, and then in due course the reverse would apply, and you would have a shadow FWC sitting cooling its' heels until its team came in and they could be reappointed. This would be in the interests of no-one.

789. Under such an approach, the FWC appointees would also be unduly mindful of their post appointment careers. Many FWC members do not come from thriving legal practices and have not 'made their fortune' prior to appointment and have mortgages to pay, children at school etc.

790. If they know they may be back on the jobs market in workplace relations in a few years, this again threatens to cloud the independence of their decision making. This is less an issue for barristers and lawyers, but is a real issue for union and employer appointments. How could a union figure act independently of former union colleagues if he or she feared they would be looking for a post-FWC job back in the union movement in a few years' time?
791. On balance, the resource industry strongly opposes a shift away from tenured or career appointments to fixed term appointments for the FWC/proposed tribunal division.

AMMA Recommendation

There should be no fixed term appointments, and the existing tenured arrangement should remain in place for the proposed tribunal division / FWC.

The proposed performance review process should be applied to all FWC members, including those with judicial appointments unless there is a legal bar to doing so.

Draft PC Recommendation 3.3 – Expert Appointment Panel³¹⁶

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the *Fair Work Act 2009* (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:

- an independent expert appointment panel should be established by the Australian Government and state and territory governments
- members of the appointment panel should not have had previous direct roles in industrial representation or advocacy
- the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4
- the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

792. Resource industry employers do not support this recommendation in any way, and appointments should remain at the determination of the Government/Minister for Employment.

³¹⁶ PC Draft Report, p.157

793. The PC Recommendation appears closely modelled on the approach contained in Labor's *Forward with Fairness* policy taken to the 2007 election. This policy proved an illusion and the FWC was shameless stacked under the previous Labor government with an unbalanced pattern of appointments.
794. It would be an extraordinary proposition that suitably qualified and experienced WR professionals be weeded out of a selection process by a so called independent panel that would deliberately lack the expertise to understand what they would bring to the role.
795. This process would also favour those who can navigate selection processes over those who may be the best FWC members.
796. There is also a concern about the difference between someone applying for a sensitive role and being sought out subtly for such a role, and this is perhaps the only area where AMMA and its members support FWC members being treated like judges.
797. Consider a senior legal partner or union official.
- a. Presently they are canvasses subtly and confidentially on their willingness be appointed to the FWC. If not, or the process falls over somehow, the individual can continue to retain the confidence of their clients or members.
 - b. However, if Draft Recommendation 3.3 applied the lawyer's employer (other partners) clients etc would know that he or she was keen to move on, and in turn that they had been passed over, to the detriment of their practice, reputation and prospects. For the union official, how could she/he stand for re-election if their opponents could argue they were over the hill, and seeking to go to the greener pastures of the FWC.
798. This would ultimately be a recipe for more public servants to be appointed to the FWC.

AMMA Recommendation

PC Draft Recommendation 3.3 not appear in the final PC report and there be no change to the existing process of governments recommending appointments to the Governor General.

Draft PC Recommendation 3.4 – Eligibility Criteria³¹⁷

DRAFT RECOMMENDATION 3.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.

Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.

Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.

A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.

799. Noting AMMA's opposition to a change in selection processes, we see no reason to change existing s.627 of the FW Act, at least for the Tribunal Division/existing FWC.
800. Putting to one side all the extraneous verbiage about judges, the basic fields of experience listed are the right ones – the challenge is to appoint the right balance of people from these fields.

FAIR WORK ACT 2009 - SECT 627

Qualifications for appointment of FWC Members

President and Vice Presidents

- (1) *Before the Governor-General appoints a person as the President or a Vice President, the Minister must be satisfied that the person:*
- (a) *is or has been a Judge of a court created by the Parliament; or*
 - (b) *is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:*
 - (i) *workplace relations;*
 - (ii) *law;*

³¹⁷ PC Draft Report, p.157

(iii) business, industry or commerce.

(1A) Paragraph (1)(a) does not apply to a person who is a Judge of the Federal Circuit Court.

Deputy Presidents

(2) Before the Governor-General appoints a person as a Deputy President, the Minister must be satisfied that the person:

(a) either:

(i) is or has been a Judge of a court created by the Parliament; or

(ii) has been a Judge of a court of a State or Territory; or

(b) has a high level of experience in the field of workplace relations, including a high level of experience that has been acquired:

(i) through legal practice; or

(ii) in the service of a peak council or another association representing the interests of employers or employees; or

(iii) in the service of government or an authority of government; or

(iv) in academia.

(2A) Subparagraph (2)(a)(i) does not apply to a person who is a Judge of the Federal Circuit Court.

Commissioners

(3) Before the Governor-General appoints a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

(a) workplace relations;

(b) law;

(c) business, industry or commerce.

Expert Panel Members

- (4) *Before the Governor-General appoints a person as an Expert Panel Member, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:*
- (a) *workplace relations;*
 - (b) *economics;*
 - (c) *social policy;*
 - (d) *business, industry or commerce;*
 - (e) *finance;*
 - (f) *investment management;*
 - (g) *superannuation.*

AMMA Recommendation

There should be no change to the eligibility criteria for appointment to the FWC or a successor tribunal division. Sections 627(1), (1A), (2), (2A) and (3) should not be amended.

AMMA also sees no requirement to amend the substance of s.627(4) which sets out appropriate eligibility criteria for future minimum wage and award determination, save that it should be moved to a stand-alone equivalent of s.627 for an entirely new and separate tribunal (the Minimum Employment Standards Commission) as recommended above.

An exception may be the additional eligibility criteria on superannuation and finance if there are no longer superannuation provisions in awards, and no future superannuation fund reviews.

Draft PC Recommendation 3.5 – Published Information**DRAFT RECOMMENDATION 3.5**

The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

801. AMMA strongly supports scope for a clearer understanding of the outcomes of all applications to the FWC, particularly those that are settled rather than arbitrated.
802. There has long been claim and counterclaim about go away money, and actual data would be welcome.
803. However, such a review will not be independent if it is run by the FWC, nor if the FWC gets to frame the questions and select the reviewer. Therefore we recommend as follows:

AMMA Recommendation

The proposed “independent performance review” of the FWC’s conciliation processes and the outcomes of those processes (Draft PC Recommendation 3.5) must be genuinely independent and should therefore:

- Be commissioned by the Minister for Employment, not by the FWC.
- Perhaps involve the Australian National Audit Office, at least in regard to the quantitative rather than qualitative component.
- Introduce a qualitative component, seeking satisfaction feedback from applicants and respondents – this is not the role of the ANAO, but equally the FWC should not select the consultant which will provide feedback on it.

