MINERALS COUNCIL OF AUSTRALIA

Submission, Senate Education and Employment Legislation Committee

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

11 November 2022

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EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) cannot support the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (the bill) in its current form.

The MCA urges the Senate to provide for proper consideration of the bill to ensure that the mining industry – and the many thousands of businesses across Australia that supply it – are not impaired by reduced productivity, industry-wide strikes, lengthy delays, surging costs, falling revenue, job losses and foregone opportunities.

The MCA supports the bill's changes to enterprise bargaining, the application of the better off overall test, provision for voluntary cooperative workplace agreements and gender equity reforms.

However, the MCA is concerned that the bill unjustifiably expands the scope for multi-employer bargaining, fails to articulate clear parameters around where multi-employer bargaining would be available and undermines the system of enterprising bargaining that has delivered many significant benefits to Australia.

The major changes the bill would introduce will undoubtedly have severe unintended consequences economy-wide – on investment, productivity, economic growth, job security and wages.

The MCA supports the reform objective of ensuring Australia's workplace relations system reinforces a productive, competitive economy that attracts investment and delivers highly paid jobs. This is best achieved through incentivising enterprise bargaining on a voluntary basis, encouraging high productivity workplace arrangements and enabling businesses and their employees to find the best possible outcomes given their widely variable circumstances.

The MCA stands for sustainable real wages growth, noting that for low-paid workers, the best and most appropriate way to deliver wage rises is to amend modern awards in low-paid industries.

Providing significantly enhanced rights for unions to force pattern agreements on non-consenting employers is the very antithesis of an economically responsible approach.

Mining is Australia's largest export industry, generating a record $413 billion in exports in 2021-22. The industry paid $43.2 billion in tax and royalty payments in 2020-21 and accounted for 30 per cent of all company tax paid that year.

But the spread of multi-employer bargaining to all parts of the economy will replace flexibility with rigidity and stifle the ability of businesses to grow, innovate, compete and be productive. In the mining industry, this will lead to poorer wage outcomes and fewer jobs.

Access to enterprise-level bargaining and tailored employment arrangements has been critical to supporting a sustained increase in highly skilled, highly paid, and secure mining jobs. Direct mining employment has trebled over the past 20 years from approximately 88,000 workers in 2002-03 to 278,000 in 2021-22.

Only one per cent of mining workers are dependent on awards for their pay and conditions. Forty per cent are covered by enterprise agreements. The remaining 59 per cent are covered by individual agreements on terms above awards and above enterprise agreements.

Choice and flexibility in employment arrangements allow Australian mining to pay the highest average wages – $144,000 a year, compared to $95,000 a year across all industries.

In its *Jobs + Skills Summit Outcomes* document, the Australian Government committed to allowing 'businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so'. However, the bill belies this commitment, dramatically expanding the power of unions to force businesses into multi-employer agreements – and take industrial action across supply chains.

The bill also expands compulsory arbitration to situations where an enterprise agreement has not been reached, undermining the principle that workers and employers should be able to freely agree their employment arrangements. Once in place, the bill makes it very difficult for multi-employer agreements to be unwound, or to be replaced by more efficient single enterprise agreements.

Recommendations

The MCA recommends that:

1. The government reaffirm its commitment to proper and genuine consultation, particularly on major economic and regulatory reforms that could have significant adverse unintended consequences
2. The Senate allow a reasonable time for the provisions of the bill to be scrutinised – especially parts 10 (Fixed term contracts), 11 (Flexible work), 15 (Initiating bargaining), 18 (Bargaining disputes), 19 (Industrial action), 20 (Supported Bargaining), 21 (Single interest authorisations), and 22 (Varying agreements)
3. The Senate pass the bill's changes to enterprise bargaining reforms in Part 14 and changes to the application of the better off overall test in Part 16
4. The Senate pass the bill's changes to 'cooperative workplaces' multi-employer bargaining agreements on the basis that participation is voluntary
5. The provisions of the bill related to multi-employer bargaining be refocused on low-paid industries where workers have low bargaining power, in line with the government's commitments at the *Jobs + Skills summit* by:
    a. Not making any changes to the single-interest stream
    b. Amending the supported bargaining stream ensure it will not capture high paying industries.
6. There be no expansion of arbitration without consent of all bargaining representatives, including for 'intractable bargaining'
7. Any changes preserve workplace democracy, including by ensuring that multi-employer agreements can be unwound where workers and employers prefer alternatives such as single enterprise agreements and that employee representatives cannot 'veto' workplace votes
8. There be no expansion of opportunities for protected industrial action across multiple employers – and if these are introduced, that they be balanced by a stronger public interest test
9. Prior to introducing legislation, the government and parliament provide for the bill to be reviewed to better understand adverse unintended consequences on:
    a. The international competitiveness of Australian businesses and their ability to attract investment
    b. Sustainable wage increases
    c. Competition and competition law
    d. Business confidence
    e. The government's objectives of increasing Australian manufacturing.

