Workplace reform priorities for Australia's next Federal Government

The Australian Mines & Metals Association (AMMA)

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AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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INTRODUCTION

1. Australia's next Federal Government, whether Coalition or Australian Labor Party (ALP), must deliver an industrial relations (IR) system that better encourages long-term economic growth and development, and that better encourages investment and job creation, whilst also allowing benefits to flow to both employees and employers and a protective safety net of minimum standards.

2. The effectiveness of our IR system in delivering competitiveness, investment and productivity, concurrently with protecting appropriate minimum standards, must be one of the leading national policy priorities for any Australian government.

3. Australia's IR system must assist enterprises in meeting the serious economic challenges faced in globally competitive capital and product markets, while at the same time maintaining and improving employment opportunities and working conditions.

4. Workplace policy is not an area that can be treated as "set and forget", or as "fixed". It is the height of political and policy hubris to think any system or policy approach should not be revisited in light of substantial operational concerns.

5. Unfortunately, the present IR system, combining a legacy of reforms under both political parties with the Fair Work policies of the current Labor government, is falling well short of what Australia requires.

6. The present system has fallen out of balance. It is increasingly characterised by entrenched ineffectiveness, delay and complexity. This holds back Australia's productivity and competiveness, and our attractiveness and reliability as an investment destination.

7. The present system has systemic flaws which limit job creation and threaten job security. This is despite the comparatively strong performance of the Australian economy and labour market in a period of global malaise and crises.

8. Change is needed urgently, and should be a high priority for whichever party forms our Federal Government after 14 September 2013.

Supporting the resource industry and its people in the national interest

9. The resource industry is the heartbeat of the Australian economy in terms of investment, employment and export growth.

10. Australia's resource industry is increasingly important to our economy, national interest and prosperity. The Reserve Bank of Australia (RBA) recently estimated that the resource industry now accounts for around 18 per cent of the entire economy, double its share in 2003/04.

11. The Chief Economist of the Bureau of Resources and Energy Economics (BREE) has stated that the success of the resource industry weathered our economy through the global financial crisis and accounted for a 40 per cent increase in real incomes (living standards) over the same period.

12. There is presently $650 billion of capital investment in resource projects committed or awaiting approval and the industry will deliver $184 billion of export earnings in 2012/13.

13. In terms of workforce, the resource industry is the fastest growing workforce in Australia, with annual employment growth reaching 25 per cent.

14. The RBA found that more than 1.1 million Australians are employed directly or indirectly by the resource industry: more than in manufacturing, as many people as in retail and construction, and twice as many as in tourism.

15. The National Resources Sector Employment Taskforce (NRSET) has estimated that every job created in mining can create three jobs in allied industries such as transport, catering, construction and support services.

16. Australia's resource industry has a long and proud history of driving reform. Our industry has initiated many the policy debates Australia needed to have about the world of work, even when those debates were uncomfortable or difficult.

17. The perspectives and priorities of the resource industry matter to the trajectory of the Australian economy, labour market and community as a whole, and should help the competing parties engage with what must be a key national policy priority for Australia; how we regulate work and workplace relations.

Urgent reform priorities

18. Australia's next Federal Government must get back into the IR reform business. Our government must again actively strive to ensure the regulation of work supports job creation, productivity, competitiveness and the advancement of our economic and social wellbeing.

19. The next Federal Government should urgently address **6 key priorities for IR reform**:

    1. Protected industrial action

    2. Allowable matters in agreements and bargaining

    3. Greenfield agreement making

    4. Individual flexibility

    5. Trade union right of entry

    6. Adverse action/general protections

7. A further four policy areas are also in particularly pressing need of reform:

    1. Industrial regulation of the building and construction industry

    2. Transfer of business

    3. Unfair dismissal

    4. The accountability of registered industrial organisations.

1. PROTECTED INDUSTRIAL ACTION

1. The very foundations of Australia's industrial relations system were in the prevention and orderly settlement of industrial disputes and avoiding the significant mutual harm to employers, employees and the community that comes from strikes, bans, pickets, lockouts etc.

