MINERALS COUNCIL OF AUSTRALIA

RESPONSE TO DRAFT REPORT OF THE STATUTORY REVIEW OF THE 'SECURE JOBS BETTER PAY' LEGISLATION

FEBRUARY 2025

TABLE OF CONTENTS

INTRODUCTION

This submission outlines the key concerns of the Australian mining industry arising from the draft report of the review of the 'Secure Jobs, Better Pay' legislation (the draft report). In summary, these concerns are:

- **Downplaying of changes**: The draft report downplays the significance of introducing compellable multi-employer bargaining and the government's broken promise regarding its impact on the coal industry.
- **Ignoring employer concerns:** It overlooks valid employer concerns about the unjustified expansion of union power and added regulatory burden, particularly in relation to forced collective bargaining without employee support.
- **Reviewer biases:** The reviewers base their analysis on a prejudgment that employers had 'so much' power before the amendments, bringing into question the review's independence.

The government publicly released the 409-page draft report on Monday 3 February 2025. Interested parties were provided less than 10 business days to respond to the report's findings and recommendations, which were due on Sunday, 16 February.

Due to the short timeframe and the length of the draft report, this response, like others, cannot provide additional quantitative or qualitative data to assist the reviewers.

This submission does not deal directly with the report's 19 recommendations, which are mainly concerned with minutia, such as operational matters and guidance notes. These matters are of limited relevance to the substantive changes the amendments have made to Australian industrial relations law.

CONCERNS ABOUT THE DRAFT REPORT AND THE REVIEW PROCESS

The MCA has no confidence in the independence or integrity of the review process, for the reasons below.

Concerns with the draft report

- **Reviewer biases:** The authors uncritically adopt union/government viewpoints without justification. For example, the authors express a view that, prior to the 2022 amendments, the Australian collective bargaining regime was *'unusual, internationally'* on the basis that '***employers had so much power*** *over the bargaining process, including initiating bargaining…'.*[1]

  The unequivocal support for this viewpoint exhibits a clear bias in favour of the agenda that has aimed to expand union power and damage employers through a variety of legislative changes.

  The MCA does not share the value judgement of the reviewers that the pre-2022 system gave employers 'so much' bargaining power. The system of enterprise bargaining was premised on voluntary enterprise agreement-making. However, collective bargaining can now be *compelled* by unions, in some cases bypassing the need to even consult the impacted workforce. This situation clearly puts more power in the hands of unions than employers and workers.

- **Failing to consider the impact of the changes on businesses:** One of the key concerns business groups have consistently made relates to the increase in complexity, uncertainty

[1] Draft report, p. 86. (emphasis added)

and litigiousness driven by the new layers of regulation under the government's workplace relations changes. The draft report barely acknowledges this. For example, there is no mention of the fact that allowing businesses to be forced into multi-employer bargaining with their competitors necessarily creates a myriad of challenges with respect to their legal obligations under competition legislation.

A second example relates to the removal of the requirement to demonstrate 'majority support' of employees when commencing bargaining for enterprise agreements within five years of expiry. The draft report uncritically endorses the ACTU's submission that the requirement '*may impose administrative burden on unions'* but gives no weight to the administrative burden employers (and employees) now face under the amendments.

- **Ignoring the significance of the major changes in the legislation:** The report does not acknowledge the significance of the shift in Australia's bargaining system that has resulted from allowing unions to force competing employers into multi-employer bargaining. This is the single greatest foundational change to Australia's industrial relations system in decades.

- **Partisanship:** At times, the draft report implicitly endorses the Labor government's push to radically change the collective bargaining system. For example, the draft report adopts a view that *'the economic situation of Australian workers declined during the period between 2012 and 2022'* and that *'whatever the cause, the urgency of the problem and the need for change were undeniable'*.[2]

  This is not independent analysis. It is political partisanship. Unsurprisingly, the draft report has been strongly endorsed at a political level by the ACTU[3] and the government.[4]

- **Lack of focus on the crucial issues:** The draft report dedicates 20 pages to an academic literature review presenting a political history of collective bargaining, including outside of Australia, which was not required by the terms of reference. In contrast, it dedicates only 10 pages to its analysis of the crucial issue of forced multi-employer bargaining.

- **Manipulation of crucial concepts:** At certain points the reviewers have engaged in self-serving manipulation of key concepts to suit their aims, most notably in relation to multi-employer bargaining:

  > *The Review's Terms of Reference use the term 'enterprise bargaining', whereas the title of this chapter and its content indicate a preference for the broader term 'collective bargaining'. Collective bargaining includes specific forms, like single enterprise bargaining and multi-employer bargaining.*[5]

  The conflation of single enterprise bargaining and multi-employer bargaining allows the reviewers to dodge the issue of the significance of the shift to compellable multi-employer bargaining, The differences between the two concepts are enormous – they should not be treated as an academic word game.

