

AUGUST 2017

A policy paper produced by  
the Minerals Council of Australia

# Australia's workplace relations framework: The case for reform

POLICY PAPER



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**The Minerals Council of Australia** is the peak national body representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable economic and social development.

This publication is part of the overall program of the MCA, as endorsed by its Board of Directors, but does not necessarily reflect the views of individual members of the Board.

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# Executive summary

The challenge of securing strong economic growth requires a continuous reform agenda that promotes productivity gains.

The Productivity Commission has warned that:

'Without a lift in productivity to counteract the fall in the terms of trade, slower per capita GDP growth is likely to prevail in the years to come, relative to the growth that occurred in the period 2000-2010.'<sup>1</sup>

In his final speech as Governor of the Reserve Bank, Glenn Stevens noted that Australia must:

'maximise our efforts in those areas that can lift potential growth.'<sup>2</sup>

Productivity growth means producing more with the same, or producing the same with less. It is achieved either by improving the efficiency of existing production techniques or by adopting new techniques (innovation). While individual companies are ultimately responsible for decisions about production and employment, their decisions are constrained – and sometimes prescribed – by policies and regulations.<sup>3</sup>

A well-functioning workplace relations system is critical to prosperity and equity, because productivity gains are the only sustainable source of higher wages and job security for workers.<sup>4</sup> While the architects of the *Fair Work Act 2009* sought to balance the competing goals of efficiency and fairness, the Act has had adverse consequences for investment and employment. Separate reviews by the 2012 Fair Work Act Review Panel (appointed by then Minister Shorten) and the 2015 Productivity Commission have identified a number of areas in which the Fair Work Act could be improved.

The MCA supports the sensible changes recommended by the 2012 Fair Work Act Review Panel regarding union right of entry into workplaces, transfer of business and unfair dismissal provisions.<sup>5</sup> Similarly, the MCA supports the Productivity Commission's 2015 recommendations on greenfields agreements, union right of entry, permitted matters in agreements and provisions relating to 'adverse action'.<sup>6</sup> Yet overall the commission is too

sanguine about the performance of Australia's labour market institutions and foundations of future national competitiveness – particularly as they relate to the needs of the mining sector.

Mining in Australia is a sophisticated and technologically advanced enterprise that demands a highly skilled and adaptable workforce. Mining jobs pay on average about \$140,000 a year – 77 per cent higher than the average for other industries.<sup>7</sup> A report by Deloitte Access Economics (commissioned by the MCA) estimates that the mining and mining equipment, technology and services (METS) sector employs 484,114 people directly and a further 655,654 indirectly – amounting to approximately 10 per cent of total employment.<sup>8</sup> Yet these jobs are possible only if Australia remains a reliable, cost-competitive supplier of mineral resources.

The Australian economy must remain open to crossborder flows of trade, investment, technology, knowledge and skills. Australia needs a modern workplace system that supports productivity to sustain future growth in living standards. Simply patching up a model that takes little or no account of international competitiveness and individual choice will see Australia miss out on investment and employment opportunities in the 21st century. What works will not be the same for every employee, every business and every industry. Australia's move away from centralised wage fixation a quarter of a century ago recognised this reality, but in recent times Australia's workplace laws have become more complex and more prescriptive.

Despite these imperatives, the recent history of workplace relations reform has been difficult. Even modest reform efforts have floundered. This is despite increased living standards, higher levels of education, the rise of human resource professionals and more accountability and media scrutiny on companies than ever before.

The MCA considers that the time is right for a new debate on workplace reform – to achieve solid and significant progress. Ultimately, Australia’s workplace relations system needs to evolve a wider set of agreement options that allows the potential of professional and respectful working relationships to be fully realised. As debate on how to best achieve this level of flexibility in workplace arrangements evolves, the MCA believes that it is important to set out some short-term priorities for reform that are consistent with this overall direction yet realistic in their ambition. In the medium term, additional measures will need to be pursued to secure future investment, productivity growth and employment.

## Recommendations

This report makes the case for practical workplace reform. It builds on recommendations from the Productivity Commission’s inquiry, while making changes and new suggestions where necessary to adapt to the exigencies of the mining industry. It highlights the following areas as needing urgent reform:

### **1 Remove the availability of protected industrial action over business decisions and confine the content of enterprise agreements to direct employment matters**

The Fair Work Act has expanded the scope of permitted content in enterprise agreements to ‘matters pertaining to’ the employment relationship – including matters pertaining to employers and unions – broadening the reach of enterprise agreements well beyond the traditional limitation of matters relating to the employment relationship.

A wider scope of permitted matters means that more content must be bargained over, more issues can form the basis of protected industrial action, and more content is then able to be included in enterprise agreements and subject to dispute resolution procedures. The broadening of permitted content has given rise to agreement terms that lead to constraints over use of contractors, require employers to

encourage union membership and restrict an employer’s ability to choose an employment mix suited to its business. The MCA proposes removing the availability of protected action over business decisions and confining the content of bargaining over enterprise agreements to direct employment matters by:

- Amending the phrase ‘matters pertaining to’ in s.172 to ‘directly related to’ the relationship between an employer and employees
- Amending s. 194 of the Fair Work Act to include an express prohibition on enterprise agreement terms that unreasonably interfere with legitimate business decisions or restrict an employer’s capacity to choose an employment mix suited to its business, including contractor and labour hire control clauses (consistent with Recommendation 25.2 of the Productivity Commission)
- Removing matters pertaining to a relationship between an employer and a union from the range of permitted matters in enterprise agreements under s.172 (consistent with Recommendation 20.2 of the Productivity Commission).
- Amending s.409 to delete the inclusion of a ‘reasonable belief’ that a claim in relation to an agreement is about a permitted matter.

### **2 Refocus adverse action provisions**

The general protections provisions prohibit a wide range of conduct described as ‘adverse action’. Adverse action may not be taken against a person because that person is exercising a workplace right or engaging in industrial activity. The onus is on the employer to prove that adverse action has not occurred. Multiple reasons for taking action are considered material and it only takes contravention of one prohibited reason for a contravention to occur.

These provisions were intended to protect freedom of association and prevent discrimination in the workplace. However, the breadth of actions described as adverse (including dismissing, refusing to employ, terminating a contract, unduly influencing) and the wide array of protections related to industrial activity and other protections

A well-functioning workplace relations system is critical to prosperity and equity, because productivity gains are the only sustainable source of higher wages and job security for workers.

(race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin) along with reversal of the onus of proof, mean that adverse action claims are being used to interfere unreasonably with ordinary management decision-making and performance management processes. The provisions can be used to frustrate legitimate organisational restructuring to adapt to new business conditions and the uncapped nature of potential compensation acts as a particular encouragement to unmeritorious claims.

The MCA proposes that:

- Adverse action provisions should be reformed by reinstating the sole or dominant reason test to prove claims of contravention
- Provision should be made for exclusions for legitimate actions
- Costs orders should be allowed to follow the result of the case – leading to a greater disincentive for unmeritorious claims
- In cases of adverse action coincident with industrial activity, the High Court's approach in *CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243* should be codified. This would confirm that just because adverse action is connected with industrial activity, it does not mean that the adverse action occurred because of the industrial activity.

### 3 More balanced right-of-entry laws

The rules for exercising workplace right of entry for union officials are rigid and have resulted in operational disruption. Requirements as to location and timing of entry should instead be determined according to operational requirements. Under the current regime, a

permit holder may even enter a workplace if his or her union is not party to an award or enterprise agreement which applies to employees at the premises.

BHP's Worsley alumina refinery had more than 550 right-of-entry visits between 2011 and 2013. Another MCA member was subject to 257 visits between January 2015 and June 2016. Unions have even asserted 'rights' to hold meetings on operational equipment.

Right of entry provisions should not be based on union eligibility rules, but should instead be clearly based on giving effect to the legitimate purpose of entry; that is, allowing employees access to representatives.

More balanced right of entry laws would be achieved by:

- Anchoring right of entry provisions in the need to allow *employees* access to their representatives (rather than a right of *unions* to advance their interests). If an employer provides a suitable location for such a purpose, there should be no further union right to gain access to lunchrooms.
- Any continuing operational issues over frequency of entry can be addressed by:
  - Removing the requirement for there to be 'an unreasonable diversion of the occupier's critical resources' in order for the Fair Work Commission (FWC) to make orders regarding the frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission)
  - The FWC taking account of the cumulative impact on an employer's operations, the likely benefit to employees of further entries and the reason for the frequency of the entries in making orders regarding frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission).

## **4 Reforms to greenfields agreements to get new project investment moving**

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A successfully functioning workplace relations regime should facilitate development and construction of internationally competitive projects by enabling greater control over cost increases over the life of a project, confidence that budget and schedule commitments can be met, and wage rates and conditions reflective of labour market and broader business conditions.

The current framework for negotiating greenfields agreements effectively results in trade unions having a right of veto over negotiations. This can stop or significantly delay the agreement-making process for major projects and lead to higher cost outcomes in setting pay and conditions at the outset of an agreement.

When faced with this situation, employers are left with no alternatives other than agreeing to the union's claims, or facing significant exposure to industrial action by starting up a project without a greenfields agreement in place. If agreement has not been reached in three months, the employer may unilaterally apply to the FWC for approval. However, the test applied by the FWC ('that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work in the geographical area') is likely to lead to inflated and non-competitive outcomes.

Secondly, in many cases in the resources sector, major project work extends beyond four years. The current limitation under the Fair Work Act means that employers may be subject to significant industrial exposure at a critical time of project construction when the greenfields agreement passes its nominal expiry date.

Reforms to greenfields agreements are required to:

- Have the FWC adopt a simpler test in approving a greenfields agreement. That is, that the terms are at least at the level of similar work performed at another enterprise covered by an enterprise agreement.

- Enable employers to enter into 'life of project' greenfields agreements (consistent with Recommendation 20.4 of the Productivity Commission) or at least agreements with a duration of up to and including five years according to operational needs.

## **5 Introduce choice of 'opting out' of enterprise agreements when income threshold met**

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For many years, the resources industry has widely utilised alternative employment arrangements to collective agreements with the general support of its employees. These arrangements have been an important mechanism for achieving a flexible and motivated workforce, high levels of productivity and well paid employment opportunities.

The limited options for agreement making which are available under the Fair Work Act restrict an employer's ability to respond to changing environments or to address individual employees' personal circumstances and requirements. The introduction of a greater range of options – such as the capacity to opt-out of an enterprise agreement and enter into individual agreements, in circumstances where employees are earning above a particular threshold – is needed. For highly skilled, well-trained and well-remunerated employees in the minerals sector, this would open up the benefits of direct, professionally-based relationships with their employers.

- There should be greater capacity for employees who are earning over a particular threshold (such as the existing high income threshold for unfair dismissals) to opt out of enterprise agreements.

# 1

## Australia's minerals industry: economic context



### A pillar of the Australian economy

The Australian minerals industry remains a pillar of the Australian economy, accounting for 64 per cent of Australia's merchandise trade. According to Deloitte Access Economics, the mining and mining equipment, technology and services sector accounts for around 15 per cent of Australia's gross domestic product and approximately 10 per cent of total employment.



### Strong growth forecast across Asia

The world's metal and energy needs are projected to continue growing in the 21st century as highly populated developing nations, particularly in Asia, converge towards advanced economies. Australia is well-placed to supply these growing markets but this opportunity is not guaranteed.



### Increasingly competitive market

As competition in world commodity markets intensifies, Australian mining companies will need to maintain their focus on cost management and productivity. This heightens the importance of workplace relations settings that enable firms to manage their operations efficiently, implement technological change, and support an adaptable and high-value workforce.

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### Mining industry's contribution to the Australian economy

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

The Australian mining industry remains a pillar of the Australian economy. Australia's resources sector remains the nation's largest source of export revenue – accounting for

64 per cent of Australia's merchandise trade. Iron ore and coal are Australia's top two exports by value.<sup>9</sup>

According to the Australian Bureau of Statistics (ABS), resources gross value added (excluding metal refining) has increased at an annual average rate of 4.4 per cent over the past two decades and the sector now accounts for approximately 7 per cent of the Australian economy.<sup>10</sup> A report by Deloitte Access Economics (commissioned by the MCA) found that the combined economic contribution of mining (excluding oil and gas but including metal refining) and mining equipment, technology and services (METS) is 15 per cent of GDP (Box 1).