2. This remains a relevant goal for our system, albeit in a 21st Century context.

3. Our system now faces the challenge of simultaneously delivering workplace bargaining and harmonious workplace relations. This requires our system to implement workplace by workplace agreement on wages and conditions, subject to a right to take protected industrial action in the bargaining process, but in practice a minimal incidence of actual action strikes, bans, pickets etc.

4. This is a completely valid challenge, and we have already seen under previous iterations of our legislation that this balance can be delivered. However, our current system has gone backwards and is failing to meet this challenge that is fundamental to the successful operation of our IR system.

5. Australia's next Federal Government must urgently address the institutionalised adversarial aspects of the current bargaining system. Our system should maximise the proportion of Australian enterprises able to successfully agree on terms and conditions of employment without being subject to damaging industrial action (or uncertainty and threat of industrial action).

6. Premature and damaging industrial action has become a hallmark of the current IR framework, frequently instigated by employees and unions at the very earliest stages of bargaining. Resort to protected industrial action at first instance is at odds with an obligation to bargain in good faith, and at odds with how all parties intend our system to operate.

7. A right to engage in protected industrial action during bargaining should remain part of the system. However, this should be a right of last resort for all parties and not one that is used prematurely or habitually. We need an IR system that delivers workplace driven outcomes in the vast majority of cases.

8. Existing very low thresholds to take protected industrial action should be tightened, and parties should be required to participate in conciliation before the Fair Work Commission prior to taking legally protected action.

9. Only when the Fair Work Commission is satisfied that all reasonable attempts to resolve the enterprise bargaining dispute have been, or are unlikely to be successful, should either party be able to take protected industrial action.

10. In cases where an employer has not yet agreed to bargain, or where there is doubt about majority support for bargaining among the workforce, a majority support determination (constituting the valid majority of the workforce to be covered by the agreement, not simply union members) should be required in all cases before protected industrial action can be sought by employees or unions.

11. Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action simply on an assertion they believe they are bargaining for permitted content. They must actually be bargaining for permitted content (see 2 below).

12. Where notices of protected industrial action are provided to an employer and less than 24 hours' notice is given of cancelling that protected action, the employer should have the right to refuse to accept employees making themselves available for work and no further protected action should be able to be taken by that group of employees for a subsequent period of 30 days.

13. The bar has been set far too high under the Fair Work Act to obtain orders that action stop, particularly for third parties economically and operationally harmed by industrial action in their supply chains, contractors or markets. This needs to be brought back into balance and reflect a better balance between public policy considerations in this area.

14. The bar should not be set so high for significant harm to third parties, given the overall value of their operations or projects, that relief is effectively denied to them. A finding that losses of $3.5 million per day do not constitute significant harm to a business is extraordinary. It is illustrative of a system and statute in need of repair.

15. The requirement for an applicant union to be 'genuinely trying to reach an agreement' with an employer before seeking a protected action ballot order should include application of a designated criteria that ensures protected industrial action is not being taken over wage and condition claims that are speculative and inconsistent with the public interest.

    1. The current ability to take protected industrial action over claims that are clearly contrary to the public interest should be removed.

    2. As part of this consideration, unions could be required to demonstrate productivity measures that will offset labour cost increases sought.

Cooling off and getting back on track

16. The FWC should be in the business of promoting industrial harmony, minimising industrial action, minimising economic harm to both bargaining participants and third parties, and ensuring workplaces are covered by genuine agreements that contribute to productivity and competitiveness.

17. The powers of the FWC should be adjusted to empower the tribunal to more readily impose a cooling off period or other innovative means of getting parties back into genuine negotiations, and to step back from taking industrial action.

18. The requirement that protected industrial action be occurring at the time a cooling off application is made should also be changed to allow an application to proceed where protected industrial action is threatened or likely to occur.

Pattern bargaining

19. The Fair Work Act purports to prohibit the taking of protected industrial action where pattern bargaining that pays no regard to the needs of the enterprise is occurring.