- **Favouring academic theories over actual evidence:** Much of the draft report reads at times like an academic literature review that leans heavily towards pro-union academics. One of the authors, Emeritus Professor Bray, is cited on no less than 22 occasions in his own report. The other reviewer, Professor Preston is cited on two occasions. Another academic theorist with a history of pro-union positions, Professor Shae McCrystal, is cited on 21 occasions. The citing

[2] Draft report, pp. 79-80.

[3] See, for example, the ACTU's media release of 3 February entitled '*Labor's IR reforms a success*', which noted, with approval that '*The reviewers dismissed the claims of the employer lobby…*': https://www.actu.org.au/media-release/labors-ir-reforms-a-success/

[4] See, for example, Minister Watt's speech to Ai Group of 10 February, which stated that '*Our changes have been backed up by the independent experts too. An independent interim review report released last week found that the Albanese Government's Secure Jobs, Better Pay Act reforms 'are, on the whole, achieving the Australian Government's intent, operating appropriately and effectively and with minimal unintended consequences*': https://ministers.dewr.gov.au/watt/address-ai-group-industry-meets-canberra

[5] Draft report, p. 64.

of academic papers is not 'evidence' that should supersede theexperience of those actually impacted by the legislation, whose experience the reviewers disregarded.

Concerns with the review process

The lack of independence apparent in the draft report is not unexpected, given the government selected, engaged, briefed and assisted the review panel in preparing the draft report.

Given these concerns, the MCA recommends that future reviews be conducted at arm's length from the government, ideally by the Productivity Commission, to ensure genuine independence.

MULTI-EMPLOYER BARGAINING

A key failing of the draft report is that it fails to acknowledge the significance of the fundamental shift in Australia's bargaining system that has resulted from introducing compellable multi-employer bargaining. This new system allows competing employers to be forced into 'agreements' against their will.

As the MCA's previous submission set out, this is a major departure from the previous bipartisan position, which has been premised on voluntary agreement-making at the enterprise level.

Despite finding that it is *'too early to draw any significant conclusions about the amendments to the single-interest employer stream'*, the draft report engages in commentary that lends support to the government's decision to implement this system, asserting that *'the international experience points to potential economic benefits',* without citing any evidence for this assertion. The draft report goes on to describe Australia's system of single enterprise bargaining as 'extreme'.[6]

These appear to be further statements of the authors' personal preferences, which is inappropriate for a purportedly 'independent' review.

The reference to *'international experience'* is unexplained and unreferenced, except in other parts of the draft report, where the reviewers cite an OECD report as evidence that (un-named) 'international agencies' have purportedly '*begun to advocate more centralised bargaining arrangements'*.[7]

Yet the analysis fails to acknowledge Australia's unique and already highly centralised system for setting wages and conditions: Only Australia has 122 modern awards made by an independent tribunal that prescribe minimum terms and conditions for specific industries and occupations, which are underpinned by National Employment Standards that cover all employees.

While the review uncritically accepts such international 'evidence' as support for multi-employer bargaining in Australia, the concerns and direct experiences of Australian employers are dismissed. This includes the evidence provided by Whitehaven Coal, which was a party to the first contested case under the single-interest stream and stated that the cumulative impact of the amendments was *'fuelling cost and inflationary pressures, impacting productivity and creating future uncertainty'*.[8]

Similarly, the efforts of employer associations to set out the reasonably foreseeable consequence that multi-employer bargaining will expand, at the expense of single enterprise bargaining, were dismissed as *'highly hypothetical'*. This dismissive approach is not supported by any logical reading of either the legislation or of the FWC's decision in the test case covering NSW coal mines. The MCA repeats the concerns expressed in its previous submission to the review:

> *The recent test case covering NSW coal mines ruled that competing businesses must now be forced to bargain together simply because they mine the same commodity in the same state. This was sufficient to meet the new legislative test of a 'common interest'.*

[6] Draft report, p.70.
[7] Draft report, p, 70.
[8] Whitehaven Coal submission.

> *This precedent can now be extended to all businesses that mine iron ore in Western Australia, opening the door to industry-wide 'bargaining' and industry-wide strikes – a return to 1970s-style industrial confrontation and disruption.* [9]

The draft report's analysis also shows a lack of awareness of the very distinctive arrangements in the Western Australian iron ore industry, which have delivered highly paid, highly secure and highly productive jobs without the need for the types of collective bargaining favoured by the reviewers.