INSTITUTIONS – OTHER MATTERS

Appeals mechanisms

PC Draft Report: (p.158)

804. AMMA has made a significant prosecution of the case for a new appeals mechanism preceding this review and will continue to support such an approach. AMMA dedicated 25 pages of detailed support for a new appeals arrangement in Australia, identifying inadequacies in the current arrangements and approach to appeals, how such a model would work, and superior approaches from other OECD countries (as the terms of reference for this inquiry directed us to do). We cited inconsistent decisions in a range of areas, and very real practical problems with the status quo including the remuneration and pension arrangements not attracting pre-eminent legal practitioners.
805. We get in response from the PC three paragraphs and 217 words, and the rather lukewarm “such a reform may not be merited”³¹⁸. The 217 words from the PC are littered with the word “may”, and in no way constitute an answer or rebuttal of the range of issues raised by AMMA and others in support of new appeal arrangements.
806. With respect, the merit reviews and greater transparency in elements of decision making may be part of the solution of a significant and entrenched problem, but they cannot be the entire solution. Resource employers reiterate that the solution must be structural, and that there needs to be an institutional revision to redress the problems being identified in the quality and consistency of FWC decision making.

AMMA Recommendation

The PC look again at AMMA's first submission in support of a new appeals arrangement through a stand-alone Employment Appeals Tribunal, as used in the UK, and include in its final report recommendations for the creation of such a body. These can be drawn from AMMA's previous Recommendation 8.6³¹⁹, and pages 374-397 of AMMA's previous submission.

³¹⁸ PC Draft Report, p.158

³¹⁹ AMMA Submission (#96), p.376

FWO

PC Draft Report: Chapter 3 (pp.139-161)

807. Resource industry employers have little or no engagement with the FWO as befits a very high paying sector of the economy, dominated by agreements and other well above award arrangements, and in which employers expend considerable resources on both sophisticated human resources practices and excellence in compliance.
808. “Harmonious, productive and cooperative workplace relations and compliance with the Act and fair work instruments”³²⁰ are being very successfully delivered in the resources industry without the assistance of any regulator – allowing the FWO to focus on lower paying sectors, and enforcing the Rule of Law as it should.

Advisory and Regulatory Overlap³²¹

809. AMMA shares the concerns of other submitters about the involvement of the FWO in the 4 year review process, and we ask the PC to more fully engage with the concerns being voiced, and to make remedial recommendations to ensure this does not happen in future.
810. The award review is a somewhat confusing process, but it remains in essence adversarial, with unions seeking or rejecting changes to awards and employers doing the same. There are hotly contested matters here, and both unions and employers have determined which changes they want to pursue and do not want to pursue.
811. The intervention of the FWO introduces a loose cannon into this process that voices views about how awards should be amended with no representative linkage to either employers or employees subject to such awards.
812. The intervention of the FWO thereby stands in the way of unions and employers agreeing on the issues to be addressed, and where possible how they should be addressed.
813. There has traditionally been a clear division between standard setting and standard enforcement, just as there is between the judiciary and the police. This is fundamental to the doctrine of separation of powers on which our legal system is based.

³²⁰ PC Draft Report, p.137, Box 3.4

³²¹ PC Draft Report, pp.145-146

814. The disquiet at the FWO overstepping its proper boundaries raises concerns on the same basis – the making of laws and the enforcement of laws have to be separated. This is in essence the concern that has prompted employers to oppose the participation of the FWO in the determination of what legal obligations should be.
815. The following is also quite irrelevant *“The FWO also stated that FWC appreciated its involvement in this space, and it is clear that there is a good working relationship between the two agencies”*.
816. It's great that there is a working relationship between the FWO and FWC, they need it after Labor's ridiculous and aborted attempt to rebadge them as the one agency, which served to confuse everyone but the WR cognoscenti.
817. But consider the corollary – a judge might well appreciate the intervention of the police, not as prosecutor, but helping her/him, make a decision. But that is not how our system works, and we have separations and independence between quite different parts of our legal system for a reason. This cannot be abandoned simply because we are taken about WR and anything goes.

AMMA Recommendation

The FWO should be specifically bared from intervention in FWC proceedings save in tightly prescribed circumstances. These could be limited to:

- Where there is a formal request from the FWC for information held or able to be collated by the FWO that will assist in the proceedings, but with no position or advocacy from the FWO as to the outcomes of the matter or any variation to an award.
- Where there is the consent of the employer and union parties to the FWO providing specifically requested evidence to support the determination of proceedings.

At no time should the FWO be able to initiate or propose variations to any award or to the NES.

PART C: OTHER MATTERS

COMPLIANCE COSTS

PC Draft Report: Chapter 25 (pp.785-800)

818. The PC frames one of the critical questions for this review and for the future directions of our WR law, focusing on compliance costs that *"go beyond those costs that might reasonably be required to meet the objectives of the workplace relations system — that is, the focus is on the wasteful incremental costs rather than total compliance costs"*³²².
819. The PC also correctly observes that *"complexity is a major source of compliance costs in the regulatory framework"* and that *"most parties find the system complex"*.
820. Our system is unnecessarily complex and employers are burdened with the sheer cost of complying with the rules and precepts of the FW Act, and its myriad Forms, Regulations, Rules, Awards and case law. What needs to come from this review is genuine relief and movement towards a different way of regulating work in Australia, which is more consistent with employment regulation in our fellow developed economies.
821. Other developed countries simply do not apply the same level of complex, multilayered and overlapping regulation and they deliver levels of employment, growth, labour market protection and compliance that are comparable if not superior, to our own.
822. We are burdened by regulatory complexity with no additional gain for either employers or employees, and certainly no support for clear information, inspection and enforcement. Over regulation, and poor regulation is not something making things better in Australia for employees (however you define better) and is in fact burdening us and harming employers, employees and our community as a whole.
823. The PC spends some time in Chapter 25 on the impact of the 2009 amendments that created the current FW Act. In response we observe:
- a. The 2009 Fair Work changes were wrought on entirely political grounds and with deliberately deaf ears to very real employer concerns about increased compliance costs and regulatory burdens.