GOOD GOVERNMENT EMBRACES CONSULTATION

The MCA recommends that the:

- Senate allow more time for the provisions of the whole bill to be scrutinised, especially parts 10 (Fixed term contracts), 11 (Flexible work), 15 (Initiating bargaining), 18 (Bargaining disputes), 19 (Industrial action), 20 (Supported Bargaining), 21 (Single interest authorisations), and 22 (Varying agreements)
- Committee include a recommendation that the government reaffirm its commitment to proper consultation, particularly on major economic and regulatory reforms that could have significant adverse unintended consequences.

The government has provided insufficient time to consult with employers and employees on the complex and dramatic changes the bill would make to Australia's workplace relations system.

Prior to the introduction of the bill, no legislative proposals were shared privately or publicly. No changes of the magnitude that the bill makes were foreshadowed by the government, including in the *Jobs + Skills Summit*. No exposure draft was issued, and no serious effort was made to engage the views of the mining industry or the broader business community on policy design.

Moreover, no election mandate exists for a sweeping expansion of multi-employer bargaining supported by protected industrial action – indeed, when pressed on the issue in an interview prior to the election, then Shadow Treasurer the Hon Dr Jim Chalmers MP said 'it's not part of our policy'.[1]

The timeframe for consideration of the bill by the Senate Education and Employment Legislation Committee stands in stark contrast to review periods for legislation of comparable complexity and risk. The 10 working days (excluding public holidays) provided to make submissions since the introduction of the bill does not allow sufficient time for representative bodies such as the MCA to consult with members on the bill's many unintended consequences.

The rushed introduction of the bill to parliament and the inclusion of major changes that were not foreshadowed at the *Jobs + Skills Summit* also runs counter to the Prime Minister's commitment to foster a new culture of cooperation between businesses and unions based on the common interest.

To legislate a far-reaching change without a reasonable opportunity for key stakeholders and industries to evaluate the proposal is to invite poor policy outcomes and put at risk the Australian economy at a time when it faces substantial economic challenges and uncertainty, including record inflation of 7.3 per cent and rising interest rates.

The MCA stresses that more time is needed to work through the bill, including how mining businesses, regional communities, jobs, and the broader economy would be affected. Parliamentarians and Senators must be afforded the respect of being given reasonable time and support to ensure they understand the measures they are being asked to vote for.

The government has asserted that the measures are needed urgently to support low-paid workers grappling with rising cost of living pressures. However, there is no guarantee that the bill will lead to sustainable wage increases. By contrast, there is a high risk that the expanded multi-employer bargaining provisions of the bill will undermine productivity and put additional pressure on businesses who are coping with increased energy costs, labour and skills shortages and ongoing supply chain constraints.

[1] ABC Insiders, *Transcript*, Dr Jim Chalmers, 21 November 2021.

A RADICAL TURN TO THE PAST

- The bill is a radical break from the economic reforms initiated by Hawke and Keating which put voluntary enterprise bargaining at the heart of the workplace relations system.
- Under the bill's changes, multi-employer agreements will spread through the economy, overriding the productivity gains achieved over decades of enterprise bargaining.

The Hawke and Keating governments implemented far reaching economic reforms that opened the Australian economy to trade and investment, giving businesses the flexibility to innovate, increase productivity and compete internationally.

Part of this reform process included the deliberate dismantling of the uniquely Australian centralised system of industrial relations, based on compulsory arbitration. This system, which featured wage instability and high levels of disputation, was replaced with the first steps towards a decentralised system – with enterprise bargaining as its centrepiece. The system was underwritten by a safety net of minimum statutory and award minimum standards. The basic framework of these reforms is the foundation of Australia's current workplace relations system, enshrined in the *Fair Work Act 2009*.