20. However, pattern bargaining continues to be the *modus operandi* of many unions who then encourage employees to take protected industrial action to secure a pattern agreement.

21. The current system is yet to actually prohibit the taking of protected industrial action while pattern bargaining is occurring. To date, the tribunal has interpreted pattern bargaining extremely narrowly so that only if identical wages, not identical pay rises, are being sought would a claim qualify by pattern bargaining.

22. The existing legislative constraints on protected industrial action being taken where a union is engaging in pattern bargaining are completely ineffective in their current form. This is especially the case in the building and construction industry, which is plagued with pattern agreements.

23. The definition of pattern bargaining should be tightened to provide more effective protection and better deliver on the stated aims of the system's practice. The exemption in the Fair Work Act that allows pattern bargaining and protected industrial action to go hand in hand must also be removed.

2. ALLOWABLE MATTERS IN AGREEMENTS AND BARGAINING

24. Australia's shift to enterprise determination of wages and conditions, and enterprise-driven improvements in productivity, competitiveness, flexibility and employee satisfaction is becoming increasingly superficial and illusory under the current Fair Work system.

25. In too many instances, agreement making in Australia has become little more than a bureaucratic process of translating standardised union claims into agreements, with no scope or challenge to address productivity or progress organisational change.

    1. In too many negotiations under the Fair Work Act, productivity improvements or changes to the organisation of work are off the bargaining table; not for negotiation.

    2. Merely processing inflated unions claims into wage outcomes closer to inflation does nothing to innovate or make enterprises more productive.

26. Government must make agreement-making simpler, more flexible and better empower employers and employees to improve productivity.

27. The Fair Work Act must be amended to start to turn this around. This must be complemented by wider dialogue and initiatives to ensure Australia gets back into the business of productivity improvement and world-leading performance, a significant part of this must relate to labour productivity and our IR system.

Allowable Matters in Agreements

28. Under the present IR system almost anything can be included in enterprise agreements, and in union claims that give rise to legally protected industrial action.

29. Union claims regularly include a wide array of matters as a vehicle to entrench, support and extend their role at the workplace and deflect the focus away from improving working arrangements for employees and employers.

30. This includes claims relating to payroll deductions of union dues, trade union training leave, provision of on-site facilities for union delegates, restrictions on the use of contractors and other union rights clauses that do not pertain to the employment relationship between the employer and its employees.

31. The virtually unrestricted nature of matters that can be subject to enterprise agreement claims has frustrated Australian enterprises in maintaining and advancing innovative, flexible work practices, including the loss of flexibilities introduced in past generations of agreement. The lack of boundaries further forces productivity off the bargaining table in too many Australian workplaces.

32. The next Federal Government should limit agreement content to matters pertaining solely to the employment relationship between the employer and its employees.

    1. This should be based on the High Court's determination of 'matters pertaining' in the *Electrolux* decision.

    2. Protected strike action and bargaining should not extend to matters that are not employment matters or that unacceptably restrict individuals' freedom of choice and companies' capacity to manage.

    3. In addition, some matters may need to be expressly identified as able to be included in agreements and others as not being able to be included in agreements (and also subject to protected industrial action).

Bargaining

33. 87 per cent of Australians in the private sector choose not to join a trade union. We need a system that not only better respects these choices, but actually reflects current rather than historic realities in Australian workplaces.

34. The current default bargaining representative status for employee organisations should be removed, in favour of transparency in representation via employees appointing in writing their bargaining representatives. Again, the system should better respect the choices of Australian employees.

35. The existing system of default representation is not transparent and leads to misrepresentations and undue complexity. Transparency in representation will also be restored through employees appointing their bargaining representatives in writing.

36. Employers should know which bargaining representatives are seeking to represent employees in negotiations and how many employees each bargaining representative actually represents.

37. Existing laws provide ample protection for employees to be represented by bargaining representatives without fear of discrimination.

38. There should be no access to protected industrial action by either employees or employers without a rigorous attempt to resolve differences, including via conciliation.