³²² PC Draft Report, p.785

- b. The previous government played fast and loose with the regulatory impact assessment process, and the system and all subject to it are paying the price. The PC has an opportunity to start to correct this failure.
 - c. The system became more costly and complex to work with, and employers incurred additional employment costs as a direct function of the re-regulation of our labour market and retreat from important reforms contained in the 2009 amendments. These concerns remain live and have become more pressing as economic and labour market challenges increase.
 - d. The system has not yet digested and coped with the 2009 changes. Rather, they continue to impact on doing business and affect job creation in Australia. It would be quite wrong to somehow conclude that the negative impact of the 2009 amendments is not still being felt in workplaces, and we can certainly report that it is causing confusion in boardrooms, impacting company bottom lines and is globally denting Australia's investment attractiveness.
 - e. AMMA members share the experiences of the AHRI members and are spending an increased amount on specialist advice as a direct function of complexity added to the system through the 2009 changes in particular³²³ (noting that our system had been vastly complex by international standards for more than a century before this re-regulation).
 - f. The Australian system has always been complex in international terms and far more complex than it needs to be to protect employees, and this has long harmed doing business and creating jobs in this country. This was true in 1968, 1998, and 2006. The 2009 amendments simply made this worse and reversed the limited but important reforms of the preceding two decades.
824. The costs of operating under our workplace relations system are a key part of the costs of employing people and doing business in Australia and need to be critically analysed, and need to be reformed if Australia is going to be a competitive place to invest, do business and create jobs.
825. This is becoming ever more important as we come off previous record levels of resource investment and face genuine risks of reduced growth and increased unemployment.
826. It remains a damaging irony that so called decentralism and deregulation, and the devolution of greater responsibility to employers and employees in workplaces has added to the length of our legislation, and the rules that must

³²³ PC Draft Report, p.791

be complied with. It is ever more regrettable that the previous government reregulated and added to the compliance burden and that businesses are now asked to absorb this as somehow the immutable last word in changing our reemployment regulation. This cannot be allowed to be the case, and the existing FW Act should not be allowed to stand unchanged.

827. We strongly endorse the following observation from the PC:

...where workplace regulations are poorly designed or implemented, these compliance costs can outweigh the benefits to compliance (such as reducing adverse outcomes for employees or the risk of penalties to employers). In such cases, this leads to the needless imposition of a compliance burden beyond that required to meet a policy objective.³²⁴

828. The challenge for the PC is to identify a roadmap to a genuine reduction in the compliance burden and to a competitive, balanced and effective workplace relations system for the future. Tinkering will only deliver part of the solution.

Additional compliance costs are not transitional or self-correcting

829. It appears the PC is being told from some quarters that additional compliance costs are merely transitional. This is not the experience of employers in the resource industry – and as the 2009 changes mature and more decisions come out of the FWC and the courts, employers experience diminishing scope to achieve what they want to achieve in a cost effective and timely manner.

830. There is nothing programmed into the transitional arrangements under the current legislation that could lead to a conclusion that additional compliance costs and impacts will necessarily or inherently abate.

Administrative burdens³²⁵

831. There appears to be vast scope to simplify and remove many of the paperwork requirements from our workplace relations system.

832. There should be a comprehensive review of paperwork requirements to ascertain why information is being collected, whether it is genuinely required, and whether it could be simplified.

833. There has been a trend over time not to simply impose a requirement on employers but to make them serve paperwork on that obligation (for example the Fair Work Information Statement and the Notice of Representation Rights).

³²⁴ PC Draft Report, p.786

³²⁵ PC Draft Report, p.787

This an area which should be examined for reform, as is the extensive paperwork necessary to make agreements.

834. Linked to this is a rise in litigation over minor variations, errors, or omissions from forms which are leading to (for example) non-approval of agreements or revoting where there is no sound policy basis for doing so.
835. There should be a greater obligation on the Fair Work Commission to facilitate agreement approval and to overcome minor administrative errors unless it would be unsafe to do so, or only in circumstances where there is grounds to genuinely conclude that employees might not have voted for an agreement were the omission or error not made.

Costs for unions

836. Reflexive opposition to regulatory reform and a slavish focus on the exceptional or insignificant risk of harm has blinded our unions to where their resources are being wasted. Viewing every extant regulation as the product of the precious blood and toil of your predecessors is a recipe for not seeing the wood for the trees on the negative impact of regulation on union members and union operations.
837. A great deal of debate has rightly been focussed in 2015 on theft and misappropriation of union members funds, but far greater waste is caught up in perpetuating too many awards, in playing pointless games in bargaining and in channelling the precious funds of working people into the coffers of labour law firms in pursuit of litigation rather than working with employers.
838. However, the information request on p.796 must not allow the proper focus of cost relief to become obscured. For every union member there are at least five employees who don't choose to join a union, and for every unionised workplace there are dozens not unionised.
839. Relieving costs and compliance burdens on employers is inherently far more important than comparable concerns for unions. Saving for employers through compliance reduction increases confidence, investment and jobs in this country and impacts on decisions to invest in this country versus our competitors.
840. Just as some costs to employers are merited, some costs and compliance burdens on unions are also merited:
- a. AMMA has argued at length for tighter controls on union entry into workplaces and addressing some of the deliberate omissions from / weakening of regulation delivered to unions in return for their support in the 2007 election.

- b. This is undoubtedly a compliance burden, but equally undoubtedly a merited one that should appear in the final recommendations of the Commission.
- c. It must also not be too simple, or too quick for employees to take protected industrial action, nor to avoid proper balloting to ensure action is supported. A level of regulation and paperwork can be in the public interest, but the challenge is to determine where this should be applied.

Regulators³²⁶

841. The PC examines the role of regulators in alleviating the effects of compliance burdens, however without reform of the regulation itself and what it requires of employers, this would be mere window dressing.

842. The best possible FWO and FWC cannot make a silk purse out of a sow's ear, and where regulation is flawed, overextended or unacceptably burdensome, these structural flaws cannot be alleviated by any regulator no matter how well resourced or empowered.

The undue complication and overlap between the NES and Awards for example cannot be alleviated by refocussing or re-empowering regulators.

843. At various points the PC notes feedback from the FWO and FWC on parts of the legislation that make their tasks more difficult, which supports the point we are making. Fixing flawed regulation must be the priority, with the form and functions of the regulator a supporting consideration.

The bottom line

844. The PC rightly analyses the regulatory burden. The challenge is to then recommend genuine relief which:

- a. Maintains effective regulation where and to the extent warranted.
- b. Does not exceed what is required.
- c. Is simplified, streamlined and rendered practical and flexible to the extent possible and appropriate.
- d. Is genuinely supported by best practice enforcement (FWO) and application (FWC).