## Mining and METS sector accounts for 15% of GDP

The total economic contribution of Australia's mining and METS sector was \$236.8 billion in 2015-16 – equivalent to around 15 per cent of Australia's GDP.

### Economic contribution by mining region

#### The Pilbara

Western Australia

 **\$37.8b**

Economic contribution

 **88%**

Region's economic activity

 **93,800**

Direct and indirect jobs

#### Bowen-Surat

Queensland

 **\$18.6b**

Economic contribution

 **63%**

Region's economic activity

 **99,700**

Direct and indirect jobs

#### The Hunter

New South Wales

 **\$15.2b**

Economic contribution

 **34%**

Region's economic activity

 **93,600**

Direct and indirect jobs

A report by Deloitte Access Economics (commissioned by the MCA) also revealed mining and mining equipment, technology and services (METS) activities support a total of 1.1 million jobs across Australia, representing approximately 10 per cent of total employment.

While the benefits of mining and METS activities are distributed across Australia, there are a number of regional areas where the sector makes a particularly significant economic contribution, as shown.

The report also features 10 case studies of mining and METS companies, which demonstrate that innovation and technological improvements are central to the efficiency and global competitiveness of the sector. The productivity benefits of innovation highlighted in these case studies include reduced operating costs, extending the productive life of mines, higher yields, safety improvements and higher workforce satisfaction and productivity.

It further points out that Australia's comparative advantage in mining and METS not only hinges on innovation, it also depends on policies that strengthen competition, support the accumulation of skills and capital and enable firms to respond flexibly to changing market conditions.

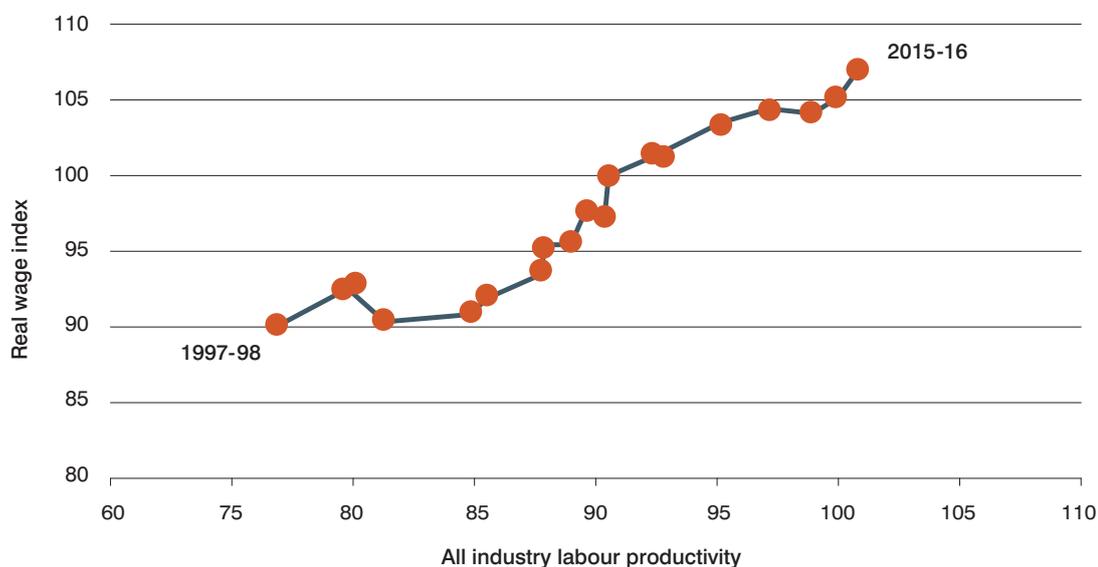
Supportive and flexible policy settings helped to establish the most recent mining boom, yet there is now the potential for adverse policy settings to compromise a major source of Australia's national prosperity and future economic growth.

To sustain the economic contribution of Australia's mining and METS sector into the future, governments need to provide:

- A competitive and fair taxation system
- Flexible workplaces
- Openness to foreign investment
- Affordable and reliable energy
- Efficient approaches to regulation, especially with respect to project approvals
- Support for collaboration between the mining and METS sector and research organisations.<sup>11</sup>

Download *Mining and METS: Engines of economic growth and prosperity for Australians* at [www.minerals.org.au](http://www.minerals.org.au)

Chart 1 Real wages and labour productivity, all Australian industries, 1997-98 to 2015-16



Source: ABS

### Wages growth ultimately depends on productivity improvements

Productivity growth is the only sustainable source of higher wages and job security for workers.<sup>12</sup> In the first decade of the 21st century, an unprecedented increase in the terms of trade – driven by world demand for resources – boosted the real income of all Australian households (as well as profits and government revenues).<sup>13</sup> Yet as the terms of trade has fallen, so must Australian businesses and workers lift their productivity to preserve living standards.<sup>14</sup>

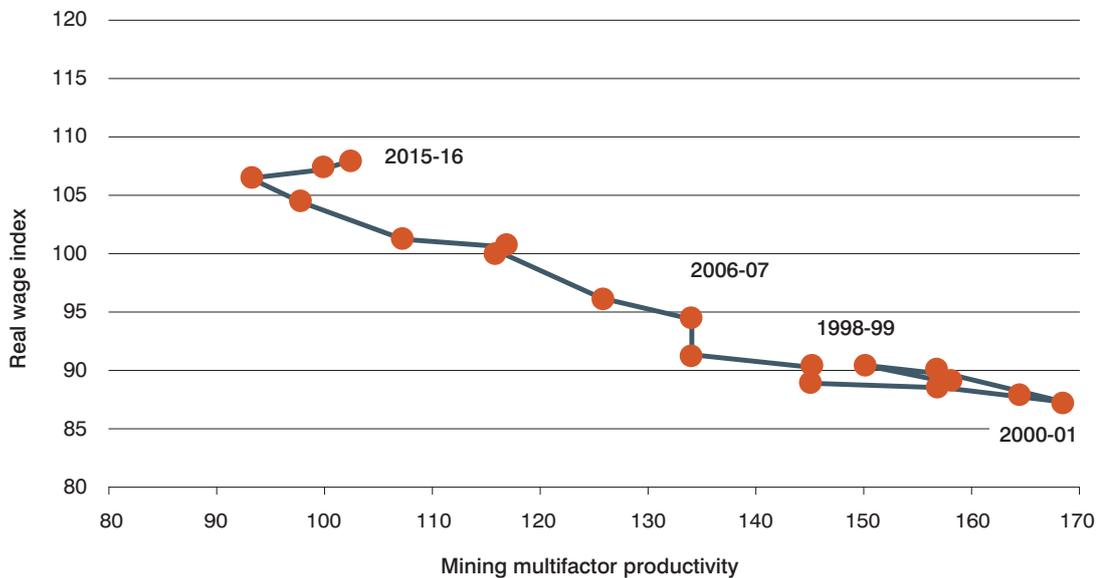
Productivity refers to increasing the rate of output (goods or services) from a given amount of inputs (labour, land, capital and energy) or maintaining a given rate of output with fewer inputs. Productivity growth is achieved either by improving the efficiency of existing production techniques, or by significantly changing the method of supplying goods or services – that is, through innovation.

### Mining industry productivity

Because mining in Australia is capital-intensive, the industry’s capital productivity has a large bearing on its multifactor productivity (i.e., the growth of output above the growth of labour and capital combined).

Between 2006-07 and 2015-16, the resources sector (including oil and gas) undertook unparalleled investment in new mines, equipment and infrastructure, with a corresponding net capital stock of \$841 billion in June 2016.<sup>15</sup> Measured productivity in mining declined during this period owing to the lag between investment and production, rapid workforce expansion with constrained labour markets, and increased mining of lower grade ores that are more costly to extract. However, as the mining boom moved from the investment phase to the production phase, multifactor productivity growth turned positive, recording 7.0 per cent growth in 2014-15 and 2.4 per cent in 2015-16 (Chart 2).<sup>16</sup>

Chart 2 Mining real wages and multifactor productivity, 2000-01 and 2015-16



Source: ABS

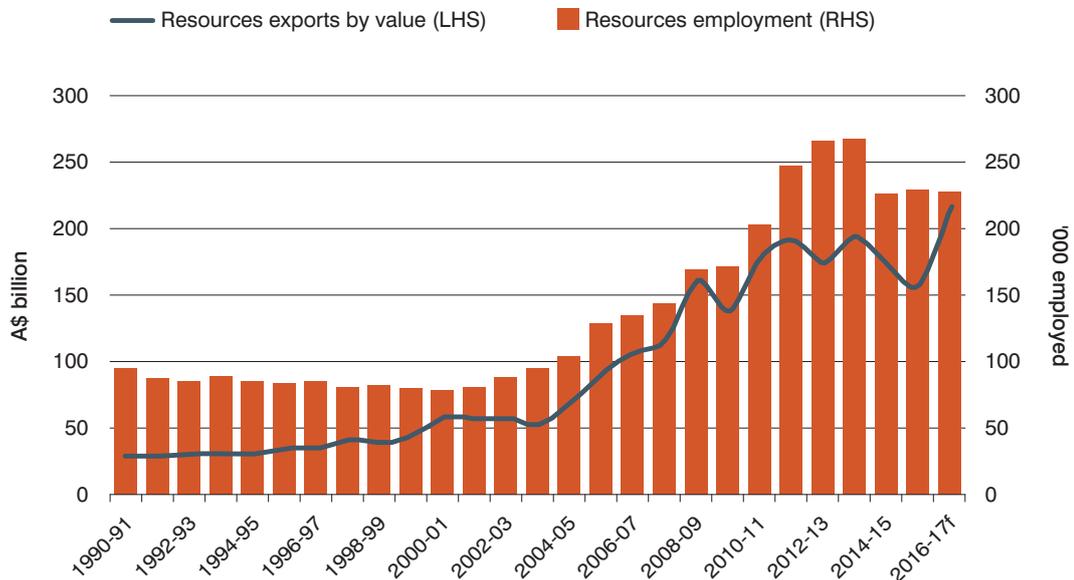
### The competitive challenge facing the Australian mining industry

Highly populated developing countries have levels of income, urbanisation and resource consumption per capita that are well below those of OECD nations. As developing nations, particularly in Asia, converge towards advanced economies, the world’s metal and energy needs are projected to continue growing in the 21st century.<sup>17</sup> What remain uncertain are the rates of growth in emerging economies which will underpin the growth in resources consumption and their future sources of supply.

Owing to its large resource endowments and close proximity to the main economic growth areas, Australia has the opportunity to continue to be a key supplier of mineral and energy commodities to the large, emerging economies in Asia. However, this opportunity is far from guaranteed. There is already substantial competition from other emerging mining regions with high grade deposits for both investment and trade deals.

Australia has not been the only country to enjoy the benefits of the investment phase of the mining boom and countries across South America, Asia and Africa have also attracted substantial investment to initiate or increase production of iron ore, base and precious metals as well as energy commodities such as coal. Many of these new mines have very low operating costs that make them highly competitive with Australian miners. For example, Brazilian iron ore producer Vale will soon start production at its newest mine known as S11D. With a production capacity of around 90 million tonnes per year and estimated cash operating cost of US\$8 per tonne it will be one of the largest and lowest cost iron ore mines in the world.<sup>18</sup>

Chart 3 Australia's resources sector – exports and employment, 1990-91 to 2016-17



Source: ABS and Department of Industry, Innovation and Science. The 2016-17 export figure is the department's March 2017 forecast. The 2016-17 employment figure is the average year to date (ABS cat. no. 6291.0.55.003).