39. Employers and employees should also have greater scope to determine the coverage of agreements, and the FWC should no longer override these choices by somehow trying to determine whether agreement coverage has been fairly chosen.

40. Consideration should be given to how the Fair Work Commission could better encourage parties to address workplace flexibility and productivity in agreements brought before it for approval.

3. GREENFIELD AGREEMENT MAKING

41. Greenfield agreements are imperative for the Australian resource industry, with the development of nationally significant resource projects requiring effective, accessible, practical and timely first-time regulation of work for a new workforce.

42. Under the current Fair Work Act, the only way an employer can make a greenfield agreement is with a trade union. As a result, many greenfield agreements are being stalled or completely withheld. Where agreements are made, unions are demanding and achieving excessive outcomes that have led to spiralling labour costs for new projects.

43. The choices for employers under the current system are unenviable:

    1. To start up a project without a greenfield agreement in place, leaving the project vulnerable to protected industrial action as soon as employees start work. This has the effect of increasing the project's financial exposure and placing it in an extremely uncertain position, potentially being subject to delays from the outset. The failure to have an agreement in place will also raise alarm bells with investors who demand industrial certainty before signing on the dotted line.

    2. Agree to unions' often exorbitant wage and conditions demands, as well as the extensive union rights agendas being pursued across the board, simply to get a greenfield agreement up and running.

44. Employers should be able to make greenfield agreements for new projects without a union having a veto over whether an agreement can be made and/or what terms it should include.

45. Where unions demand that fanciful and inflationary claims be agreed before sanctioning a greenfield agreement, there must be a safety valve for employers. In such circumstances, employers must have the option of registering a greenfield agreement that would be tested against the relevant modern award, the National Employment Standards and the better off overall test, without obtaining consent from a union or unions.

46. On application by the employer, the Fair Work Commission should have the ability to deem that a union's demands are not in the public interest and to issue a greenfield "determination" where agreement with unions cannot be reached in a reasonable timeframe.

47. Any tribunal intervention or consideration in relation to a Greenfields agreement must be at the instigation of the employer only, and not be able to be commenced by trade unions or the tribunal.

48. Compulsory arbitration is not the answer. A significant number of major employers in resource industry have expressed concerns regarding the capacities of industrial tribunal members, many of whom have limited experience in business operations, to properly engage with the scale and complexity of considerations involved in bringing massive resource projects to investor approval and project commencement.

4. INDIVIDUAL FLEXIBILITY

49. At the rhetorical level at least, all parties recognise the increasing role of individual determination and choice in the operation of our workplace relations system.

50. Our workplaces and markets are no longer the homogenous monocultures upon which our historic award system was predicted, and our system needs to continue to evolve in step with changing communities and markets.

51. One of the current government's key justifications for removing the ability to make new AWAs was that essential individual flexibility could be delivered under its Fair Work framework, via:

    1. Flexibility provisions included in awards and collective agreements; and

    2. Individual flexibility arrangements (IFAs) based on the above flexibility provisions in modern awards and collective agreements.

52. As with so much of the Fair Work system, this has not worked in practice.

53. Scope for individual flexibility has been rendered essentially inoperative in many cases through trade union approaches to collective bargaining.

54. The foundation for IFAs and individual flexibility has been eaten away from within by what the system allows trade unions to do at the collective level.

55. This needs to be revised, and, as the current government intended, genuine scope for individual flexibility provided under awards, collective agreements and IFAs. The system needs to operate as originally communicated to the Australian community, and to deliver genuine individual flexibility within the existing framework of the Fair Work legislation.

56. Enterprise agreements should at very least contain the Fair Work Act's model flexibility term currently included in all modern awards. Agreement making with trade unions should not be able to be used to restrict the capacity of individual employees to access genuine individual flexibility where able to be agreed with the employer.

57. While the model flexibility clause should be the minimum standard required, the optimal situation would be to ensure:

    1. Restrictions not be able to be placed on what terms of a collective agreement can be subject to an IFA.

    2. IFAs are able to run for the nominal term of an enterprise agreement, that is, four years.

    3. It is possible to make IFAs a condition of employment.

    4. IFAs are not subject to unilateral termination during their life. The current 28-day notice period for cancellation of an IFA by either party fails to provide essential certainty.