³²⁶ Draft PC Report, p.796

- e. Is subject to a sensible process of re-examination and refinement, in a process of continuous regulatory improvement (noting that this should be developed with employer and union input to avoid the problems plaguing the 4 yearly modern award review process).
845. Employers do not call for outright deregulation in this review. However, employers, employees and the community as a whole would benefit greatly from smarter, more effective and more targeted employment regulation.
846. This could make a real difference to confidence in investing, doing business and creating jobs in Australia, challenges which are becoming more and more pressing as we face greater economic adversity and risks to employment.
847. Critical to not “sleepwalking into recession”³²⁷ is counter-cyclically making employers and investors more confident to inject capital and create jobs. Governments don’t create jobs, and have limited levers to pull to make private sector employers more confident to do so. One of these levers is reforming our employment regulation, and now is the time to recommend government acts in this area.
848. In the conclusion to Chapter 25³²⁸ the PC outlines the areas in which it says compliance burdens could be alleviated:
- a. The accessibility and ease of use of awards (Chapter 12)
 - b. Changing unfair dismissal arrangements (Chapter 5)
 - c. Changing enterprise bargaining arrangements to reduce costs and rigidities (Chapter 15)
 - d. Lowering the costs of industrial disputes by reducing scope for gaming the system (Chapter 19)
 - e. Addressing FWC governance issues to improve quality of decision-making (Chapter 3).
849. For resource employers the priorities for regulatory reform are:
- a. Reducing the costs and complexity of reaching an enterprise agreement and getting it approved. In particular we need far clearer regulatory signals to unions and the FWC could reduce the costs and administrative burdens considerably.

³²⁷ Attributed to Martin Parkinson at the recent Reform Summit, <http://www.smh.com.au/federal-politics/political-news/national-reform-summit-we-are-sleepwalking-into-a-real-mess-says-former-treasury-boss-martin-parkinson-20150826-gj8040.html>

³²⁸ Draft PC Report, Subsection 25.4, pp.798-799

- b. Reducing the costs and impacts of industrial action for employers.
 - c. Reducing the regulatory impacts, costs and litigious risks of the general protections regime, which is not identified as a key area for compliance relief in the Draft Report (Subsection 25.4) and should be.
850. AMMA has urged the PC to take a principles led approach to reforming our workplace relations system³²⁹, and went a step further to identify a very sound and balanced set of guiding principles for the Commission to build on. Relevantly the principles for labour market regulation identified by AMMA included:
- a. **Genuine safety net:** The safety net has to become a genuine safety net, which will be of declining direct relevance, but protect those genuinely in need through the protection of a fundamental body of minimum standards.
 - b. **Enterprise determination:** Australia's WR framework should again encourage and support employers and employees moving off the safety net and into agreements appropriate to the enterprise and employment.
 - c. **Shorter and simpler:** The overwhelming impression one gets from looking at other WR systems is how much simpler and straightforward they are in either prescribing or proscribing outcomes. Putting to one side what is regulated and to what level, Australian employers and employees are entitled to a vastly simpler and more straightforward framework of rights and obligations.
 - d. **Regulate outcomes not processes or treatment of employees:** The PC notes that Australia regulates processes more than other Anglosphere countries, and properly understood this accounts for much of length of the FW Act and complication in our system of WR regulation. This is a duplication of regulatory approach, and we need to move away from regulating how workplace relations plays out, towards ensuring outcomes for employees in particular meet prescribed standards.
 - e. **Fairness:** A WR system needs to be fair in outcomes for those who work and employ under it. It's up to parliament to determine what fair outcomes, rights and entitlements are. Subjective tests of fairness are inexact and difficult to comply with, and should be removed from the system in favour of clearer, less subjective regulation that is "fair" in what it provides for.

³²⁹ AMMA Submission (#96), pp.10-12

AMMA Recommendation

AMMA Recommendation

The PC should recommend a further, more targeted review in the wake of this inquiry to:

- Assess the processes, paperwork and administrative requirements of operating under the FW Act for employers, individuals and organisations.
- Recommend measures to streamline processes and administrative requirements.

This could be conducted by the Auditor General, PC, the Office of Best Practice Regulation (OBPR) and/or the Small Business Commissioner, with participation from a suitably qualified business person, ideally with experience in SMEs.

IMPACTS

PC Draft Report: Chapter 26 (pp.801-824)

851. Chapter 26 of the Draft PC Report seeks to identify (or canvasses the potential identification of) the impacts of what the PC recommends in draft form. Putting to one side the specific recommendations, many of which employers support, we wish to make the following general points/observations.
852. **Look to previous experience:** The PC looks at various academic studies to attempt to assess the impacts of recommended changes, but should also look to previous experience in Australia and to our competitive, productivity and employment performance after previously reforming our labour market (from 1993, from 1996, from 1998, and from 2005). The PC can also compare and contrast this to our competitive, productivity and employment performance after the reregulation of our labour market in 2009. The fact is that genuine reform, decentralism and regulatory reform is positive, and re-regulation has been negative. From this the PC can conclude that genuine and substantive reform will improve the economic and labour market considerations it has been asked to have regard to.
853. **Workplace experience must be considered along with research:** A great deal of academic research is traversed in Ch.26, but this should not substitute or exclude the experiences of Australian employers and employees. OECD and ILO research may be useful, but it should be considered along with the actual experiences of Australian employers who deal with the system. It would be extraordinary if the views of a desk bound researcher in Geneva or Paris were preferred to feedback from employers on how they react to our workplace regulation and the lived experience of working under it. It should also be recalled that there is substantial politics in what the ILO and OECD researches, and that unions and employers at the global level heavily contest the research agenda of these organisations.
854. **Take confidence and sentiment into account:** Confidence and sentiment are important, as are changes in confidence for investors and employers. The PC should have regard to the positive impacts for confidence and behaviours that would flow from a package of genuine reforms to our workplace relations system.

- a. Linked to this, the PC is unduly dismissive of the evidence from the World Economic Forum regarding comparative employer perceptions of different national systems³³⁰. Even if one assumed employers would be prone to exaggerate labour problems above other problems, why would Australian CEO perceptions automatically be any worse than CEOs in other developed countries in this regard?
 - b. CEO perceptions matter and should be dismissed so cavalierly. CEOs make the critical decisions on investment and job creation, so what they report should not be dismissed or ignored.
855. **Who the relevant interests are and are not:** In looking at the impacts of recommended changes to employment protection the PC includes in (and in fact leads with) the possible impact on the FWC and then trade unions³³¹. Over-focussing on institutions and organisational players has led our workplace relations system astray for decades. The key interests are identified in the terms of reference are employers, employees and by implication the wider community. The impact on unions or employer associations is irrelevant, and naming the FWC as the lead party to be impacted on is misguided. The FWC is not an interest or party relevant to this review. It does what parliament tells it to and evolves and is impacted on as parliament determines, noting that this may change from time to time.
856. **Understand the relevance of WR reform to productivity:** The PC suggests that *"the notion that WR reform alone will transform productivity is misplaced"*. With respect that is a straw man that no serious employer representative has argued for in this review. AMMA does not argue WR reform alone will transform productivity – and we have never argued this.
857. However we do urge the PC to take into account:
- a. Australia's productivity performance is critical to our economic and labour market performance, and to our opportunities and living standards.³³²
 - b. Australia is becoming a less productive and competitive place to do business and that many of our key competitors have a superior productivity performance.³³³
 - c. Productivity is complex and multi-factorial, but workplace reform does impact on any country's economic performance, and it is one of the relevant determinants of productivity performance. No one is saying it's

³³⁰ PC Draft Report, p.804

³³¹ PC Draft Report, p.804

³³² AMMA Submission, (#96), pp.35-36

³³³ AMMA Submission, (#96), pp.36-39

the only determinant, but as Julia Gillard told us on resigning "it also does not explain nothing".