### The minerals sector workforce

The resources sector employs approximately 230,000 people in high-value, high-wage, high-skilled jobs – nearly three times higher than in 2000 (Chart 3).<sup>19</sup> According to Deloitte Access Economics the mining and METS sector employs 484,114 people directly and a further 655,654 indirectly – amounting to approximately 10 per cent of total employment (Box 1).

The resources sector workforce has benefited from substantial investments made over the past decade (Chart 4). The expanded capital stock has underpinned average weekly earnings of resource sector workers increasing 66 per cent over the past decade to \$2,635 – 77 per cent higher than the average for other industries.<sup>20</sup>

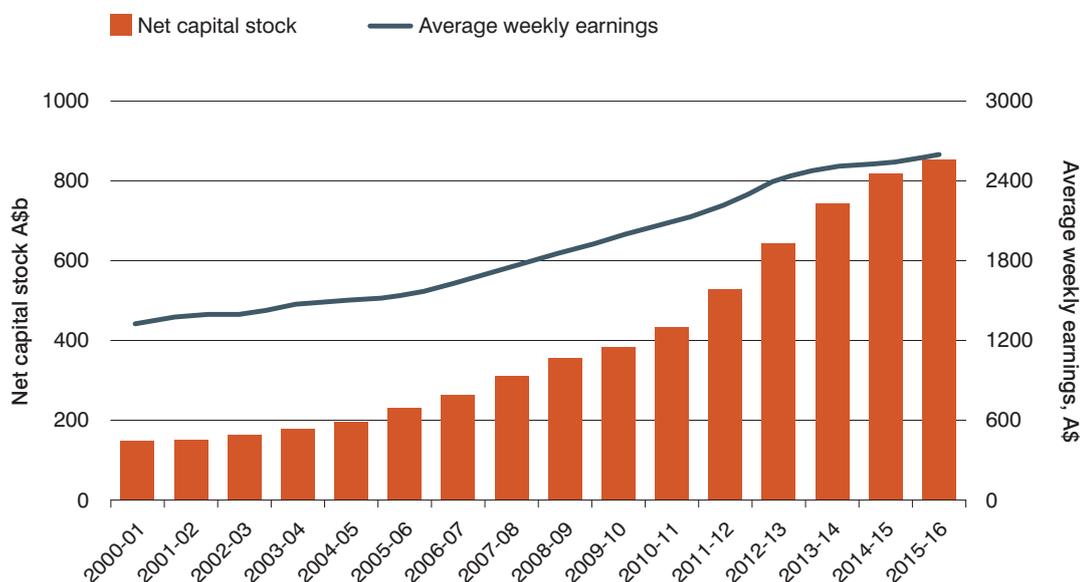
Western Australia, Queensland and New South Wales account for 85 per cent of national employment in mining. Mining employment is critically important to many regional and remote communities in Australia, with 61 per cent of industry employment in regional and remote areas, compared with 37 per cent for

all industries. Mining accounts for up to 50 per cent of employment in some regional centres.<sup>21</sup>

The minerals industry is also the largest private sector employer of Indigenous Australians with more than 6 per cent of the industry's workforce identifying as Indigenous, up from an average of less than 1 per cent 20 years ago.<sup>22</sup> At some sites, Indigenous workers account for up to 40 per cent of those directly and indirectly employed. MCA member companies have developed a range of strategies aimed at retention and career development for Indigenous employees.

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

Chart 4 Australian mining industry – Net Capital Stock and Average Weekly Earnings



Source: Australian Bureau of Statistics, Cat. No. 5204 Australian System of National Accounts, Cat. No. 6302 Average Weekly Earnings, Australia.

Australia’s resources workforce covers a range of scientific and professional occupations. The resources sector is the largest total employer of:

- Mining engineers (12,500)
- Geologists and geophysicists (12,000)
- Industrial and mechanical engineers (13,330)
- Metallurgists and physicists (2,700).<sup>23</sup>

Mining is also the third-biggest employer of environmental scientists, employing more than 13,600 directly and indirectly.<sup>24</sup>

The minerals industry has a relatively high proportion of skilled workers with 63 per cent having a Certificate III qualification or higher, compared with 58 per cent for all industries. The top 10 mining occupations account for more than half of industry employment, with nearly one in five workers employed as drillers, miners and shot firers. The industry employs large numbers of tradespeople (as a percentage of employment, about three times the all industries average).<sup>25</sup>

The minerals industry spends around 5.5 per cent of payroll on training activities, with one in 20 employees either an apprentice or a trainee. Research released in 2013 found that 67 per cent of companies in the industry reported employing apprentices and trainees, more than double the Australian average of 29 per cent.<sup>26</sup> The industry also makes a major contribution to higher education, with the MCA-operated Minerals Tertiary Education Council (MTEC) contributing \$40 million to tertiary minerals disciplines since 1999.

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

## **The central role of labour market flexibility in productivity**

Economic and social developments continue to transform the nature of workplaces, their composition, when and where work is performed, and what constitutes bargaining power within modern workplaces where shared success places a premium on businesses having an engaged and adaptable workforce. These changes underline why employers and employees are demanding greater choice and flexibility in the world of work.

The old industrial model from which the Australia's workplace relations system developed more than a century ago – heavily male-oriented and unionised, geared overwhelmingly towards goods production, established on a narrow range of skills and business models, invoking protection from competition and 20th century technology – is less and less relevant to the needs and expectations of Australian employers and employees in the 21st century. That labour market flexibility contributes to superior economic outcomes is well established in economic research (Box 2).

The old industrial model from which Australia's workplace relations system developed more than a century ago ... is less and less relevant to the needs and expectations of Australian employers and employees in the 21st century.

## Why labour market flexibility matters

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**Research by the Department of Industry, Innovation and Science found that:**

The empirical analysis confirms that across the OECD increases in labour market flexibility (LMR) flexibility have a beneficial downward impact on the unemployment rate ... Notably, any further flexibility enhancing LMR reforms in OECD economies such as Australia have the potential to create relatively more employment opportunities for younger labour force participants.<sup>27</sup>

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

Using data covering 18 OECD countries over the period 1974-2003 [including Australia], we explore the effects of product and labour market regulations on aggregate TFP [total factor productivity] growth for the business sector. We find some evidence that lower levels of regulation are associated with higher TFP growth over subsequent years. There is also some evidence that labour and product market deregulation has more of an effect in combination. That is, greater flexibility (or efficiency) in one dimension appears to be more beneficial when the other market is also relatively flexible (efficient).<sup>28</sup>

**Dr Martin Parkinson, former Treasury Secretary, has stated that:**

There are many areas of the economy today that are still in need of a reformist eye. The provision of public services in health, education, utilities and transport come to mind. That sounds like enough for starters. But I do worry that without the proximate motivation for reform that we had in the 1980s, we risk moving too slowly. On the labour market for instance, the discussion of reform is close to a no-go area, but it really is critical to our future success that we be willing to change where that is sensible.<sup>29</sup>

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

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

If we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making.<sup>30</sup>

# 2 Recent workplace relations reform efforts

The journey from a centralised wage fixation system to the enterprise bargaining reforms of the 1990s to 2005 Work Choices to the 2009 Fair Work Act helps explain the problematic nature of the current workplace relations framework.

Recent reform efforts have shown how Work Choices remains a powerful focus of union campaigns in opposition to even modest industrial relations reform proposals.

The MCA considers that it is vital that Australia reverts to the reform trajectory that began with the *Industrial Relations Act 1993* (under the Keating Government) and continued with the *Workplace Relations Act 1996* (under the Howard Government). It is important that the process encourages reform of a nature and pace that builds trust and confidence in the direct relationship between a business and its employees.

## Workplace relations before and after the Fair Work Act

In 1993, the Keating Government initiated the transition from centralised wage fixation to productivity-focused enterprise bargaining (underpinned by compulsorily arbitrated awards and arbitrated wage increases). Crucially, non-union enterprise agreements were introduced for the first time. Prime Minister Paul Keating clearly articulated the new model:

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

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

Completing industrial relations reform is another link in the chain of reform which began a decade ago. It is important now that we accelerate the reform so that all the other elements of flexibility in the economy can work in greater harmony.<sup>31</sup>

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

The 1996 Howard reforms took the next steps along the path the 1993 reforms commenced. The thrust of these reforms were explicit in the principal object of the Workplace Relations Act:

[E]nsuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level.<sup>32</sup>

Two new streams of agreement making were introduced: agreements negotiated directly

and collectively with employees and Australian Workplace Agreements which allowed employers to make individual agreements with their employees. Both kinds of agreements remained subject to a 'no disadvantage' test. However, the 2005 Work Choices amendments (which, among other things, scrapped the 'no disadvantage' test) allowed ready promotion of the belief that employees were being treated unfairly. Despite the Coalition reinstating the 'no-disadvantage' test in 2007, Work Choices remains a powerful focus of campaigns in opposition to workplace relations reforms.

By and large, the architects of the Fair Work laws regarded their proposed changes as consistent with the reform direction set by the Keating Government. In August 2007, the then Opposition Leader and then Deputy Opposition Leader and Shadow Minister for Employment and Industrial Relations acknowledged that: 'There is a clear case for workplace reform in Australia. A modern and flexible economy demands it'.<sup>33</sup> Three weeks before the 2007 federal election, the then Deputy Opposition Leader declared that 'not one part of Labor's industrial relations policy is about going back'.<sup>34</sup>

Nevertheless, the Rudd Government's *Fair Work Act 2009* did unwind key elements of previous workplace relations reforms. It removed the Keating distinction between union and non-union enterprise bargaining streams by presuming that a union will be a bargaining representative so long as it has one or more members employed at the workplace. There is no requirement for an employee to nominate the union; rather, the union is automatically designated as the bargaining agent unless individual members state otherwise in writing.<sup>35</sup>

The Fair Work Act also relaxed existing right of entry laws by linking them to union eligibility rules rather than the previous requirement for a union to be covered by an agreement or award at a worksite. In addition, the abolition of AWAs facilitated union entry visits to previously non-unionised worksites as employees had to be employed on collective agreements. Moreover, right of entry clauses were made allowable matters in enterprise agreements, which meant that unions could now take protected industrial

action over the clauses where employers refuse to accede to them.<sup>36</sup>

More broadly, a low threshold was set for taking protected industrial action matched by a high threshold set for these seeking orders to stop industrial action, particularly for third parties economically and operationally harmed by such action in their supply chains, contractors or markets. The flexibility envisaged in the form of Individual Flexibility Arrangements proved largely illusory, owing to unions' opposition to flexibility on key matters such as hours of work, rostering and overtime.

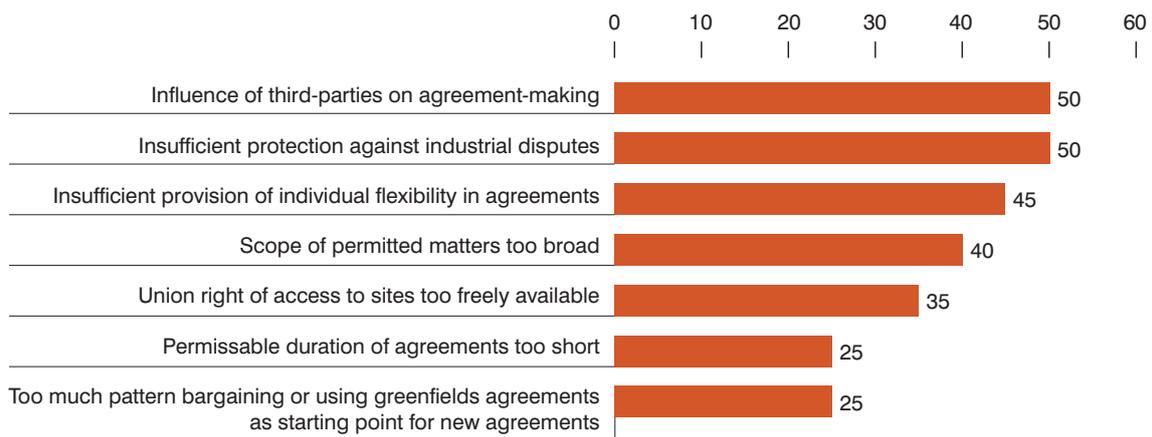
### **Impact of the Fair Work Act on minerals industry productivity**

A genuine productivity agenda is vital to the Australian minerals industry. Australian producers compete in fiercely contested international markets and cannot pass on higher domestic costs to customers. This competitive pressure drives innovation, which enables miners to extract and process ores at lower cost and to extract deposits that are deeper or more remote. As the Prime Minister, Malcolm Turnbull MP, has pointed out, the mining industry 'is now and always has been the most innovative and the one that takes the greatest risks in Australia's whole corporate sector'.<sup>37</sup>

While mining productivity is improving (see Section 1) a number of provisions of the Fair Work Act are restricting the ability of companies to change work practices, adapt to changing market conditions and ultimately grow their businesses. A productivity-focused survey of MCA member companies found the workplace relations framework to be second only to project approvals processes (and equal to taxation and royalties) as a reform priority. The system's capacity to impede productivity was most apparent in terms of delays in reaching agreements (55 per cent of respondents), restrictions on flexibility in work arrangements (50 per cent) and a lack of productivity offsets in agreements (45 per cent). In addition, respondents were asked to indicate the relative importance of factors that have unnecessarily stifled productivity (Chart 5).