The MCA draws the reviewers' attention to comments by the Treasurer of the Western Australian Government, reported in media reports on 14 February:

> *Many people who work in our resource projects have seen very, very much improved conditions over the past few decades… in many instances they have been negotiating very good new shifts, new rosters and new improvements*.[10]
>
> *The federal government has its agenda, and we very much always want to put forward the WA nuances, the fact that WA has been getting the balance right when it comes to industrial relations…*'[11]

Yet another example of the reviewers' partisanship is their repeating of the government's false assertion that it is 'reviving' multi-employer bargaining and their disapproval of the 'danger' of it being wound back:

> *This attempt to revive multi-employer bargaining is part of a renewed interest internationally in multi-employer bargaining… Many unions support it, while many employers oppose it. Opposition brings the* ***danger*** *that new barriers will be placed in the way of those seeking to negotiate multi-employer agreements.*[12]

As the MCA noted in its previous submission, assertions by the government that it is 'reviving' multi-employer bargaining are not correct:

> *The original* Fair Work Act*, passed by the Rudd Government in 2009, never included compulsory multi-employer bargaining, where employers could be forced in against their will.*
>
> *This was an entirely new concept introduced by the Albanese Government in 2022, for which it had no mandate and which was 'not part of our policy' prior to the 2022 election.*
>
> *Multi-employer bargaining did exist under the 2009 legislation, but on a voluntary basis, where employers were part of the same common enterprise (e.g. McDonald's franchisees, or Catholic schools).*[13]

The draft report does not give sufficient weight to employer concerns about multi-employer bargaining, its impact on the coal industry and the precedent that has been set for other sectors. Instead, the reviewers have substituted their own personal preferences.

As the Minerals Council made clear in its submission to the review, and on many other occasions, the imposition of forced multi-employer bargaining is the single greatest foundational change to Australia's industrial relations system in over three decades. The government gave a commitment prior to the last election that it would not introduce it. After the election, it gave specific assurances that it would not extend to sectors such as coal mining. Those assurances were worthless.

The fact that neither of these assurances have been met leads directly to the conclusion that the legislation is not 'operating as intended'.

The MCA recommends that the reviewers refrain from making overarching and unsubstantiated statements of support for the government's position and consider the likely impact of the legislation on businesses, particularly in the Western Australian mining industry.

---

[9] MCA submission, p. 5

[10] Australian Financial Review, *WA workers thriving without unions: Labor treasurer*, 14 February 2025.

[11] The Australian, *State ALP warning on PM's IR laws*, 14 February 2025.

[12] Draft report, p, 81 (emphasis added).

[13] MCA submission, p. 14

UNILATERAL COMMENCEMENT OF BARGAINING

The legislation introduced a new power for unions to compel employers to commence collective bargaining for a new agreement within five years of the expiry of an existing agreement. This can be done unilaterally by a union, without any need to demonstrate any employee support or interest.

The MCA has been strongly critical of this new power to force employers into what could be a divisive, litigious and ultimately pointless process.

The draft report rejects employer concerns about the removal of the requirement for employee 'majority support'. Without explanation, the reviewers choose to adopt the ACTU's characterisation, stating the requirement *'in some cases, where it is opposed may impose administrative burden on unions and employees'*.[14]

This is essentially a 'cut and paste' of the ACTU's argument in its submission:

> The requirement to demonstrate majority support as a condition for gaining an authorisation that is opposed places a considerable administrative burden on unions and employees.[15]

No weight is given to the undue administrative and procedural burden on employers (and on employees) who can be forced into a bargaining process they never asked for.

There is also no consideration of the reasons why the 'majority support' requirement existed in the first place, or the appropriateness of removing the concept of workplace democracy. The draft report simply concludes that the government's amendment has been successful merely because it has been used:

> *Having considered the Australian Government's legislative intent (to streamline bargaining and reduce barriers to collective bargaining) and the early evidence, which shows the provisions are being used, the Review Panel concludes that the amendments have so far been effective.*[16]

The draft report also fails to seriously consider employer recommendations, such as the recommendation by the Australian Industry Group to reduce the window for restarting bargaining from five to three years, dismissing it as 'arbitrary'.[17]

Strikingly, the review also expresses the view that *'it would be unacceptable to return to pre-existing provisions that gave employers an uneven power to avoid the renewal of agreements'*.[18]

This is an extremely partisan assertion. It ignores the fact that many employers see no need to update their enterprise agreements and nor do their employees (if they did, they could have initiated bargaining under pre-2022 provisions and voted to do so). It also overlooks the suite of new powers unions have been given under subsequent *Fair Work Act* changes, including paid training leave for union delegates, which allows unions to more easily organise workplaces that genuinely 'want to bargain'.