- d. The PC must recommend sufficient WR reform to ensure our employment regulation better contributes to Australia's productivity performance and the competitiveness of Australian enterprises, particularly in key export industries such as resources.
- e. The success and relevance of this review will be judged on the impact of what is recommended on productivity. This is not to say that WR is the sole determinant of productivity, but that it is an important factor. Without identifying reforms that will materially benefit productivity, this review will be judged a success.

858. **Productivity is about more than unfair dismissals and job mobility:** The PC's analysis of the impact of its recommendations on productivity is entirely too narrow. AMMA firmly focusses on reforms to agreement making and industrial action as critical to productivity, as do other key employer representatives. Yet the PC's analysis appears solely focussed on unfair dismissal and employment protection³³⁴. Focussing solely on employment protection and labour mobility risks missing the point. Employers don't want their employees to leave, taking their training and experience with them, rather they want to be able to encourage their existing employees to work more productively.

859. **Minimum wages affect productivity through more than education and training:** The PC tells us that "*The main channel through which minimum wages and conditions affect productivity is through incentives for employees to undertake further education and training*"³³⁵. With respect that's just not correct and it fails to in any way engage with key issues such as:

- a. The differing levels of labour and other costs between countries and what this demands in terms of productivity performance to make employment economic. This is a critical issue in resources where the end commodity product is more or less generic. The differences between minimum wages and conditions between Australia and Brazil, Indonesia or French West Africa means that to generate and retain jobs here we need to be even more efficient and productive.
- b. The impact of work regulation on the introduction of new productive technologies or organisation of work (e.g. changing shifts) that can cut the competitiveness gap between Australia and lower paying countries.

³³⁴ PC Draft Report, pp.805-806

³³⁵ PC Draft Report, pp.809

860. **Disputing union entry (right of entry) won't change abuse:** The PC indicates that:

Improving the ability of the FWC to deal with abuse of right of entry, and to limit right of entry to unions with no members in an organisation (chapter 19) would have the effect of reducing the costs imposed on some businesses by unions that make excessive entries into a workplace.³³⁶

861. AMMA deals with this in detail in Part A, but in terms of positive impacts we fear they may be far less than is being assumed and less than they could have been. Increased remedial capacity to litigate in the FWC will not stop abuse in this area; it hasn't to date and there is no reason to think it will do so now. Union officials need renewed obligations to comply with the law when entering workplaces, and need to be properly prosecuted for failing to do so.

- a. In addition it is conceptually wrong to group union entry/right of entry with employment protection measures³³⁷. The two are entirely separate concepts, and union entry has nothing to do with employment protection.

862. **Don't assume Australian unions know when to stop on labour costs:** The PC notes international research suggesting that in centralised or industry based bargaining "...coordinated action will ensure that wages are not so high as to threaten the viability of businesses". We seriously question the transplant ability of such research to Australia, and it is not borne out by experience, including a number of unions currently pursuing wages claims well in excess of average wage growth or any projection of price changes.

863. **We are not doing this for the academics:** The PC may look to academic work to help assess the likely impacts of what it recommends, but any future research or reporting must be of utility to the system.

- a. We are not running the system for academics, and we need to focus on employers and employees at workplaces and what they want. It is not clear that we need to collect any bespoke data beyond the standard ABS data collection.
- b. Data collection is a burden on employers, and should be minimised to what is essential. We also reiterate that major research projects such as AWIRS 1995 and the FWC's 2014 Australian Workplace Relations Study don't represent the best use of scarce government resources.

³³⁶ PC Draft Report, pp.807

³³⁷ PC Draft Report, pp.807

MINIMUM WAGES

PC Draft Report:

Chapter 8 (pp.285-334), Chapter 9 (pp.335-372), Chapter 10 (pp.373-390)

864. Despite lodging the most comprehensive submission the Commission received, and seeking to address the range of matters raised in the issues papers, AMMA said far less about minimum wages than many other participants in this review. The basis for this was made clear in our initial submission:

...for the resource industry, minimum wages and penalty rates are less front-of-mind in the management of day-to-day workplace relations, and are less determinative of overall labour costs and/or employee incomes.

...The resource industry pays the highest wages distribution and median wages of any industry, and these wages well exceed the minima in awards covering the industry.³³⁸

865. However, it was also made clear that minimum wage structures need to be simple and provide a very clear foundation for bargaining and above award payments. AMMA urged the Commission to consider a far simpler structure for minimum wages in Australia, and far fewer individual minimum wage rates.³³⁹

Minimum Wage Proliferation

866. Of course the level and impact of minimum wages are the preeminent considerations, but on our examination of Chapters 8 and 9 the Commission has failed to engage with a corollary question of whether we need so many separate minimum wages in a labour market of just 11.6 million people. This is despite a clear acknowledgement of the problem in the Draft Report:

Australia has a complex set of minimum wages and conditions contained in the National Employment Standards and the awards.³⁴⁰

867. We ask the Commission to look again at the complexity of regulation in this area, distinct from the levels of minimum wages and the considerations for their variation, and repeat our earlier recommendation:

AMMA Recommendation 6.3.1

Australia should move towards a far simpler structure of minimum wages, significantly reducing the overall numbers of minimum wage rates by moving towards removing minimum wage differentials between industries

³³⁸ AMMA Submission, (#96), pp.274-275

³³⁹ AMMA Submission, (#96), AMMA Recommendation 6.3.1, pp.276-277

³⁴⁰ PC Draft Report, p.808

*(horizontal proliferation) and setting only genuine minimum rates for the lower paid and lower skilled in need of a minimum wage safety net (reducing vertical proliferation).*³⁴¹

868. Draft PC recommendation 9.1³⁴² appears set to only further complicate this by adding regional variations, and what is in fact being drawn out is that Australia's minimum wages have too high a bite on market rates to perform a genuine safety net role. We note that a country like the UK, which has massive cost, economic and labour market differences between London and some rural and regional centres has a single minimum wage.

AMMA Recommendation

The PC Recommend that the FWC be charged with significantly reducing the numbers of minimum wage that constitute the Australian minimum wages safety net, and with capping minimum wages in awards to the lower paid. There may be exceptions to this for the public and community sectors and other funded areas.