The former Labor resources minister and ACTU president Martin Ferguson has called for a ‘clear-eyed assessment of the Fair Work Act’, arguing that high labour costs and low productivity are ‘an unsustainable mix’.

**Chart 5 Factors contributing to identified impediments to productivity growth (percentage of respondents, multiple responses)**



Source: Survey of MCA member companies

Individual elements of the Fair Work Act present discrete and specific problems. Moreover, the interaction of provisions sets up a negative feedback loop between incentives and outcomes, which have the effect of taking the focus of energies away from the core goal of promoting productive and cooperative workplaces (Box 3).

The former Labor resources minister and ACTU President Martin Ferguson has called for a ‘clear-eyed assessment of the Fair Work Act’, arguing

that high labour costs and low productivity are ‘an unsustainable mix’.<sup>38</sup> Separate reviews by the Fair Work Act Review Panel (appointed by then Minister Shorten) and the Productivity Commission have identified a number of areas in which the Fair Work Act could be improved – union right of entry into workplaces, transfer of business and unfair dismissal provisions among them. Yet despite the modesty of these proposals and their essentially bipartisan character, attempts to implement them have failed to pass through parliament (Table 1).

Table 1 Five modest workplace relations reforms that have stalled despite bipartisan foundations

	Labor Opposition policy 2007	Fair Work Act 2009 & amendments to 2013	Fair Work Act Review Panel 2012	Productivity Commission 2015	Government reform attempts 2014 to 2015	Impact on minerals industry
<b>Trade unions' right of entry to worksites</b>	<p>Promised to maintain Howard-era rules limiting right of entry to unions that are party to an agreement or award covering the workplace.</p>	<p>Relaxed the law by linking unions' right of entry to presence of workers who are eligible to become members. 2013 amendments stipulated that the Fair Work Commission (FWC) can only arbitrate if frequency of entry requires 'unreasonable diversion of the occupier's critical resources'. Meal rooms are the default meeting place and employers on remote sites must provide accommodation and travel.</p>	<p>The FWC should have greater power to resolve disputes about the frequency of visits to a workplace by a union official, including with regard to the location of meetings.</p>	<p>The FWC should be better able to deal with disputes about frequency of entry, by repealing the 'unreasonable diversion' condition and requiring the FWC to take into account: the cumulative impact on the employer; the likely benefit to employees of further entries; and the union's reasons for the frequency of entries.</p>	<p>The Coalition sought to expand the FWC's capacity to deal with disputes about the frequency of visits (as recommended by the Fair Work Act Review Panel), as well as repeal the 2013 amendments regarding the default meeting place and travel and accommodation requirements. Labor opposed these measures.</p>	<p>Unnecessary work stoppages that significantly reduce productivity. BHP Billiton's Worsley alumina refinery had visits between 550 right-of-entry more than 2011 and 2013. The company also received a request from the CFMEU to meet with employees in the cabin of a dragline, despite the risk to safe operations. Another MCA member was subject to 257 visits between January 2015 and June 2016.</p>
<b>Individual flexibility arrangements (IFAs)</b>	<p>Promised to replace Australian Workplace Agreements with a viable process for IFAs and 'a genuine non-union collective agreement that has no union input at all'.</p>	<p>The Fair Work Act outlawed individual statutory agreements, replacing them with common law contracts underpinned by modern awards with mandatory flexibility clauses. The Act also includes a requirement to show a union all IFAs after they have been made.</p> <p>The Act further abolished the non-union enterprise bargaining stream introduced in 1993, and automatically designates unions as bargaining agents even if they only have one member in the workplace.</p>	<p>The better off overall test (BOOT) should be amended to permit an IFA to confer a non-monetary benefit in exchange for a monetary benefit, subject to conditions.</p> <p>The Act should provide a defence for an alleged contravention of a flexibility term.</p> <p>The maximum notice period for termination of an IFA should be increased from 28 days to 90 days.</p>	<p>The default notice period for termination of an IFA should be 13 weeks and the maximum notice period should be 1 year if agreed by both the employer and employee.</p> <p>The government should amend the Fair Work Act to introduce a new no-disadvantage test to replace the BOOT for the assessment of IFAs.</p>	<p>The Coalition sought to implement the recommendations of the Fair Work Act Review Panel, and also to require flexibility terms in enterprise agreements to provide, as a minimum, that IFAs may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading. Labor opposed these measures.</p>	<p>The effects of recentralising workplace relations after 16 years have been highly adverse for the high-wage, high-performance minerals industry. Existing IFAs have proven very difficult to negotiate for anything other than minor matters. Reduced choice and flexibility in employment arrangements makes it harder for companies to operate innovative and productive workplaces while providing attractive salaries and working conditions.</p>
<b>Transfer of business provisions</b>	<p>No position stated.</p>	<p>The transfer of business provisions under the Fair Work Act deal with situations where a business is transferred from one national system employer to another. The result may be that an award, agreement, or another type of 'transferable instrument' follows the transfer and becomes binding on the new employer.</p>	<p>The Fair Work Act should be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.</p>	<p>Reiterated the Fair Work Review Panel's recommendation and further proposed that the FWC should have more discretion to order that an employment arrangement of the old employer does not transfer to the new employer. Also, the Act should be amended to provide that a transferring employment arrangement automatically terminates after 12 months, except in transfers between associated entities.</p>	<p>The Coalition sought to implement the recommendation of the Fair Work Act Review Panel, but Labor opposed this measure.</p>	<p>An employer who buys or otherwise takes on another business may be forced to maintain terms and conditions of employment that are uncommercial or inconsistent with the new employer's arrangements. In some cases, companies have undertaken suboptimal measures to avoid being bound by past agreements they did not make.</p>

Table 1

... continued

	Labor Opposition policy 2007	Fair Work Act 2009 & amendments to 2013	Fair Work Act Review Panel 2012	Productivity Commission 2015	Government reform attempts 2014 to 2015	Impact on minerals industry
<b>Unfair dismissal claims</b>	Promised a 'fast and simple system' with no lawyers or 'go away money' – but only for businesses with 14 employees or fewer.	Under s397 of the Fair Work Act, the FWC must conduct a conference or hold a hearing in relation to unfair dismissal claims, if the matter involves facts which are in dispute.	The Fair Work Act should be amended to give the FWC discretionary power to dismiss applications (and without a hearing) where the parties have concluded a settlement agreement, or where an applicant fails to attend a relevant proceeding, or where the applicant fails to comply with the FWC's directions or orders relating to the application. The Act should also be amended so that the FWC is not required to hold a hearing when dismissing an application is frivolous or vexatious, or has no reasonable prospects of success.	The government should introduce non-refundable fees that are incurred when unfair dismissal claims are lodged and when they proceed to arbitration. The FWC should have clearer powers, in limited circumstances, to deal with unfair dismissal applications before conducting a conference or hearing, and based on forms provided by applicants and respondents. The government should introduce a two-stage test for considering whether a person has been unfairly dismissed. The government should change the penalty regime and remove the emphasis on reinstatement as the primary goal in the Fair Work Act.	The Coalition sought to implement the recommendations of the Fair Work Act Review Panel but Labor opposed them.	The current regime encourages speculative claims which are cheaper for employers to settle short of court proceedings, even where there is little evidence to support an applicant's allegations. Employers are therefore often driven to the least-worst option of making 'go-away' payments. Employers also have insufficient tools to uphold fair and reasonable safety and conduct rules, such as alcohol and drug management policies.
<b>Annual leave loading</b>	No position stated.	Section 90(2) of the Act provides that if on termination an employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave. Because section 90(2) is part of the National Employment Standards, it is a minimum standard of employment that cannot be reduced by an industrial instrument.	Annual leave loading should not be payable on termination unless specified in an award or enterprise agreement.	Notes that the typical 17.5 per cent loading added to the annual leave is intended to compensate for the fact that were a person at work – in certain industries – they would have earned penalty rates on some of the days they worked. The value of penalty rates on weekends is spread across all annual leave entitlements, regardless of the times of the week that gave rise to those entitlements. Nevertheless, leave loadings are now often seen as simply another entitlement, irrespective of actual weekend or shift patterns.	The Coalition sought to implement the recommendation of the Fair Work Act Review Panel but Labor opposed this measure.	The Fair Work Act has displaced the longstanding position that annual leave loading is only payable to an employee on termination if expressly provided for in the relevant agreement or award, and this change has resulted in additional costs for a large number of employers. Leave loading typically amounts to 17.5 percent of an employee's base rate of pay.

Sources: Kevin Rudd MP, then Leader of the Opposition and Julia Gillard MP, then Deputy Leader of the Opposition and Shadow Minister for Employment and Industrial Relations, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007; Australian Mines and Metals Association, *Fair for Who? The rhetoric versus the reality of the Fair Work Act*, October 2012; Gareth Jolly, MinterEllison, *HR&IR Update: Workplace Relations – Amendment of the Fair Work Act*, 28 June 2013; Professor Emeritus Ron McCallum AO, The Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Australian Government, 18 November 2012; Productivity Commission, *Workplace Relations Framework: Final Report, Volume 2*, Canberra, 21 December 2015; Parliament of Australia, *Fair Work Amendment Bill 2014: Explanatory memorandum*; Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Explanatory memorandum; Senator Doug Cameron, Shadow Minister for Employment and Workplace Relations, *Fair Work Amendment Bill 2014: Second Reading Speech*, Senate Hansard, 16 March 2016, pp. 1555-1558; Senate Education and Employment Legislation Committee, *Report on Fair Work Amendment (Remaining 2014 Measures) Bill 2015 [Provisions]*, 4 February 2016; Dean Dalla Valle, then President of Coal, BHP Billiton, 'Right to enter must not cut productivity', *The Australian*, 28 November 2014; Parliament of Australia, *Fair Work Amendment Act 2015*; Professor Ron McCallum, 'Unpacking the Fair Work Act', *At Work: Workplace Relations and Safety May/June 2011 Newsletter*, HWL Ebsworth Lawyers, 30 May 2011; Fair Work Commission, *At the Commission: Unfair Dismissal Proceedings*, last updated 9 December 2014; Fair Work Ombudsman, *Transfer of Business*, last updated August 2014.

## Selected comments from MCA member companies on workplace relations challenges

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### On impediments to innovation and productivity:

Processes prevent the business from reacting quickly. Unions follow dispute resolution clauses to delay changes and needlessly involve the Fair Work Commission. This happens for roster changes, restructures, redundancies etc. The 'default' position in the Fair Work Act strongly favours the union. The Act has barriers that complicate direct engagement with employee ...

### On bargaining matters and agreement making:

The scope for 'permitted matters' in enterprise agreements is too broad; [it] should be limited to employee entitlements/terms of employment only.

### On unfair dismissals and performance management:

The Fair Work Act adds bureaucracy and uncertainty to certain processes, in particular to performance management. Regardless of the process followed prior to termination, many choose to Fair Work with an unfair dismissal claim purely to see if they can extract more money from the former employer.