    5. Employers and employees can agree that no protected industrial action can be taken during the life of IFA, as is the case for other forms of agreement.

58. At all times agreement must be genuine and there should be appropriate protections for employees in both the making and operation of IFAs.

5. TRADE UNION RIGHT OF ENTRY

59. Australia's workplace relations system has long provided a legislated capacity for unions to enter employer workplaces for prescribed purposes, subject to legislated or arbitrated capacities and controls. What these controls are, and the balance between competing interests in this area, has been subject to considerable political debate dating back to prior to the 2007 election.

60. In November 2007, then-Deputy Opposition Leader Julia Gillard said:

> *"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it [that the Fair Work*

Act will retain identical right of entry rules to those under the Workplace Relations Act]."

61. That promise was not kept.

62. In reality, union access to worksites has widened enormously under the Fair Work Act, creating significant additional disputation, uncertainty and imposts upon employers.

63. It has also encouraged a completely unacceptable level of harassment of potential union members/bargaining clients in enterprises that trade unions are targeting for coverage.

64. The current right of entry provisions have encouraged a greater number of union visits by an increased number of unions competing for coverage. Right of entry provisions have become a recruitment vehicle for unions at the expense of both employers and employees, the latter more often than not choosing not to join a union.

65. Unions undertaking hundreds of visits to any site is contrary to both community expectations for fairness and balance and the reasonable exercise of management.

66. The current situation reflects a fundamental lack of respect for the choices being made by those working people to exercise their right not to join a union.

67. Proportion and reasonableness needs to be reinserted into Australia's right of entry rules.

Unique challenges in the resources sector

68. Right of entry rules designed to help union officials stroll in through the open roller doors of metropolitan factories are quite unsuited to remote operations, particularly offshore operations, in the resource industry.

69. Resource sector operations are unique in the sheer scale, area and complexity of activities, the numbers of people employed, and the remoteness and difficulty of access. Massive safety considerations are paramount and severely control how these sites operate and the access and movements of all persons on site.

70. Transport to and from offshore and remote locations in our industry is difficult and costly. In practice, businesses running sites cannot always bring all persons out to their remote operations that they wish to. Unique legal concerns also limit who can and cannot be flown in and out, and in what numbers.

71. Any suggestion that employers must somehow fund or facilitate union officials seeking to sell union membership getting access to remote resource industry workplaces, particularly offshore, is completely unrealistic and impractical.

72. The Prime Minister was quite right back in 2007 when as Deputy Opposition Leader she said the long-standing right of entry rules in place at that time did not need to be changed.

73. Australia's next Federal Government should realign right of entry rules for trade unions in a form consistent with those that existed prior to the 1 July 2009 changes.

74. Union rights to enter workplaces should no longer be solely based on unions' constitutional rules. All of the following conditions should be met before a union official can legally enter a worksite:

    1. The union should be a party to an enterprise agreement that covers the site or be attempting to reach one;

    2. The union should be required to demonstrate that it has members on that site; and

    3. Those members should have requested the union's presence.

75. This would restrict entry under both s.481(1)(a) for the purposes of investigating breaches and s.484(b) for the purposes of holding discussions with members, to cases where unions have actual members on-site rather than just workers that are covered by the union's eligibility rules (i.e. potential members).

76. Right of entry clauses in enterprise agreements: There should be no capacity for unions to include additional right of entry provisions in enterprise agreements that bestow entry rights which are in addition or inconsistent with the legislated system. Statutory checks and balances should not be able to be undone through bargaining

77. Reasonable limits on site visits: There should be a limit on the number of entry visits that unions can make to worksites that are not for the purposes of investigating suspected breaches. The number of visits for discussion purposes should be capped.

78. Employer supervision and direction: Given the size, location and type of machinery on resource projects, as well as employers' enormous safety obligations, employers must have the capacity to reasonably direct union permit holders in relation to where to go onsite during visits.