Regional Minimum Wage Rates – PC Draft Recommendation 9.1

869. A very significant proportion of resource employment occurs in rural, regional and remote Australia, and therefore may be impacted on by the propositions being canvassed in Chapter 9 of the Draft Report, notwithstanding the low direct reliance in minimum wages in most resources activities. This includes PC Draft Recommendation 9.1:

PC DRAFT RECOMMENDATION 9.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.

870. If such an amendment were recommended to government in the PC's final report, the PC needs to go the next step and address non-award and non-minimum wage employment in rural and regional areas, including whole states in which investment and job creation has been depressed such as Tasmania and South Australia.

³⁴¹ AMMA Submission, (#96), AMMA Recommendation 6.3.1, pp.276-277

³⁴² PC Draft Report, p.360

871. Job creating resource investment and the maintenance of resources jobs in genuinely adverse operating conditions rely not on minimum rates and awards, but on agreements and the above award part of our WR system.
872. Relief can also be needed in what is often the major employer in a region, or one of them, or to facilitate an expansion or new operation.
873. Draft Recommendation 9.1 should be complemented by a recommendation aimed at agreement covered and larger operations for whom operating under the award and minimum wage system is not relevant.

AMMA Recommendation

PC Draft Recommendation 9.1 be complimented by a further recommendation:

The Australian Government should amend the Fair Work Act 2009 (Cth) so that in circumstances where:

- An employer is operating in a region or industry for which the FWC has made a temporary variation in awards in exceptional circumstances (i.e. the changes canvassed in Draft PC Recommendation 9.1).
- An employer is operating in a region which is drought declared,
- An employer is operating in a region impacted on by a natural disaster,
- An employer is operating in a region facing other significant economic or labour market challenges that threatens jobs and business viability; or
- An employer otherwise faces operational or economic adversity such that jobs and/or the viability of the business are at significant risk,

The employer may:

- Notify the FWC that any expired and out of term Enterprise Agreement is to be terminated (through a scripted automatic process for agreement termination)
- Initiate a process to vary an in-term enterprise agreement with the consent of the employees covered (i.e. put an amendment to a vote), notwithstanding any no extra claims provision which may form part of the agreement (i.e. accounting for the Toyota situation).
- Apply to have a proposed greenfields agreement which would create new jobs compared only to the award safety net, not any higher test against extant agreements or so called "prevailing industry standards".
- Apply to have an Enterprise Agreement approved in the public interest which would create or retain jobs in an area experiencing crisis or adversity, where such an agreement may otherwise not pass elements of the NDT / BOOT test.

MINIMUM WAGES FOR APPRENTICES, TRAINEES AND JUNIORS

PC Draft Report: pp.359-372

INFORMATION REQUEST³⁴³

The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.

874. Without going directly to the issues of non-training junior rates of pay (which have little or no direct application in the resources industry), **the PC should not recommend any shift to a competency basis for Australia's minimum wage system.**
- a. Where qualifications are inherently required for a particular position this is already taken into account in minimum wage setting, For example in the *Maritime Offshore Oil and Gas Award 2010* the various master, chief officer, engineer etc. classifications require particular tickets and qualifications. So qualifications and competencies are already rewarded through our existing simplified classifications in modern awards.
 - b. The safety net needs to be clear and simple to play its role, and competency based wages are anything but. Competency based wages inherently represent the type of arcane, industrial relations "dark arts" that we need to outgrow and that distract from compliance.
 - c. Competency based minimum wages are the antithesis of the democratisation of knowledge, compliance and responsibility and would merely serve to re-enshrine reliance on awards and employers organisations.
 - d. A competency based progression system for minimum rates would be a recipe for a minimum wage nightmare, and a considerable complication for compliance and enforcement. Having to discern competencies would considerably complicate advising on minimum wages and securing compliance. It would not only considerable complicate the work

³⁴³ Draft PC Report, p.359/p.50

of the FWO, but it would be a recipe for disputes where employers seek to do the right thing, to properly inform themselves and pay accordingly.

- e. Minimum wages are the safety net, and it is fundamental to our system that additional bargaining and reward be secured through above minimum arrangements, either registered through an agreement under the Fair Work Act 2009 or an unregistered “over-award” arrangement. Competency rates are therefore already able to be progressed through bargaining, and unions have been able to pursue and secure such arrangements through bargaining for more than two decades.
 - f. Competency based arrangements could only ever work where work is generic and homogenous across workplaces (something Australia has moved further and further away from in recent decades) and where there is a follow up dialogue and workplace relationship between instigating unions and the employer. This is inherently a model for the bargaining systems, not for the minimum wages safety net.
 - g. Employers also need to be able to evaluate the pros and cons of competency based wage arrangements for their workplaces and their workplace cultures. There is considerable academic, HR and corporate psychology research on these arrangements, particularly coming out of the US, which any employer should be able to consider in shaping a remuneration system that suits their workplace – whether competency based or not – without being forced into a particular model through minimum wage structures.
 - h. Practically, it would be far easier to erect an agreed competency model on a foundation of non-competency based minimum rates, than to try to secure a non-competency based model through bargaining above a competency based minimum wage model.
875. Above all, this represents very old thinking. Competency based minimum wages are a thirty plus year old idea. In fact, it is not even a minimum wage concept – it comes from a time of centralisation when award rates were market rates.

AMMA Recommendation

The PC not complicate our minimum wage arrangements or render them further behind international best practice by moving to a competency model.

If the PC is minded to consider any shifts in this area, it should be strictly quarantined to minimum wages for those undertaking formal apprenticeships.

Competency based progression should play no part in minimum wages for non-apprenticed juniors or any adult or fully qualified employees.

PENALTY RATES

PC Draft Report: Chapter 13 (pp.457-482), Chapter 14 (pp.483-532)

876. The PC spends extensive time on penalty rates, dedicating two chapters and two recommendations to this matter, which reflects the importance of this issue to some sectors and those who work in them.
877. Employment in the resource industry is in substantial part well paid and well in excess of safety net levels, even when penalty rates are factored in. This is consistent with the PC's observation that "working time regulations apply to a heterogeneous body of employees and workplaces"³⁴⁴ – a precept that should guide the PC in making any final recommendations in this area.

Keep it simple and don't reduce existing flexibility

878. The guiding imperative for resource employers is to be able to employ using rostering arrangements that best accord with their commercial and operational imperatives. In many cases resource operations operate continuous or extended shifts that see employees working nights and weekends (and well remunerated for doing so), and under annualised salaries.
879. Putting to one side the level of penalties, the structure of different payments in awards for differing periods of work should not as a result of this review:
- a. Become more complicated or make the navigation of statutory tests for agreement making more difficult or uncertain.
 - b. Reduce scope to enter into or maintain annualised salary and staff employment models which have proven very successful in the resource industry.