### On transfer of business provisions:

The transfer of business provisions have limited our ability to respond quickly and appropriately to changing economic circumstances. To avoid being bound by agreements we did not make and were not a party to, we have chosen suboptimal solutions.

### On system complexity:

The Act is very complex and legalistic and requires most companies to rely on internal and external legal advice. This has resulted in significant increases in compliance and advisory costs. Recent negotiations and approval of enterprise agreements are legally complex – even when there is overall agreement. In situations where there are disputes, costs can escalate quickly...

The complexity of award coverage means that different rights and entitlements can apply to employees working side by side in the same team. For example, while non-award employees can cash out their annual leave (as provided by National Employment Standards) an engineer covered by the Professional Employees Award cannot.

Source: Survey of MCA member companies

# 3 Mining sector: immediate priority reform areas

A genuine productivity agenda is vital to the Australian minerals industry. In the mining sector, the imperative remains for open cross-border flows of trade, investment, technology, knowledge and skills.

In that context, labour availability and workplace flexibility are key to the future growth and innovation in the mining sector. Australia needs a modern workplace relations system that supports productivity in order to sustain future growth in living standards. Simply patching up a model that takes little or no account of international competitiveness and individual choice will see Australia miss out on investment and employment opportunities in the 21st century.

As the previous section highlighted, separate reviews of the Fair Work Act by the Fair Work Act Review Panel (appointed by then Minister Shorten) and the Productivity Commission have identified a number of areas in which the Fair Work Act could be improved. Yet despite the modesty of these proposals and their essentially bipartisan character, the recent history of workplace relations reform has meant that attempts to implement them have failed to pass through parliament.

The MCA believes that the time is right for a new debate on workplace reform – to achieve solid and significant progress. Ultimately, Australia’s workplace relations system needs to evolve a wider set of agreement options that allow the potential of professional and respectful working relationships to be fully realised. Similarly, there is a need to challenge a critical starting assumption of the Fair Work Act – that an individual statutory agreement can never

be part of a productive, cooperative and equitable workplace relations framework.<sup>39</sup> As debate on how to best achieve a broader level of workplace arrangements evolves, the MCA believes that it is important to set out some short-term priorities for reform that are consistent with this overall direction yet realistic in their ambition. In the medium term, additional measures will need to be pursued to secure future investment, productivity growth and employment. Some of these have already been canvassed by the Productivity Commission.

This chapter therefore identifies mining industry priorities for achievable workplace reform. It builds on recommendations from the Productivity Commission inquiry with changes and new suggestions where necessary to adapt to the exigencies of the mining industry. In this section, five areas are highlighted as needing urgent reform:

1. Remove the availability of protected action over business decisions and confine the content of enterprise agreements to direct employment matters
2. Refocus adverse action provisions
3. Deliver more balanced right of entry laws
4. Make reforms to greenfields agreements to get new project investment moving
5. Introduce choice of ‘opting out’ of enterprise agreements when income threshold met.

## Minerals industry immediate reform priorities

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### 1

**Remove availability of protected action over business decisions and confine the content of enterprise agreements to direct employment matters by:**

- Amending the phrase ‘matters pertaining to’ to ‘matters directly related to’ the relationship between an employer and employees.
- Amending s.194 of the Fair Work Act to include an express prohibition on enterprise agreement terms that interfere with legitimate business decisions or restrict an employer’s prerogative to choose an employment mix suited to its business, including contractor and labour hire control clauses (consistent with Recommendation 25.2 of the Productivity Commission)The removal of matters pertaining to a relationship between an employer and a union (consistent with Recommendation 20.2 of the Productivity Commission).
- Removing matters pertaining to a relationship between an employer and a union (consistent with Recommendation 20.2 of the Productivity Commission).

### 2

**Refocus Adverse Action provisions:**

- The sole or dominant purpose test should be reinstated in determining whether a contravention of the adverse action provisions has occurred.
- Provision should be made for exclusions for legitimate actions.
- Costs orders should be allowed to follow the result of the case – leading to a greater disincentive for unmeritorious claims.
- In cases of adverse action coincident with industrial activity, the High Court’s approach in *CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243* should be codified to confirm that just because adverse action is connected with industrial activity, it does not mean that the adverse action occurred because of the industrial activity.

### 3

**More balanced right of entry laws:**

- The purpose of right of entry provisions should be anchored in allowing *employees* access to their representatives (rather than a right of *unions* to advance their interests). If an employer provides a suitable location for such a purpose, there should be no further union right to gain access to lunchrooms.
- Any continuing operational issues over frequency of entry can be addressed by:
  - The removal of the requirement for there to be ‘an unreasonable diversion of the occupier’s critical resources’ in order for the FWC to make orders regarding the frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission).
  - The FWC taking account of the cumulative impact on an employer’s operations, the likely benefit to employees of further entries and the reason for the frequency of the entries in making orders regarding frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission).

### 4

**Greater certainty for greenfields projects to get investment moving:**

- The FWC should adopt a different formulation in determining that a greenfields agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work in the geographical area:
  - That the terms are at least at the level of similar are at least at the level of similar work performed at another enterprise covered by an enterprise agreement.
  - This would mean that the agreement could be in line with acceptable comparable rates rather than the current provision which is likely to require payment at the top of the range.
- There should be capacity for employers to enter into ‘life of project’ greenfields agreements (consistent with Recommendation 20.4 of the Productivity Commission) or at least agreements with a duration of up to and including five years according to operational needs.

### 5

**Introduce choice of opting out of enterprise agreements where income threshold met:**

- There should be greater capacity for employees who are earning over a particular threshold (such as the existing high income threshold for unfair dismissals) to opt out of enterprise agreements.

# 1

## Remove the availability of protected action over business decisions and confine the content of enterprise agreements to direct employment matters

### Issue

The Fair Work Act has expanded the scope of permitted content in enterprise agreements from 'matters relating to' the employment relationship to 'matters pertaining to' the employment relationship – including matters pertaining to employers and unions. This has broadened the reach of enterprise agreements well beyond the traditional limitation of matters relating to the employment relationship. More content must be bargained over, more issues can form the basis of protected action and more content is then able to be included in enterprise agreements which may then be subject to the dispute resolution procedures under those enterprise agreements. This has given rise to agreement terms that lead to constraints over use of contractors, require employers to encourage union membership or restrict an employer's ability to choose an employment mix suited to its business.

The content that is permitted in enterprise bargaining agreements significantly enhances the prospect that parties will engage in protected industrial action owing to the potential scope of claims (which in many cases have little or no relevance to the employer-employee relationship).

### Recommendation

#### The MCA suggests:

- Removing the availability of protected action over business decisions and confining the content of bargaining over enterprise agreements to direct employment matters by:
  - Amending the phrase 'matters pertaining to' in s.172 to 'matters directly related to' the relationship between an employer and employees
  - Amending s.194 to include an express prohibition on enterprise agreement terms that unreasonably interfere with legitimate business decisions or restrict

an employer's capacity to choose an employment mix suited to its business, including contractor and labour hire control clauses (consistent with Recommendation 25.2 of the Productivity Commission)

- Removing matters pertaining to a relationship between an employer and a union from the range of permitted matters in enterprise agreements under s.172 (consistent with Recommendation 20.2 of the Productivity Commission).<sup>40</sup>
- Amending s.409 to delete the inclusion of a 'reasonable belief' that a claim in relation to an agreement is about a permitted matter.

### Rationale

Under the Fair Work Act, enterprise bargaining and agreements must relate to 'matters pertaining to the relationship between an employer... and that employer's employees' and 'matters pertaining to the relationship between the employer... and the employee organisation...'<sup>41</sup>

The Fair Work Commission is not required to check the content of an agreement to ensure that it is confined to permitted matters in the approval process. Under s. 409 of the Fair Work Act, employee claim action ('protected action') can be taken for the purpose of supporting or advancing claims in relation to an agreement that are only about, or are reasonably believed to be only about, permitted matters. However, industrial action cannot be taken in support of claims to include unlawful terms.

The 'matters pertaining to' provision has led to significant contention, even disregarding the extension of matters to an employer and union.

The most predominant issues experienced in the resources sector have been in respect of clauses that have the effect of constraining an employer's ability to engage contractors or labour hire workers. The law in this area is difficult for an employer to navigate and often open to controversy. On the one hand, job security clauses which provide that contractors

must not be engaged on terms and conditions undercutting an employer's enterprise agreement are permitted, whereas terms which restrict or qualify an employer's right to use independent contractors are not permitted.<sup>42</sup>

Given the uncertainty in these provisions, it is not uncommon to see clauses in enterprise agreements in the resources sector which place restrictions on an employer's ability to engage third party labour – claims from unions which go well beyond the scope of the relationship between an employer and its employees. These clauses can, for example:

- Restrict or prohibit the use of contractors or labour hire workers<sup>43</sup>
- Prevent the retrenchment of employees in favour of contractors or labour hire workers<sup>44</sup>
- Deal with rates of pay for contractors and labour hire workers.<sup>45</sup>

Further, there are many other examples in enterprise agreements in the resources sector which have little, if anything, to do with the employer-employee relationship, or which impede an employer's ability to determine an appropriate labour mix suited to the needs of its business:

- Job security clauses which limit an employer's ability to outsource work or engage alternative forms of labour<sup>46</sup>
- Clauses providing for payment or paid time off for employees to attend union meetings<sup>47</sup>
- Clauses requiring noticeboards to be made available on site for union notices<sup>48</sup>
- Clauses providing for union training leave to attend union courses or conferences<sup>49</sup>
- Clauses providing for the deduction of union dues from an employee's pay<sup>50</sup>
- Clauses requiring employee representatives to be provided with the names and commencement dates of new employees<sup>51</sup>
- Clauses providing paid leave for employees to attend to union business.<sup>52</sup>

The core issue is that an employer may be faced with an increased risk of protected industrial action and disputation in relation to matters pertaining to the union or matters which cut across the fundamental right of an employer to manage its own business (Box 5). Yet the ability of an employer to manage its business is a principle

that has been recognised in the jurisprudence of Australian courts and tribunals for decades.<sup>53</sup>

The Productivity Commission recommended in its 2015 report that the Fair Work Act specify that enterprise agreements may only contain terms about 'permitted matters'.<sup>54</sup> The MCA does not believe this recommendation goes far enough and supports amendments that make enterprise agreements explicitly 'directly related to' the relationship between an employer and employees.

Amending s. 409 will provide greater clarity to the availability of protected action. The current requirement for a 'reasonable belief' that a claim in relation to an agreement is about a permitted matter is too open to interpretation and should be deleted. There should also be a tighter definition of unlawful matters. The proposed prohibitions on content noted above (i.e., on contractor and labour hire control clauses in enterprise agreements and enterprise agreement terms that restrict an employer's prerogative to choose an employment mix suited to its business) should be reflected in an amendment to the definition of unlawful matters in s.194. In addition to these specific matters, there should be a general description of claims that interfere unreasonably with legitimate business decisions.

This would ensure that a term that restricts the use of contractors or restricts business decisions in other ways will be of no effect (s. 253) and industrial action in support of such a claim will not be protected (s. 409(3)). The nature of the changes therefore removes the availability of protected action for non-employment matters and would make any such provisions unenforceable.

The benefit of these reforms would be to enhance productivity and the quality of both bargaining and enterprise agreements in two ways. Firstly, negotiations will be less likely to be stifled by claims which are not directly related to the employer-employee relationship (or which constrain in other ways) an employer's ability to manage the workforce and work flow. As a result, agreements will have fewer terms and conditions which adversely affect productivity and/or efficiency – directly or indirectly. Secondly, because there is a clear employment focus during the bargaining process, protected industrial action cannot be misused for ulterior purposes.

## How the expansion of permitted content is impeding efficiency and change at the workplace

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### BHP

Employers, such as BHP, face the threat of protected industrial action for the inclusion of clauses permitted under legislation that impede management's ability to operate, and increase the potential for disputes ...