As then Prime Minister Paul Keating explained:

> …the model of industrial relations which we are moving towards… is a model which places primary emphasis on bargaining at the workplace level and within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would only be there only as a safety net. This safety net would not be intended to prescribe the actual conditions of work for most employees, but only to catch those unable to make workplace agreements with employers.[2]

Part of the Keating reforms involved a devolution to the workplace level, a significant reduction in the role of arbitration, and to compensate for that, the creation of rights to take protected industrial action. It was never intended that protected industrial action and arbitration would both be available.

The decentralisation of wages and conditions allowed businesses to increase wages in accordance with their capacity and to achieve workplace productivity improvements without the prospect that those high wage levels would flow through the economy to business sectors that could not afford the increased costs or obtain the productivity improvements to sustain them.

Institutionalising pattern bargaining and relegating workplace decision-making and productivity without any analysis of the economic consequences is reckless and irresponsible.

The overall effect of the bill, as drafted, would turn back the clock on decades of workplace relations reform that has brought productivity and wage increases. It would do so by fundamentally altering the Hawke/Keating approach based on agreement making at the enterprise level, introducing a range of mechanisms through which businesses can be forced into agreements that do not reflect the commercial realities in which they operate or the requirements of their workforce.

Under the bill's changes, multi-employer agreements will spread through the economy, overriding the productivity gains achieved over decades of enterprise bargaining. Over time, large and inflexible multi-employer deals will become the main determinant of employment conditions. Increasingly, the workplace relations system will come to resemble the traditional industrial relations model that existed before the reforms of the 1980's: centralised, focused on material production and characterised by disputation. This model is less relevant to the needs and expectations of modern Australian employers and employees.

In addition to forcing enterprises into both single enterprise and multi-enterprise arrangements with terms they have not agreed to, the bill would greatly expand the rights of unions to threaten and engage in protected industrial action. For the first time in Australia, a right to strike will extend beyond

[2] Prime Minister Paul Keating, speech to the Australian Institute of Company Directors, 21 April 1993.

the single enterprise to encompass diverse businesses that have been subjected to a multi-employer agreement with arbitration available to impose a much higher outcome than a safety net.

Reversing the Keating enterprise bargaining system is likely to cost jobs, spread conflict and undermine productivity improvements.

CONTRIBUTION OF THE MINING INDUSTRY

- Australia is the world's largest exporter of minerals and metals, and the largest contributor to the Australian economy.
- Mining supports over 1.1 million jobs at over 200 operating mine sites and in supply chains across the country.
- Policies that deliver internationally competitive and stable investment settings are essential for positioning Australia for the next wave of mining investment.

The Australian minerals industry is a global leader in providing the essential elements of modern life while growing the economy and sustaining regional communities, including small and medium businesses, through local commerce and employment, and the provision of community services, while supporting the economic aspirations of Indigenous Australians.

Australia is the world's largest exporter of minerals and metals, making it an essential part of global supply chains. Australia ranks as the top exporter of iron ore, metallurgical coal, alumina, lithium and mineral sands, and is a prominent exporter of uranium (second in the world), thermal coal (second), nickel (fourth), copper (sixth), and is the second-largest producer of gold. The minerals industry delivers these materials while having world leading sustainability standards, including best-practice environmental management and community engagement.[3]

Mining is the largest contributor to the Australian economy accounting for 10 per cent of gross domestic product (GDP), the largest source of export income, and supports over 1.1 million jobs at over 200 operating mine sites and in supply chains across the country.

Since the peak of the mining investment boom in 2013, the industry has produced $2.2 trillion in resources export revenue, $249 billion in mining wages, $143 billion in company taxes, $112 billion in royalties, and 21 per cent of Australia's GDP growth.[4] Despite the size of the contribution, mining uses less than 0.1 per cent of Australia's land area and undertakes continuous rehabilitation of land disturbed during operations.[5]

The minerals industry's substantial contribution to the economy over the last decade resulted from the large investment in exploration, mining projects and sustaining capital that was made since the early 2000s. It was this investment that ensured Australia had the mine production capacity, supporting infrastructure, services and skilled workers to enable the industry to meet growing global demand for commodities. Over the last decade, the mining industry's (excluding oil and gas) expenditure on new mines, equipment and infrastructure totalled $254 billion.