The MCA expresses its disappointment that the review has failed to seriously consider the perspective of employers and has instead uncritically adopted the union position.

INTRACTABLE BARGAINING

The draft report sidesteps the key concern that the 'intractable bargaining' framework, as amended, intentionally stacks outcomes in arbitration in favour of unions.

[14] Draft report, p. 92
[15] ACTU submission, p.96.
[16] Draft report, pp. 91-92.
[17] Draft report, p. 92.
[18] Draft report, p. 92.

The government's introduction of new 'intractable bargaining' rules expanded the Fair Work Commission's powers in setting pay and conditions in workplaces. It has also changed the dynamics of collective bargaining, because it is no longer possible for an employer to 'not agree' to an enterprise agreement.

Subsequent government-Greens amendments implemented under the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* constrained the Fair Work Commission's ability to arbitrate as it sees fit and guaranteed that a union can never be worse off in any respect in an arbitrated outcome. The MCA acknowledges the reviewers' apparent scepticism about this change, noting their position of being *'unconvinced'* as to whether these subsequent amendments will have the intended effect.[19]

However, the draft report papers over the implications of this change, and suggests unions and employers are in the same position under the current intractable bargaining framework:

> *The reality is that **both sides use bargaining tactics** and there is nothing inherently wrong in doing so. The purpose of the intractable bargaining framework is to introduce a level of risk (through the uncertainty of the FWC's decisions) to continuing disagreement and to balance the positions and power of the bargaining participants.*[20]

This completely sidesteps the concerns employers have raised, that arbitration has essentially become risk-free for unions. Under the subsequent amendments, virtually all of the risk in arbitration now lies with the employer. Unions have no incentive to reach agreement when arbitration is now 'risk-free'.

The MCA is also gravely concerned at the value judgements and double standards expressed by the reviewers on the subject of 'bargaining tactics'.

On the one hand, the reviewers express their personal view that '*there is nothing inherently wrong*' with unions using Intractable Bargaining Determinations as a bargaining tactic.[21] This statement is made in the context where this tactic will only be of benefit to unions and will always be to the detriment of employers. On the other hand, the draft report makes the value judgement that it *'does not agree that the threat of termination of enterprise agreements is a legitimate bargaining tactic*',[22] where this could previously have been used by employers.

The MCA recommends that the review consider the fact that a bargaining system in which one side bears no risk cannot '*provide a strong incentive for <u>good-faith</u> negotiations…'* as the legislation intended.[23]

The MCA further recommends that the final report elaborate on why the reviewers are 'unconvinced' about the government-Greens amendments.

RIGHT OF ENTRY TO ASSIST HEALTH AND SAFETY REPRESENTATIVES

The review was also required to consider the amendments to union 'right of entry' that removed the requirement for a union official to hold a right of entry permit if they were entering a workplace to purportedly assist a Health and Safety Representative (HSR).

[19] Draft report, p. 134.
[20] Draft report, p. 134. (emphasis added)
[21] Draft report, p 134.
[22] Draft report, p 171.
[23] Draft report, p. 126.

These amendments created a very deliberate ‘loophole’ in which right of entry can be exercised by a union official without giving the usual notice period and without them meeting the requirements that otherwise apply to permit holders, including ‘fit and proper person’ requirements.

The amendment was a government amendment, added to the ‘Closing Loopholes’ legislation and ‘rammed through’ Parliament without the opportunity for any scrutiny through the usual Senate inquiry processes.

The loophole is so wide that that even union officials who have had permits revoked for misconduct or had a permit denied on the basis that they were not ‘fit and proper’ can nonetheless exercise entry under the guise of an asserted ‘request’ to ‘assist’ a HSR.

Disappointingly, the review does not engage with these concerns. The reviewers conclude that *‘more actual evidence of misuse is required’* before considering any change. The draft report acknowledges concerns at the potential for abuse but suggests this abuse should be allowed to play out and be document before any action is taken to address it. This is not a responsible approach.

Ensuring the integrity of the right of entry system is a critical issue in the mining industry, with unions currently ‘stepping up’ their campaigns in the Pilbara and elsewhere. One MCA member experienced over 900 union entries in its WA operations in 2024 alone. This represents an increase of around 300 per cent compared to previous years.

FIXED TERM CONTRACTS

The MCA acknowledges the draft report’s criticisms of the government’s fixed term contract amendments, and its finding that *‘the fixed-term contract amendments were an overly complex solution to the perceived problem’.*

This finding supports the views of the MCA and others that there was never any policy rationale for the government’s amendments in this area.

The MCA welcomes the recommendation that the government reconsider the approach to limiting the use of fixed-term contracts – including removing the current absurdly complex and unclear list of exemptions inserted into the Act.