The most recent EA [enterprise agreement] at Mt Arthur Coal, signed in 2016, restricts retrenchment to a 'last-in-first-out' policy. This is inconsistent with an employer's right to decide who it employs, and impacts an employer's ability to ensure the best possible people (e.g. from a merit, skills, culture or diversity perspective) are applied to the task at hand ...

The same is true of two former BHP businesses at Port Kembla and Appin Mine.

At the Port Kembla Coal Terminal the Limited Enterprise Agreement signed in 2012 requires employee representatives to be informed of the name and commencement date of new employees. Whilst seemingly minor this requirement creates administrative burden for employers, and potential privacy concerns for new employees covered by the agreement ...

The Appin Mine's latest EA, signed in 2011, specifies that the company will not replace employees who resign or retire with contractors and sets a minimum threshold for wage conditions for any contractors that are used. This limits employers from making operational decisions on the appropriate mix of employment, and inhibits competitiveness by creating a floor on labour rates which may be in excess of the market rate for employment.<sup>55</sup>

### Glencore

The issue of permitted content in EAs needs to be addressed. In particular, it is not appropriate for employees to be able to bargain for (and potentially take protected industrial action in relation to) claims that inhibit managerial decision-making about contractors and labour hire (including requiring employees receive the same pay as company employees), union rights in the workplace (including attendance at induction or in disciplinary matters) and similar matters. The effect of these claims is to impede managerial prerogative and productivity, and is not necessary to protect employees ... If matters such as those identified above were not permitted matters, growing business and improving productivity via acquisition would become more seamless and less problematic ...

The required content of an EA now includes an obligation to consult on changes to regular rosters or ordinary hours of work ... The black coal industry operates continuously across seven days of the week and 52 weeks of the year where fluctuations in the Australian dollar and international supply factors have enormous bearing on production demands ... While Glencore's preference is to consult on a collective basis, under regulations we are required to formally consult with employees and their union(s). This is unnecessary and creates the potential for organisations to either delay such change or use this process as leverage for other concessions that could directly affect operational effectiveness and productivity.<sup>56</sup>

## Union business

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### BHP

BHP's experience with bargaining negotiations is that union bargaining representatives often put forward claims to include (or maintain) express provisions in the enterprise agreement dealing with attendance and arrangements for union AGMs, union monthly meetings, delegates meetings, union ballots and unpaid leave for union training.

Union bargaining representatives have also sought to include express rights for the union to conduct elections for safety representatives, for union delegates to be introduced to all new employees and for 'employee representatives' to be released from normal duties without loss of pay to hold discussions with employees and attend tribunal and court proceedings (with claims for travel, meal and accommodation costs).

The inclusion of union business in bargaining leads to lengthy discussions and potential disagreement, prolonging bargaining and bringing with it the risk of protected industrial action. It means there is a greater risk of workplace disruption on matters which are truly more for the benefit of the union bargaining representative than any individual employee.

# 2

## Refocus adverse action provisions

### Issue

The general protections provisions prohibit a wide range of conduct described as 'adverse action'. Adverse action may not be taken against a person because that person is exercising a workplace right or engaging in industrial activity. The onus is on the employer to prove that adverse action has not occurred. Multiple reasons for taking action are considered material and it only takes contravention of one prohibited reason for a contravention to occur. These provisions were originally intended to protect freedom of association and prevent discrimination in the workplace. However, adverse action claims are being used to interfere unreasonably with ordinary management decision-making and performance management processes due to:

- The breadth of actions described as adverse (including dismissing, refusing to employ, terminating a contract, unduly influencing)
- The wide array of protections related to industrial activity and other protections (race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin)
- The reversal of the onus of proof
- The uncapped nature of potential compensation, which acts as a particular encouragement to unmeritorious claims.

As a matter of course, employers are required to make operational and investment decisions. Depending on the circumstances, these decisions will necessarily involve, at least in some way, a consideration of labour costs (which are ordinarily established by an industrial instrument). However, under the current general protections regime, it is increasingly difficult for employers to make these types of day-to-day decisions without falling foul of the general protections provisions. The net effect is that these provisions can be used to frustrate legitimate organisational restructuring to adapt to new business and market conditions.

## Recommendation

### The MCA suggests:

- Provision should be made for exclusions for legitimate actions
- The sole or dominant purpose test be reinstated in determining whether a contravention of the adverse action provisions has occurred
- Costs orders should be allowed to follow the result of the case – leading to a greater disincentive for unmeritorious claims.

## Rationale

The Fair Work Act provides that it is unlawful to take adverse action against a person because they have the benefit of an industrial instrument, or for reasons which include that person having the benefit of an industrial instrument.<sup>57</sup> However, under predecessor legislation, such conduct would only be unlawful if the sole or dominant purpose of the conduct was to avoid the industrial instrument.

The sole or dominant purpose test was intended to address the types of matters that the Federal Court had to navigate in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 184 ALR 641. In this case, an employer sought tenders for work that was being performed by employees. The considerations of the employer necessarily included matters relating to labour costs (which were obviously connected with the industrial instrument applying to the employees) but the avoidance of the industrial instrument was not the primary reason for the operational decision. The issue was only resolved by way of a legislative amendment which introduced the sole or dominant purpose test.

In the resources sector, there have been numerous matters before the Federal Court where it has been alleged that outsourcing decisions were made for reasons which include the fact that employees had the benefit of an industrial instrument. This is a direct consequence of the removal of the sole or dominant purpose test.

An employer who needs to make an operational or investment decision should not be subject to the risk of adverse action proceedings because a component of that decision related to labour costs or another matter arising under the industrial instrument. Employers cannot be expected to make operational or investment decisions without some form of consideration of labour costs – it is an entirely appropriate and legitimate matter for an employer to take into account.

The adverse action provisions need to be refocused by either introducing amendments to reinstate the sole or dominant purpose test or to provide for exclusions in the case of legitimate actions. This latter mechanism would be similar to those which already apply in the case of anti-bullying provisions. Bullying does not include reasonable management action carried out in a reasonable manner. Exclusions could be applied to cover business decisions such as organisational or business restructures carried out in a reasonable manner. Similarly, exclusions could apply in other areas where the adverse action provisions have been used as part of an industrial campaign (see below).

A further reform required is to make adverse action matters a cost jurisdiction. Unmeritorious claims flourish when there is little downside in making a claim. At the moment, there is a modest filing fee which brings access to conciliation. By contrast, the costs of defending a claim are significant.

There has been a constant rise in the number of claims (2429 claims involving dismissal in 2012-13 rising to 3270 in 2015-16 and 1869 for the first two quarters of 2016-17. This is a rise of 50 per cent on 2012-13 levels). Most are settled by agreement – 75 per cent resolved without issuing a certificate (which states that the matter cannot be resolved by agreement).<sup>58</sup> The MCA understands that only one third of cases where a certificate has been issued result in the commencement of court action, and a much lower proportion result in court proceedings and a decision. This suggests that cases are settling because of the costs of defending them.

Costs orders should be allowed to follow the result of the case – leading to a greater disincentive for unmeritorious claims (and a

greater ability to run a case that has merit.) Costs orders could be made by the FWC against applicants who commence a matter unreasonably, such as having no reasonable basis to suggest the presence of an unlawful reason. This could be done in conjunction with a requirement for the FWC to revert to conducting face to face conciliations by

members. Conciliation is currently conducted by staff conciliators by telephone. Conciliators have no powers to order costs. A telephone conciliation is an easy way to bring pressure for settlement and may be the principal reason why more cases are settling than before when the conciliations were conducted face to face by FWC members.

## Industrial activity: *Codification of the High Court's approach in CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243*

### Issue

The High Court has settled longstanding issues as to how s. 346 (industrial activities) of the Fair Work Act is to be applied. This approach should be codified to limit the potential for subsequent – and more expansive – interpretation by a court.

### Recommendation

#### The MCA suggests:

The High Court's approach in *CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243* should be codified to confirm that just because adverse action is connected with industrial activity, it does not mean that the adverse action occurred because of the industrial activity

### Rationale

A person must not take adverse action against another person because that person engages, has at any time engaged, or proposes to engage, in industrial activity.<sup>59</sup>

In considering this provision, the High Court has found that:

Section 346 does not direct a court to inquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.<sup>60</sup>

The case dealt with a BHP Coal employee

who participated in a protest organised by the Construction, Forestry, Mining and Energy Union (CFMEU) near the entrance to the Saraji coal mine. As part of his participation in the protest, the employee held signs supplied by the CFMEU and waved them at non-striking workers. The signs read 'No principles SCABS No guts'. The employee was dismissed for offensive conduct regarded as a violation of BHP Coal's workplace conduct policy.

The BHP submission to the Productivity Commission highlights the difficulties experienced by employers, and the differing views of the judiciary, in applying the general protections provisions in the Fair Work Act (and specifically section 346). Following the High Court's decision in *CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243*, a total of nine judges (across the Federal Court and High Court) considered whether the company had taken adverse action against an employee as a result of the employee engaging in industrial activities. Ultimately, there was a five/four split amongst members of the judiciary. This uncertainty highlights the difficulties and risks that employers face when managing disciplinary issues.<sup>61</sup> A similar example was provided by Rio Tinto in its submission (Box 6).

The legislative parameters within which management decisions are to be made need to be clear. In this respect, the reform measure proposed by the MCA will codify the existing state of the law, and in doing so, will give greater certainty to employers about how s. 346 of the Fair Work Act is to be applied.

## How existing adverse action provisions are encouraging unmeritorious claims

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### BHP

In 2015, certain work at the BMA Blackwater Mine was contracted out. The CFMEU commenced Federal Court adverse action proceedings alleging this occurred because BMA's employees had the benefit of higher wages under the BMA enterprise agreement.

The pleadings filed by the union were vague, suggesting in broad terms that some agreement was entered into for prohibited reasons between BHP and the contractor. BHP was successful in having large parts of the claim struck out in an interlocutory step.

The CFMEU appealed this decision, culminating in the Full Federal Court hearing the matter then upholding the strike out. BHP now faces an extensive discovery exercise, which the union claims is necessary to allow it to amend and properly plead the claim.

In reality, there is no proper basis for the proceeding as the alleged unlawful agreement does not exist. Despite BHP voluntarily producing the outsourcing contracts at an early stage to show the claim has no basis, the CFMEU has pressed on with its action.

Eighteen months after the proceedings commenced, the case is still in its early stages. By the time the matter is heard, enormous expense will be incurred in defending the claim, even though it is without merit.

### Rio Tinto

Rio Tinto has been the respondent to a number of claims that are completely devoid of merit. Unfortunately given the uncertainty in application of the law as well as the process for progressing claims, they cannot be ignored and must be responded to ...

An example of such a claim is the matter of *Rajiv Lal v Rio Tinto Technology and Innovation Ltd [2014] FWC 4875*. In that case Mr Lal was properly made redundant in 2008. Some six years later he was reading a newspaper and claimed that an article in it referred to an area he used to work in that had been reinvigorated many years later so he made a general protections claim complaining about his dismissal six years earlier. Nothing included in the application indicated that there was a reasonable basis for a six year delay, or that the claim was made on any reasonable basis or had any reasonable prospect of success. The Fair Work Commission is not empowered to simply dismiss the claim despite it being completely hopeless. Therefore the employer was put to the time and expense of responding to the claim to have it dismissed ...

Under the system Mr Lal is entitled to appeal. In this case he did appeal the decision and the employer was then put to further wasted time and expense of responding to the appeal. Nothing prevents this type of situation being repeated.<sup>62</sup>

# 3

## More balanced right-of-entry laws

### Issue

The rules for exercising workplace right of entry for union officials are rigid and have resulted in operational disruption. Under the current regime, a permit holder may enter a workplace even if his or her union is not party to an award or enterprise agreement which applies to employees at the premises. The workplace need only contain workers who are eligible to become members under the union's rules.<sup>63</sup>

Employers in the mining sector are often subject to an overuse of right of entry privileges by permit holders. This places an unreasonable burden on management and has led to significant impacts on productivity and profitability of operations by causing unnecessary disruptions to the workplace.