³⁴⁴ Draft PC Report, p.459

Draft Recommendation 14.1 – Quantum of Penalties

DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

880. Many resource sector operations operate on a continuous shift basis, 24 hours a day; seven days a week. What does the Commission envisage happening where Sunday's are worked as part of shift work? This does not seem clear from the report and needs to be clarified.

Draft Recommendation 14.2 – Implementation

DRAFT RECOMMENDATION 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

881. The service sectors will address this recommendation and the consistency question in due course, but there needs to be scope for any re-examination of penalties for particular industries to be addressed on a timetable prioritised by that industry.

Annualised salaries

882. The PC cites a paucity of data on annualised salaries³⁴⁵. We reiterate it is a widely used and longstanding practice amongst resource employers. Scope to annualise salaries is explicitly recognised (and provided by) the Mining Industry Modern Award:

³⁴⁵ Draft PC Report, p.492

17. Annualised salaries

17.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

clause 13—Classifications and minimum wage rates;

clause 14—Allowances;

clause 20—Overtime and penalty rates; and

clause 23.4—Payment for annual leave.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

17.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

17.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 13—Classifications and minimum wage rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

883. It is very important that long standing scope for annualising salaries by consent between employers and employees be retained in both registered agreements and under awards in the future, and we ask the PC take this into account.

Information request - preferred hours clauses³⁴⁶

884. Employers increasingly deal with demands to accommodate employees preferred hours of work, including to assist with reconciling competing demands on employee time between their working and non-working lives. Agreed

³⁴⁶ Draft PC Report, pp.530-531

accommodations, where possible, can be very positive from the perspectives of both employers and employees.

885. As working time preferences change and diversify, the so called disadvantages of working traditionally non-standard working patterns apply to fewer employees and cannot be assumed. We take the Commission to be observing as much in its analysis, which is positive.
886. In the labour intensive and major operations which typify much of the resource industry, individually preferred hours may not be applicable or possible, but options to change rosters swings or shifts may accomplish what employees seek.

INFORMATION REQUEST

The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract.

What would the risks of any such 'penalty rate' agreements be and how could these be mitigated?

AMMA Recommendation

The PC should include in its final recommendations:

- a. Additional scope for employees and employers to genuinely agree on preferred hours arrangements which would not attract additional penalty payments.
- b. Such arrangements to be included in all awards, and able to be included in registered agreements with the support of the parties and endorsed by the majority of employee (i.e. voted up).
- c. Within this, scope for changes for agreed shift arrangements without triggering existing penalties or notice requirements.

887. Any rules stating employers would need to pay penalty rates for asking employees to work non-preferred hours would need to be carefully crafted to not displace (or be clearly calibrated in relation to) overtime provisions and practices (which carry their own penalties). There should also be flexibility on an overall basis, which would take into account the overall package of terms and conditions in assessing whether the employee would be worse off. For example, where an employee is earning well in excess of award rates of pay overall the

“penalty” for an employer initiated variation in agreed hours might be less than 50%, so long as the employee was not disadvantaged.

888. Any “risks” are mitigated by requiring genuine agreement, prohibiting coercion, and properly informing employees of their rights and responsibilities (i.e. from the FWO).
889. Finally, any such a capacity for individuals to reach agreement with their employer should not be able to extinguished by a collective agreement, which has too often been used by unions to limit flexibility (recalling the previous problems for facilitative provisions and current problems for IFAs).
890. Consider for example a mother working in a non-traditional area for women's employment who may be attracted to an agreed-hours arrangement to best support her work and family needs (perhaps shift parenting with a partner not working weekends). A male majority in the workplace should not be able to distinguish her capacity to enter an agreed hours arrangement if she and her employer can do so, and this should be at all times an individual matter.

ALTERNATIVE FORMS OF EMPLOYMENT

PC Draft Report: Chapter 20 (pp.711-739)

891. AMMA responds to Draft Recommendation 20.1 on agreement terms regarding contractors, labour hire and casual employees in Part A of this submission.

Contracting

892. AMMA endorses the PC's conclusion that *"while a statutory definition is superficially attractive, there would be considerable difficulties and risks associated with a policy shift involving the rigid adherence to such a definition, and all to solve a problem of unknown dimensions"*³⁴⁷, and supports the PC not making substantial recommendations for any changes in this area.
893. There are existing prohibitions on sham contracting and with further efforts from regulators and better cooperation with unions and employers they could be even more effective.
894. We note the PC sees merit in replacing the 'recklessness test' with a 'reasonableness test' in s.357 of the FW Act³⁴⁸. This may well be a far more complex issue than has been revealed in the submissions of the small number submissions received. We also note that all the sources cited were all commissioned under the previous Labor government.
895. Any final recommendation or positing of such a change should be based on a wider inquiry, directing employers and the wider legal profession to consider the ramifications of what it being proposed.

Casual Employment

896. It is welcome that the PC busts the casualisation myths pedalled by trade unions and others, and notes that the incidence of so called 'alternative' forms of employment have decreased slightly³⁴⁹. It follows that the PC should reject any calls to remediate, further regulate or discourage the use of casual employment.

Internships

897. The PC makes an information request in regard to internships:

³⁴⁷ PC Draft Report, p.726

³⁴⁸ PC Draft Report, p.729

³⁴⁹ PC Draft Report, p.711

INFORMATION REQUEST

The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.

898. AMMA members use internships but our organisation is not significantly involved in addressing their work arrangements. Our only submission on this matter is to urge the PC to take into account:
- a. The importance of internships to high quality university and vocational education and the strengthening of Australian qualifications. Key qualifications on which the resource sector relies such as geology and engineering often require temporary 'work experience' placements prior to graduation, and many of these linkages lead to jobs and careers.
 - b. The benefits internships offer to individuals and professions, and to kicking starting successful careers.
899. We urge the PC to take great care not to discourage or place at risk the offering of work experience opportunities, professional placement years, clerkships or their take up by employees.