Analysis by the Centre for International Economics shows that Australia's economic growth would have been 13 per cent lower in 2020 – the first year of the COVID-19 pandemic – had there not been a permanent increase in the size of the mining industry from 2005.[6]

In 2021-22, resources generated a record high $413 billion of export revenue and accounted for 69 per cent of total exports.[7] This was underpinned by robust exports of:

- Iron ore - $134 billion
- Coal - $113 billion

[3] See: Minerals Council of Australia, *ESG Change for the better*, released 16 November 2021.

[4] Australian Bureau of Statistics, *International Trade in Goods and Services*, March 2022, released 5 May 2022; Australian Bureau of Statistics, *Business Indicators, Australia*, December 2021, released 28 Feb 2022; Ernst & Young, *Royalty and Company Tax Payments*, Report prepared for the Minerals Council of Australia, June 2022; Australian Bureau of Statistics, *Australian System of National Accounts*, released 29 October 2021.

[5] Minerals Council of Australia estimate.

[6] Centre for International Economics, *Estimating the economic benefits of mining expansion and further productivity reforms*, report prepared for the Minerals Council of Australia, Canberra, 31 May 2021, pp. 1f, 10fff.

[7] Australian Bureau of Statistics, *International Trade in Goods and Services, Australia*, table 3, released 6 October 2022.

- Gold - $25.8 billion
- Aluminium, alumina and bauxite - $15.9 billion
- Copper - $12.5 billion.

This revenue enabled mining to contribute a combined $43.2 billion in company tax (almost 30 per cent of total company tax paid) and royalties in 2020-21, which was a 16 per cent increase from the $37.3 billion paid in the previous financial year.[8]

While mining investment remained strong in 2021-22 at $30.5 billion, it was largely a result of ongoing expenditure to sustain production levels at existing mines rather than new capital investment. Exploration expenditure was also strong at $3.9 billion, which was close to record levels.[9]

Global consumption of mineral and energy commodities will continue to grow as economies develop, grow and decarbonise. As new energy, transport and health care technologies emerge, there will be even greater opportunities for Australia to export a range of minerals and metals used in high-tech manufacturing.

The outlook for Australian mining is broadly positive, providing it remains competitive at both attracting investment and being able to diversify to other export markets as required. Policies that deliver internationally competitive and stable investment settings are essential for positioning Australia for the next wave of mining investment and maintaining its position as the largest exporter of minerals and metals in the world.

[8] Ernst & Young, Royalty and Company Tax Payments, Report prepared for the Minerals Council of Australia, June 2022.

[9] Australian Bureau of Statistics, *Private New Capital Expenditure and Expected Expenditure, Australia,* released 1 September 2022; Australian Bureau of Statistics*, Mineral and Petroleum Exploration, Australia, Australia,* released 29 August 2022.

EMPLOYMENT ARRANGEMENTS IN THE MINING INDUSTRY

- The mining industry pays the highest wages and has successfully established a culture of creativity, productivity, shared benefits, and cooperation within the parameters of the existing workplace relations framework.
- Mining operations vary greatly in their business requirements and workforce needs (due to factors such location, ore body, cost base and the transport and housing needs of the workforce).
- To remain competitive, a diverse mix of employment arrangements must be preserved and valued including tailored employment agreements and enterpise agreements.

A diverse mix of employment arrangements in mining has underpinned a sustained increase in highly skilled, highly paid and secure mining jobs. Mining employment has trebled over the past 20 years from 87,800 in 2002-03 to 277,600 in 2021-22.[10]

The mining industry pays the highest average wages ($144,000 a year, compared to $95,000 across all industries) and most mining workers are full-time (96 per cent) and permanent (88 per cent).[11]

Only one per cent of non-managerial mining workers are dependent on awards for their pay and conditions. Forty per cent are covered by enterprise agreements and 59 per cent are on individual agreements on terms above awards and enterprise agreements.[12]

Australia's workplace relations system must continue to recognise and enable a range of agreement making options. Individual workers are demanding more choice in their employment arrangements, which can often be dealt with more easily in their contract of employment (with the underlying protection of the Award and National Employment Standards). While other groups of workers remain covered by enterprise bargaining agreements, there are large mining sector employers who have close to 100 per cent of their non-supervisory employees working under enterprise agreements.