79. Costs of entry: Unions are a commercial service provider seeking to attract clients to their service. As such, unions must meet the travel, logistical and other expenses of their entry onto worksites to meet current and potential members. Under no circumstances should employers be required to in any way subsidise or fund union right of entry.

80. Disputes over right of entry: The above changes should significantly decrease current levels of disputation and dissatisfaction created by aggressive trade union right of entry campaigns.

81. However, there may be value, in addition to the initiatives above, in creating a fast-track capacity to take disputes or concerns to the Fair Work Commission for resolution.

82. One of the tools that could be considered is limiting otherwise lawful entry where there has already been a volume of entries onto a site that would be considered reasonable.

83. However, the Commission's discretion in this area would be limited and explicitly spelled out so as not to allow further broadening of the already too broad provisions in practice.

6. ADVERSE ACTION / GENERAL PROTECTIONS

84. In 2009, the current Federal Government grafted an entirely new platform for litigation onto Australia's workplace relations system, taking existing long-standing and effective legal protections against discrimination and unlawful treatment and expanding them significantly to create an unnecessary and counterproductive new avenue to sue employers.

85. The very broad-ranging "adverse action" provisions were introduced without any genuine examination of their necessity, especially in light of other remedies long available under our law (e.g. discrimination and OHS laws).

86. Every employer action relating to an employee activity now needs to be assessed against the potential for an adverse action claim to be brought at some future time.

87. As was entirely foreseeable, this has become a lawyers' picnic and has served to create another tool in strategic litigation and avenue for forum shopping. It has also significantly increased the costs of employment through the extensive new documentation and record-keeping requirements it forces on employees.

88. This adventure in speculative litigation should be removed from our system entirely, in favour of restoring the long-standing, well understood, and balanced protections which preceded the current legislation.

89. Failing the removal of the adverse action provisions in their entirety, the following changes should be made to the system as a matter of urgency:

    1. The reverse onus of proof on employers should be removed as it encourages non-meritorious claims to be brought and allows claims to proceed further than they otherwise would if the burden of proof rested with the applicant.

    2. Applicants should be required to comprehensively document the grounds on which they are bringing their claim to enable employers to prepare their defences and so the FWC can assess the merits of the application before it moves to conciliation.

3. An entitlement to a workplace right should have to be the dominant reason for the adverse action alleged to have been taken, rather than one of several factors, for a claim to proceed. Claims should not be able to proceed where other valid, more significant reasons exist for the adverse action such as poor performance or misconduct.

4. Removing actions on the basis of alleged discrimination that is able to be pursued using other, long standing Commonwealth and State legislation.

5. Employees undertaking union activity should not be exempt from an employer's right to take disciplinary action if the same activity would result in disciplinary action if undertaken by an employee not engaged in union activities.

6. The six-year time limit for bringing adverse action claims under s.372 where dismissal is not involved should be reduced to 21 days, the same time limit applying to adverse action claims made under s.365 where dismissal is involved (following amendments to the Fair Work Act that took effect on 1 January 2013).

    1. The current six year allowable period to bring claims doesn't stand up to any form of scrutiny.

    2. During a period of more than 2000 days, managers change, staff change, whole cultures and processes change. It is impossible to be able to reconstruct events reliably in many cases so far in the past.

    3. The current system is predicated on an operational impossibility. This operates to the significant prejudice of employers required to defend claims subject to a reversed onus of proof.

1. Damages should be limited to economic loss only, excluding claims for pain and suffering and other alleged non-economic harm.

2. The application of the general protections to prospective employees and independent contractors is unwarranted and should be removed.

FURTHER PRESSING AREAS FOR REFORM

4. In addition to the six lead workplace reform priorities set out above, a number of other areas of the system need to be brought back into balance to address significant concerns for the resource industry and for all enterprises, employees and the wider community. Four particularly pressing areas for reform are as follows:

Industrial regulation of the building and construction industry

5. The laws that successfully curtailed unlawful and thuggish behaviour in the Australian building and construction industry must be restored.