INTERNATIONAL LABOUR STANDARDS

PC Draft Report: Chapter 23 (pp.761-768)

International Labour Standards

900. The PC appears to have had regard to International Labour Standards amongst its considerations, but to have approached this from an appropriate context as a foundational or compliance matter, which is not significant to driving the next development in our work laws than the economic, social and labour market challenges we face.
901. Employers strongly support this, we need to drive change in our workplace relations framework based on our needs as a country, and whilst not offending ILO precepts, these often decades-long precepts cannot drive the changes we need to deliver jobs, opportunities and increasing living standards.
902. Some may “argue that Australia should align labour laws with the ILO's International Labour Standards”³⁵⁰, however such a view is misguided and a misplaced oversimplification.
- a. An ILO member state ratifying an ILO convention is obliged to bring its laws and practice into conformance and give effect to the precepts of that convention according to its terms, and the constitution of the ILO. The PC captures this when it refers to ILO standards as a reference point.
 - b. ILO conventions were never drafted to be used as templates to which national labour laws would be “aligned” and with respect those raising such a notion are adding nothing to the PC's considerations according to its terms of reference.
903. ILO Conventions are not a binding code or supranational labour legislation, rather they set broad precepts for quite different national labour relations systems which nation states give effect to according to their different national systems. It was ever thus, and Australia's workplace relations system was as different to those of the US, Continental Europe, and even other Commonwealth countries when we joined the ILO in 1919 as it is now.
904. The time has also passed when ILO conventions could drive increases in living or working standards in a complex modern G20 economy such as Australia's. Drivers of change will not lie in decades old consensus documents.

³⁵⁰ Draft PC Report, p.761

905. Australia has well developed consultative machinery for consideration of unratified ILO conventions, and this should continue to do this work.
906. The notion of symbolic ratification³⁵¹ is antithetical to Australia's rigorous approach to compliance with ILO obligations. Australia is a leader amongst ILO states precisely because we do not adopt standards on an aspirational basis or where they are not relevant, and too many ILO states suffer from an over-ratification of standards with no chance of every complying with at least half of them.
907. Note: Box 23.1 outlines Australia's Framework for Ratifying International Treaties. For completeness, the Commission may also wish to note Australia's ratification of ILO Convention 144, *Tripartite Consultation (International Labour Standards) Convention, 1976*³⁵², and subsequent passage of what is now the *National Workplace Relations Consultative Council Act 2002*.
908. The NWRCC has a subcommittee on International Labour Affairs (ILAC) which is in practice the forum in which Australian unions, employers and government first formally engage on possible ratification of ILO labour standards (both newly adopted standards, and existing unratified standards through the ILO's Art 19 reporting process and the ILO's General Survey process). This is in reality critically important to the ratification process, and an omission from Box 23.1.

Trade Agreements

909. Australia is at the time of writing mired in a ridiculous political debate on the approval of the draft China Australia Free Trade Agreement (CHAFTA). The resource industry strongly supports the adoption of CHAFTA, which offers the prospect of considerable investment, export and job opportunities for Australia.
910. The Commission has not included any recommendation in Ch.23. This is the appropriate approach to this area.
911. We are reinforced in this view by recalling the globally agreed approach to the interaction of trade and labour standards. The 1996 Singapore WTO declaration³⁵³ contains the agreed multilateral approach to the respective and separate roles of global trade regulation and global labour market standards:

4. We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and

³⁵¹ Draft PC Report, p.763

³⁵² Ratified on 11 June 1979

³⁵³ Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN(96)/DEC, 18 December 1996, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

912. This long standing approach should inform the PC's considerations in this area, and the final report should not contain any specific recommendations on trade agreements, maintaining the approach in the draft report.

AMMA Recommendation

There are no draft recommendations in Chapter 23 of the Draft PC Report. AMMA supports this approach and it should be reflected in the final PC report.

MIGRANT WORKERS

PC Draft Report: Chapter 21 (pp.741-750)

913. Only a limited subset of visa types are used in the resource industry, centred on the entry of skilled and experienced migrants into Australia to contribute to the domestic industry and its global competitiveness.
914. AMMA addressed sponsored foreign workers in Chapter 9 of our initial submission³⁵⁴ emphasising that international employees in the resources industry are highly paid, that it is far from a low cost option for Australian employers, and the consistent lack of non-compliance or complaints in our industry.
915. In response to Ch.21, the following points should be noted for the PC's final report:
- a. Various generalisations in the text need qualification, and the addition of the qualifier "some". Highly paid managers and experts in our industry are not "more vulnerable to underpayment"³⁵⁵ than other employees. The generalisations of much of Ch.21 are not sufficiently precise, and need qualification for differing experiences between industries and visa types.
 - b. This is a highly politicised area, subject to deliberate misinformation and dangerous xenophobic dog whistling from some quarters, including in recent times in relation to skilled migration from particular countries (i.e. China). The PC should take particular care to not generalise from isolated observations for particular visa types, to all visa types.
 - c. There are also existing steps being taken to make changes to the 457 visa system in response to precisely the issues being raised by the PC³⁵⁶. These should be allowed to take effect for this visa class before any further changes are considered.
 - d. We also note that ongoing measures are being pursued by the government to strengthen migration compliance and enforcement of work rights, which need to be taken into account. For example:
 - i On 10 September, the Assistant Minister for Immigration and Border Protection announced new measures to help protect migrant

³⁵⁴ First AMMA Submission, March 2015, (Submission #96)

³⁵⁵ Draft PC Report, p.741

³⁵⁶ Noted on p.744 of the Draft Report.

workers by providing additional information and resources to visa holders so they understand their workplace rights.³⁵⁷

- ii This included a new Pay and Conditions tool to allow migrant employees to check their pay and conditions. Information for students and temporary graduates is to be updated shortly.

916. Resource industry employers overwhelmingly use 457 visas to access international skills in a genuinely global industry that are not accessible in Australia, where and when they are needed. These arrangements are overwhelmingly higher paying and fully compliant, and therefore have negligible interaction with inspectorates.

917. Draft Recommendation 21.1 is as follows:

DRAFT RECOMMENDATION 21.1

The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth)).

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

918. In relation to any additional inspection resources:

- a. In a down-turning labour market there should be less demand for international employees, at least in some areas. The Commission's Figure 21.1 showing a decline in 457 visa numbers supports such a view.
- b. Any additional resources should be directed to where there is a valid basis to suspect endemic problems. This appears to lie in areas other than the 457 visa program, and attention could focus on other visa series, or on WR compliance generally.
- c. The implementation of the government's response to the Azarias review should be allowed to take effect and be properly evaluated prior to any additional resources being allocated.

³⁵⁷ Media Release, 10 September 2015, Senator Michaelia Cash Assistant Minister for Immigration and Border Protection Minister Assisting the Prime Minister for Women, "Temporary Visa Holders: know your work rights!" - <http://www.minister.border.gov.au/michaeliacash/2015/Pages/know-your-work-rights.aspx>

AMMA Recommendation

Draft PC Recommendation 21.1 be amended to ask the government to consider it in light of its consideration and response to the Azarias review and changing patterns of labour migration prior to any new resource allocation, and that any new resources be directed to those visa series where use is increasing and set to increase, and to industries where there is a history and risk of abuse.