Right of entry provisions should instead be clearly based on giving effect to the legitimate purpose of the entry. That is, by acknowledging the purpose of right of entry provisions is to allow *employees* access to their representatives, rather than a right of *unions* to advance their interests.

### Recommendation

#### The MCA suggests:

- The purpose of right of entry provisions should be anchored in allowing *employees* access to their representatives (rather than a right of *unions* to advance their interests)
- Any continuing operational issues over frequency of entry can be addressed by:
  - Removing the requirement for there to be 'an unreasonable diversion of the occupier's critical resources' in order for the FWC to make orders regarding the frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission)

- The FWC taking account of the cumulative impact on an employer's operations, the likely benefit to employees of further entries and the reason for the frequency of the entries in making orders regarding frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission).<sup>64</sup>

### Rationale

Currently, right of entry under the Fair Work Act enables a permit holder to enter a workplace where the permit holder's union is entitled to represent the industrial interests of those employees.<sup>65</sup> As a result of the relaxation of the statutory right of entry rules when the Fair Work Act was introduced, right of entry privileges are commonly being abused by permit holders. By way of example, BHP's former Worsley alumina refinery had more than 550 right of entry visits between 2011 and 2013.<sup>66</sup> Another MCA member was subject to 257 visits between January 2015 and June 2016.

The current right of entry regime enables union membership recruitment drives in the workplace, often between multiple unions competing for members.

In order to legally resist right of entry, it has often become necessary for site level management to interpret and understand complex union rules regarding occupational and industry coverage. Despite this, employers face civil penalties where they unreasonably delay or refuse entry by a permit holder who is entitled to enter the workplace, or where they hinder or obstruct a permit holder while exercising their rights of entry.<sup>67</sup>

The current right of entry regime therefore places an unreasonable burden on management and has led to significant impacts on productivity and profitability of operations by causing unnecessary disruptions to the workplace.

The right of entry laws need to strike a better balance by acknowledging that the purpose of right of entry provisions is to allow employees access to their representatives, (rather than a right of unions to advance their interests). Hence the purpose of the access should be described as to allow employees a reasonable opportunity to meet with a union official during meal times if they wish to do so. This also means recognising the reciprocal right of employees not to participate in such meetings or contacts if they do not wish to do so.

The obligation of the employer should therefore be one of allowing access to a venue for discussions with individual members or for meetings of members. The venue should reasonably allow employees to access their official or participate in a meeting should they wish to do so. It also means respecting the rights of employees who do not wish to participate in such meetings to have access to normal facilities at meal times.

This is especially relevant where union officials are using entry as part of a recruitment drive. Some union officials seek to attend worksites every day to sit in the lunch room and 'service' their members when it is in reality for the purpose of building membership.

Any continuing operational issues over frequency of entry can best be addressed by:

- The removal of the requirement for there to be 'an unreasonable diversion of the occupier's critical resources' in order for the FWC to make orders regarding the frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission)
- The FWC taking account of the cumulative impact on an employer's operations, the likely benefit to employees of further entries and the reason for the frequency of the entries in making orders regarding frequency of entry (consistent with Recommendation 28.1 of the Productivity Commission).<sup>68</sup>

## Unreasonable right of entry

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### BHP

BHP's Kwinana Nickel Refinery was the subject of multiple right of entry requests by the CFMEU during a major shutdown in 2015. One of these right of entry requests was used by the CFMEU as the test case for its assertions that right of entry to hold discussions under section 490(2) can be exercised before and after employees' shifts and outside any mealtime or other such break.

The Fair Work Commission found against the CFMEU. However, this matter is now the subject of Federal Court proceedings in which the CFMEU is seeking a declaration that permit holders can exercise a right of entry before and after shifts and that the refusal of entry constituted a contravention of the Fair Work Act.

This matter raises further concerns about the imbalanced nature of right of entry provisions. If successful, it would compound the effect of a February 2016 Full Bench decision in a right of entry dispute between BHP Billiton Mitsubishi Alliance (BMA) and the CFMEU.<sup>69</sup> In that case, the Full Bench ruled that a permit holder could access a small crib room attached to a dragline because it was provided by the employer for the purpose of taking meal and other breaks.

While the dragline decision is under appeal to the High Court, the current right of entry provisions challenge the ability of employers to operate safely and productively without undue interference and distraction.

# 4

## Reforms to greenfields agreements to get new project investment moving

### Issue

A successfully functioning workplace relations regime should facilitate development and construction of internationally competitive projects by enabling the delivery of:

- Greater control over cost increases over the life of a project
- Confidence that budget and schedule commitments can be met, and
- Wage rates and conditions reflective of labour market and broader business conditions.

The current framework for negotiating greenfields agreements effectively results in trade unions having a right of veto over negotiations. This can stop or significantly delay the agreement-making process for major projects and lead to higher cost outcomes in setting pay and conditions at the outset of an agreement.

When faced with this situation, employers are left with no option but to agree to the union's claims, or face significant exposure to industrial action by starting up a project without a greenfields agreement in place. If agreement has not been reached in three months, the employer may unilaterally apply to the FWC for approval. However, the test applied by the FWC ('that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work in the geographical area') is likely to lead to inflated and non-competitive outcomes.

### Recommendation

#### The MCA suggests:

- The FWC should adopt a simpler test in approving a greenfields agreement. That is, that the terms are at least at the level of similar work performed at another enterprise covered by an enterprise agreement.

### Rationale

A greenfields agreement can only be made prior to project commencement, with one or more relevant unions.<sup>70</sup> This creates a power imbalance in greenfields negotiations where unions have a right of veto over greenfields agreements in circumstances where employers do not have any mechanism to bring about an orderly or balanced outcome.

If agreement has not been reached in three months, the employer may unilaterally apply to the FWC for approval. Prior to approving a greenfields agreement, the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work in the geographical area.<sup>71</sup> While the provision has not been subject to interpretation, the current 'prevailing industry standards' test for greenfields agreements could lead to a 'last best agreement' approach to agreement making. If so, without refinement, the application of the test could lead to conditions of employment gradually becoming more inflated and non-competitive over time. This acts as a disincentive for employers to enter into greenfields agreements and in turn, hinders investment in major projects and job creation.

An alternative formulation needs to be developed that remains balanced and fair. A number of possibilities are available.

One example is to change the test so that the terms are at least at the level of similar work performed at another enterprise covered by an enterprise agreement. In other words, the agreement could be in line with acceptable comparable rates rather than the current provision which is likely to require payment at the top of the range. This would provide a real incentive for a union to agree on a reasonable alternative. It also has the added advantage of providing more certainty because the employer need only bring

evidence of the other agreement and demonstrate how the work is similar. The current provision, by contrast, allows the FWC to take evidence on a range of other enterprises and focus on those at the higher end if pressed to do so by the union. Arguments about whether another agreement is in a comparable industry tend to be resolved

in favour of including a broader range rather than excluding other agreements.

Basing the requirement instead on a comparison to the outcome of at least the level of one other enterprise would seem to be a fair and appropriate outcome for a greenfields agreement.

## ***Greater certainty for greenfields projects***

### **Issue**

In many cases in the resources sector major project work extends well beyond four years. However, this means that employers may be subject to significant industrial exposure at a critical times of project construction when the greenfields agreement passes its nominal expiry date.

### **Recommendation**

#### **The MCA suggests:**

There should be capacity for employers to enter into 'life of project' greenfields agreements (consistent with Recommendation 20.4 of the Productivity Commission) or at least agreements with a duration of up to and including five years according to operational needs.<sup>72</sup>

### **Rationale**

Under the current regime, a greenfields agreement can be entered into for a maximum duration of four years,<sup>73</sup> and after a greenfields agreement has passed its nominal expiry date, industrial action may be taken. The current duration of greenfields agreements is out of

step with the realities of major project work, in that such work often extends beyond four years. For example, Australia's recent LNG engineering projects are some of the world's most complex construction projects, many of which extend well beyond four years. These projects make a significant contribution to economic development, and in turn, job growth. In most cases, employers have no option but to renegotiate an agreement during the life of the project and as a result, they are exposed to significant risk of industrial action delaying the completion of the project. When faced with this situation, employers have a lack of certainty – something which is critical for significant investment decisions.

The reform measure proposed by the MCA ensures that significant investment decisions may be made with industrial certainty over the life of the project and that critical work on major projects is not delayed by industrial action. A degree of certainty about the industrial environment (including employment conditions) over the life of the project is vital in providing investors with confidence especially given the capital requirements and risks associated with new resources projects.

The proposed reform measure is broadly consistent with Recommendation 20.4 of the Productivity Commission.<sup>74</sup>

# 5

## Introduce choice of ‘opting out’ of enterprise agreements where income threshold met

### Issue

For many years, the resources industry has widely utilised alternative employment arrangements to collective agreements with the general support of its employees. These arrangements have been an important mechanism for building a flexible and motivated workforce, high levels of productivity and well paid employment opportunities.

The limited options for agreement making which are available under the Fair Work Act restrict an employer’s ability to respond to changing current and future environments or to address individual employees’ personal circumstances and requirements. Limiting agreement options is out of step with the needs and aspirations of a diverse and changing industry workforce and a modern workplace relations framework. Accordingly, one of the starting assumptions of the Fair Work Act – that an individual statutory agreement can never be part of a productive, cooperative and equitable workplace relations framework needs to be revisited and amended.

The ability to opt out of an enterprise agreement and enter into individual agreements, in circumstances where employees are earning above a particular threshold would be an important step towards more choice in employment arrangements. There are a number of ways to achieve this. For example, it could operate in a similar manner as the existing ability to opt out of awards [section 328 (3) Fair Work Act].

For highly skilled, well-trained and well-remunerated employees in the minerals sector, this would open up the benefits of direct, professionally based relationships with their employers.

### Recommendation

#### The MCA suggests:

There should be capacity for employees who are earning over a particular threshold (such as the existing high income threshold for unfair dismissals) to opt out of an enterprise agreement and to enter into individual agreements.

### Rationale

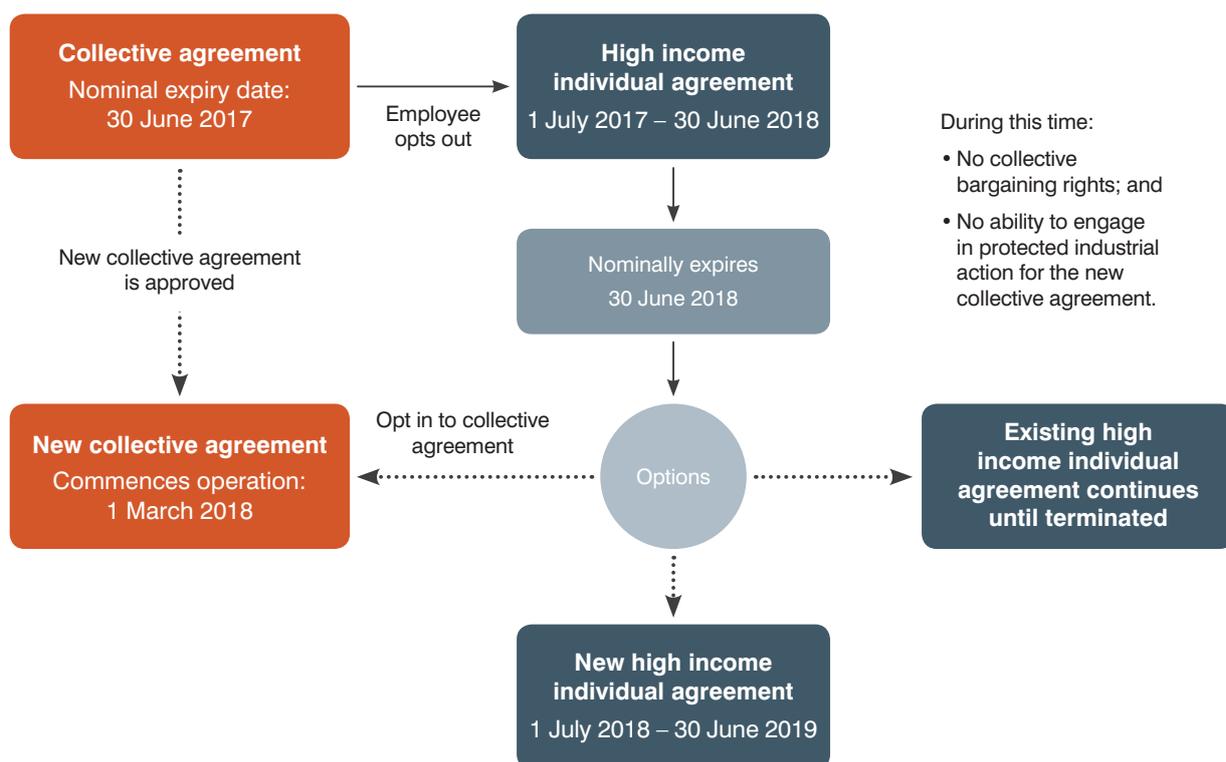
The Fair Work Act is based on the premise that an individual statutory agreement can never be part of a productive, cooperative and equitable workplace relations framework.<sup>75</sup> However, there is ample evidence from within the mining industry that this premise is incorrect.