6. The building and construction industry must again be given the proper legislative support to eliminate unlawful and unacceptable behaviours that have become an impediment to conducting business in the resource industry, and which artificially inflate the cost and timeliness of Australia's built infrastructure.

7. The present policy approach is unsound and ineffectual. The abolition of the Australian Building and Construction Commission (ABCC) and its replacement with Fair Work Building and Construction (FWBC) in 2012 has seen a return to a widespread culture of unlawfulness.

8. Significantly reducing penalties, along with the powers and functions of the enforcement body, has given the green light for building and construction unions to act like they are above the law. Relaxing the law and neutering an effective regulator has been an invitation to heightened union militancy.

9. In the resource industry, a return to union excesses makes essential infrastructure more costly and industrial relations far less reliable on time-critical projects. International investors choosing between Australia and other markets are acutely aware of the problems caused by the abolition of the ABCC and many of the other policy approaches under the current Fair Work system.

10. The next Federal Government must reintroduce the laws that successfully curtailed unlawful and thuggish behaviour in the building and construction industry. Maximum penalties for unlawful behaviour must be set at levels that provide a genuine deterrence against such behaviour in the building and construction industry.

Transfer of business

11. The transfer of business laws under the Fair Work system have proved counter-productive and are discouraging the employment of existing workers by new business owners.

12. Under our next Federal Government, there should be no mandatory requirement for employers to take on a previous employer's industrial arrangements where a business transfer occurs, particularly if the majority of employees of the new entity are already covered by another industrial instrument.

13. In the absence of the complete removal of the transfer of business provisions, transferring instruments should only apply for a period of six months rather than having open-ended operation until new arrangements are negotiated.

Unfair dismissal

14. The Fair Work Act's unfair dismissal rules, in the same way as the adverse action provisions (above), have had the effect of encouraging speculative claims by employees and have seen the federal industrial tribunal encroach on various aspects of what should be managerial decision making.

15. The costs of defending unfair dismissal claims remain significant, as does the incidence of employers being compelled to pay to make claims go away (even where the employer has acted properly and the claim is without merit).

16. Processes for unfair dismissal litigation need to be re-calibrated to properly balance the rights and interests of employers and claimants, and the expectations of the wider community. A range of changes should be considered:

    1. Determination of whether a dismissal is harsh, unjust or unreasonable should exclude consideration of the consequences of termination of employment for workers and their families.

    2. Given the unique and fluctuating circumstances of the building and construction industry, daily hire employees in that industry should be prevented from bringing unfair dismissal claims unless they are dismissed for prohibited reasons.

    3. Employers should only be required to canvas redeployment options for workers they make redundant within their own enterprises or within their subsidiaries' enterprises. The broad definition of 'associated entity' applying to redeployment obligations on employers where they are considering dismissing employees should be removed.

    4. Where employees are dismissed following serious safety breaches, there should be no ability for the commission to reinstate those workers or else it risks undermining the safety culture of the enterprise and the industry.

Accountability of registered organisations

17. The legislation and rules governing registered organisations have considerable deficiencies. Increased operational transparency and accounting controls are required.

18. The rules of registered organisations should be required to deal with disclosure of remuneration, pecuniary and financial interests to ensure greater accountability and transparency.

19. Union officials should not be able to receive monies or other benefits from their positions on superannuation boards, insurance companies, industry training bodies and the like without declaring to members that they hold such positions and stating the income or benefit received.

20. Receipt of monies or benefits from employers must also be declared. Employers should be required to state where they have made pecuniary or other contributions to unions or union-associated bodies such as training organisations. Union rules and legislation should also specifically require this transparency.

21. Registered industrial organisations should be held accountable to the same standards expected of incorporated companies. This means that:

    1. Misuse of members' funds and the exercise of undue pressure on third parties for financial and like contributions is not acceptable conduct.

    2. Officials of registered organisations should not be permitted to behave in a manner inimical to the interests of the organisation's members.