The limited options for agreement making which are available under the Fair Work Act restrict an employer’s ability to respond to changing environments or to address individual employees’ personal circumstances and requirements. Limiting agreement options is out of step with the needs and aspirations of a diverse and changing industry workforce and a modern workplace relations framework.

Individual agreements have been used extensively in the mining industry for more than two decades. They have facilitated flexible and productive work practices while also providing attractive salaries and working conditions for the industry’s changing workforce. Indeed, employees on individual arrangements have consistently received higher remuneration than those on collective agreements.

Many employees have a strong interest in remaining under an agreement that is personal to them and that directly reflects

Chart 6 High income opt out



their relationship with the business. In many instances, employees in the resources sector have made a choice to continue to be bound by their expired Australian Workplace Agreement rather than have an enterprise agreement apply to their employment. Indeed, on many occasions, collective enterprise agreements are reached with unions which are entirely removed from the interests of individual employees.

MCA member companies respect the right of a group of employees to be represented by a union in a bargaining context where the employees wish to do so. Equally, a

modern workplace relations framework should accommodate a form of individual agreement, backed by a strong safety net, which allows an employee to agree to employment arrangements directly with his or her employer. The safety net can be managed through the National Employment Standards and modern awards.

The MCA proposes there be capacity for employees earning over a particular threshold such as the high income threshold to opt out of an enterprise agreement and to enter into individual agreements. This form of opt out arrangement would work as set out in Box 9.

## Fundamental features of proposal for high income earners to opt out of enterprise agreements

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<b>General principle</b>	—	Opt out of enterprise agreement completely (including the bargaining process) if earning over high income threshold.
<b>Availability</b>	—	Available at commencement of employment and thereafter (subject to genuine choice).
<b>Application of industrial instruments</b>	—	Award/enterprise agreement does not apply to employee, but employee must be better off against award.
<b>Applicability of NES</b>	—	National Employment Standards set minimum conditions.
<b>Bargaining</b>	—	No bargaining rights (other than freedom from coercion etc.) once high income individual agreement is made. No access to protected industrial action once high income individual agreement is made.
<b>Duration</b>	—	Minimum life of 12 months and maximum life of four years. Ability to opt back in after 12 months (in which case will revert to the enterprise agreement). Otherwise continues until terminated or replaced.

## Endnotes

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- <sup>3</sup> See Gary Banks, *Productivity Policies: the 'to do' list*, address to Economic and Social Outlook Conference, Melbourne, 1 November 2012, p. 6f.
- <sup>4</sup> See Gary Banks, *Competition Policy's regulatory innovations: quo vadis?* Address to the Economists Conference Business Symposium, 12 July 2012, Productivity Commission, Canberra, p. 8.
- <sup>5</sup> Professor Emeritus Ron McCallum AO, The Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Australian Government, 18 November 2012.
- <sup>6</sup> Productivity Commission, *Workplace Relations Framework: Inquiry Report*, Canberra, 21 December 2015.
- <sup>7</sup> Australian Bureau of Statistics, *Average Weekly Earnings, Australia, Nov 2016*, ABS cat. no. 6302.0, released on 23 February 2017.
- <sup>8</sup> Deloitte Access Economics, *Mining and METS: engines of economic growth and prosperity for Australians*, 29 March 2017.
- <sup>9</sup> Department of Industry, Innovation and Science, *Resources and Energy Quarterly – March 2017*, released on 7 April 2017, pp. 8, 135.
- <sup>10</sup> Australian Bureau of Statistics, *Australian system of national accounts 2015-16*, cat. no. 5204, released on 28 October 2016. NB that the ABS's definition of 'mining' includes oil and gas but excludes metal refining.
- <sup>11</sup> Deloitte Access Economics, *Mining and METS: engines of economic growth and prosperity for Australians*, 29 March 2017.
- <sup>12</sup> See Gary Banks, *Competition Policy's regulatory innovations: quo vadis?* Address to the Economists Conference Business Symposium, 12 July 2012, Productivity Commission, Canberra, p. 8.
- <sup>13</sup> See Christopher Kent, Assistant Governor (Economic), Reserve Bank of Australia, *After the Boom*, Bloomberg Breakfast, Sydney, 13 September 2016; Productivity Commission, *Transitioning Regional Economies: Initial Report*, 21 April 2017, p. 3.
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- <sup>16</sup> See Productivity Commission, *PC Productivity Update 2016*, Canberra, released on 26 April 2016, p. 7.
- <sup>17</sup> Department of Industry, Innovation and Science, *Resources and Energy Quarterly – March 2016*, released on 8 April 2016.
- <sup>18</sup> Stephen Bartholomeusz, 'Giant Vale mine a good cause for Treasury caution', *The Australian*, 20 December 2016.
- <sup>19</sup> Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, cat. no. 6291.0.55.003, released on 22 September 2016.
- <sup>20</sup> Australian Bureau of Statistics, *Average Weekly Earnings, Australia, Nov 2016*, ABS cat. no. 6302.0, released on 23 February 2017.
- <sup>21</sup> Australian Workforce and Productivity Agency, *Resource sector skills needs 2013*, Australian Government 2013.
- <sup>22</sup> Boyd Hunter, Monica Howlett and Matthew Grey, *The Economic Impact of the Mining Boom on Indigenous and Non-Indigenous Australians*, Centre for Aboriginal Economic Policy Research, Working Paper 93/2014, 8 August 2014.
- <sup>23</sup> Department of Employment, *Job Outlook 2014*; MCA calculations. NB these figures are estimates of the total number of workers directly and indirectly employed by the resources sector.

- <sup>24</sup> *ibid.*
- <sup>25</sup> National Centre for Vocational and Education Research (NCVER), *Training and Education Activity in the Minerals Sector*, 20 March 2013.
- <sup>26</sup> *ibid.*
- <sup>27</sup> Bilal Rafi, Department of Industry, Innovation and Science, *The impact of labour market regulation on the unemployment rate: Evidence from OECD economies*, Research Paper 3/2017, April 2017.
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- <sup>30</sup> Gary Banks, *Successful Reform: Past Lessons, Future Challenges*, Keynote address to the Annual Forecasting Conference of the Australian Business Economists, 8 December 2010, Productivity Commission, p. 16.
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- <sup>32</sup> *Workplace Relations Act 1996 (Cth)*, s. 3(d).
- <sup>33</sup> Kevin Rudd MP, then Leader of the Opposition and Julia Gillard MP, then Deputy Leader of the Opposition and Shadow Minister for Employment and Industrial Relations, *Joint Statement: Forward with Fairness – Policy Implementation Plan*, 28 August 2007, p. 1.
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- <sup>35</sup> See Professor Ron McCallum, 'Unpacking the Fair Work Act', *At Work: Workplace Relations and Safety*, May/June 2011 Newsletter, HWL Ebsworth Lawyers, 30 May 2011; and Paul Ludeke, *The 'Reform' Misnomer Under the Fair Work Regime*, HR Nichols Society XXXII Conference, April 2011.
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- <sup>40</sup> Productivity Commission, *Workplace Relations Framework: Inquiry Report, Volume 2*, Canberra, 21 December 2015, pp. 683, 820.
- <sup>41</sup> *Fair Work Act 2009 (Cth)*, s.172(1)(a).
- <sup>42</sup> See *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 4457.
- <sup>43</sup> *Appin Mine Enterprise Agreement 2011*, Appendix 2.
- <sup>44</sup> *Appin Mine Enterprise Agreement 2011*, Appendix 2; *Premier Coal Enterprise Agreement 2012 - 2016*, clause 30.
- <sup>45</sup> *Premier Coal Enterprise Agreement 2012 - 2016*, clause 30.
- <sup>46</sup> *Penrice Mine Enterprise Agreement 2013*, clause 12.
- <sup>47</sup> *Premier Coal Enterprise Agreement 2012 - 2016*, clause 38; *Moranbah North Mine Enterprise Agreement 2014*, clause 3.7.
- <sup>48</sup> *Dawson Mines Collective Agreement 2015*, clause 5.7.
- <sup>49</sup> *Premier Coal Enterprise Agreement 2012 - 2016*, clause 38; *Port Kembla Coal Terminal Limited Enterprise Agreement 2012 - 2015*, clause 33.1.
- <sup>50</sup> *Dawson Mines Collective Agreement 2015*, clause 5.7.
- <sup>51</sup> *Port Kembla Coal Terminal Limited Enterprise Agreement 2012 - 2015*, clause 33.1.
- <sup>52</sup> *Dawson Mines Collective Agreement 2015*, clause 5.4; *Moranbah North Mine Enterprise Agreement 2014*, clause 3.7; *Port Kembla Coal Terminal Limited Enterprise Agreement 2012-2015*, clause 33.1.
- <sup>53</sup> *Australian Federated Union of Locomotive Enginemen and State Rail Authority of New South Wales* (1984) 295 CAR 188.

- <sup>54</sup> *ibid.*, p. 683.
- <sup>55</sup> BHP Billiton, *Australian Workplace Relations Framework: Submission to the Productivity Commission*, March 2015, p. 9.
- <sup>56</sup> Glencore, *Submission to the Productivity Commission: Australian Workplace Relations Framework*, March 2015, p. 10.
- <sup>57</sup> *Fair Work Act 2009 (Cth)*, s. 341.
- <sup>58</sup> Fair Work Commission, *Annual Report 2015-16*, pp. 29, 49.
- <sup>59</sup> *Fair Work Act 2009 (Cth)*, s. 346.
- <sup>60</sup> *CFMEU v BHP Coal Pty Ltd* (2014) 253 CLR 243, [19].
- <sup>61</sup> BHP Submission to the Productivity Commission Inquiry into the Workplace Relations Framework dated 29 March 2015.
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- <sup>64</sup> Productivity Commission, *Workplace Relations Framework: Inquiry Report, Volume 2*, Canberra, 21 December 2015, p. 910.
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- <sup>66</sup> Dean Dalla Valle, 'Right to enter must not cut productivity', *The Australian*, 28 November 2014.
- <sup>67</sup> *Fair Work Act 2009 (Cth)*, ss. 501 and 502.
- <sup>68</sup> Productivity Commission, *op. cit.*, p. 916.
- <sup>69</sup> *Construction, Forestry, Mining and Energy Union v Central Queensland Services Pty Ltd T/A BHP Billiton Mitsubishi Alliance*, Fair Work Commission [2016] FWCFB 288.
- <sup>70</sup> *Fair Work Act 2009 (Cth)*, s. 172.
- <sup>71</sup> *Fair Work Act 2009 (Cth)*, s. 187(6).
- <sup>72</sup> Productivity Commission, *Workplace Relations Framework: Inquiry Report, Volume 2*, Canberra, 21 December 2015, p. 691.
- <sup>73</sup> *Fair Work Act 2009 (Cth)*, s. 186(5).
- <sup>74</sup> Productivity Commission, *op. cit.*, p. 691.
- <sup>75</sup> *Fair Work Act 2009 (Cth)*, s. 3(c).







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