The mining industry relies on the ability to tailor employment arrangements to generate value and deliver high paying jobs because:

- The industry is a world-leader in developing and adapting transformative technologies, which are continually augmenting and reshaping mining roles
- The industry employs skilled professionals and tradespeople from diverse backgrounds in a wide range of occupations
- The industry operates in dramatically different workplace environments – from head offices in capital cities, to regional towns and remote locations hundreds of kilometres from the nearest town or community
- Mining operations can have very different staffing requirements owing to differences in geography and ore bodies – both between and within companies
- Mining experiences larger swings in production and revenue than other major industries.

The current workplace relations system supports an overall harmonious mining industry with low levels of disputation. The level of industrial disputes in all industries has reduced significantly. The latest ABS data show that the average number of working days lost due to industrial action per 1000 employees was 6 days for the first half of the 2022 calendar year, while only 0.6 working days were lost in mining (other than coal) in the same period.[13]

[10] Australian Bureau of Statistics, *Labour Force, Australia, Detailed,* May 2022, released 23 June 2022, table 6.
[11] Australian Bureau of Statistics, *Average Weekly Earnings,* November 2021, released 24 February 2022, table 10h; *Labour Force, Australia, Detailed,* May 2022, released 23 June 2022, table 6; *Characteristics of Employment, Australia,* August 2021, released 14 December 2021, table 3.2.
[12] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2021,* released 19 January 2022, data cube 5.
[13] Australian Bureau of Statistics, *Industrial Disputes, Australia,* June 2022, released 8 September 2022, table 2b.

The overall effect of multi-employer bargaining could include lower productivity, reduced job opportunities, lower investment and mine closure or lay-offs, with adverse consequences for the regions and townships around these mines.

The pattern of industrial action in the mining industry is indeed revealing. The coal industry, which predominantly operates on enterprise agreements is subject to much higher levels of disputation than the remainder of the industry, which generally operates on above-award tailored agreements. The mining industry does not want to see increased disruption, loss of wages and conflict spread to mines that operate cooperatively and successfully.

In short, the mining industry has successfully established a culture of creativity, productivity, shared benefits, and cooperation within the parameters of the existing workplace relations framework, and it should not be upended. It is imperative that any measures preserve the ongoing implementation of the mining industry's generous enterprise-based arrangements and above-award tailored agreements.

Finally, great care must be taken to ensure that measures do not drive the fermentation and spread of conflict and coercion in Australian workplaces through forcing businesses into multi-employer agreements and introducing opportunities for unsustainable, forced outcomes.

Box 1: Tailored employment arrangements in the mining industry

The WA iron ore industry is one of the biggest generators of wealth in the nation, with export revenue of $134 billion in 2021-22.[14] It also underwrites the WA state budget, generating royalties of $10.29 billion in 2021-22, and employed approximately 79,000 workers in 2021-2022.[15]

In the iron ore industry, it is commonplace for workers to be employed under tailored common law contracts. These contracts pay well above award rates – often higher than the already high mining industry average wages of $144,000 per year. In addition, workers have access to valuable benefits such as health care, share schemes and incentives. On no measure can the WA iron ore industry be regarded as a low paid industry.

Within the iron ore industry many thousands of employees choose to be employed under common law contracts. For example, in one major mining company these contracts have delivered higher than inflation wage growth in all but one year over the last 10 years.

In addition, the industry has been relatively free of industrial disputes and disruptive strikes in that period. Yet one company alone estimates that a four-week strike across its operations, which could happen under a multi-employer agreement, would cost it $2.8 billion in lost revenue assuming an iron ore price of $100 per tonne.

The industry's workforce is not 'locked out' of bargaining – workers can bargain collectively at any time, with or without union support but many choose not to do so because their existing employment contracts deliver some of the best wages and terms in Australia.

Because these high paying employment arrangements do not rely on enterprise agreements, the WA iron ore industry will be exposed to the imposition of restrictive multi-employer agreements in the single interest stream.

Should such agreements take hold and spread through the industry, they will impact productivity, making Australia's iron ore industry less competitive and resulting in poorer wage outcomes. This could threaten job security in existing operations and future jobs in future projects. Once a multi-employer deal spreads it will be very difficult to unwind due to the lack of mechanisms to do so in the bill.

Given the strategic importance of the iron ore sector, setting the sector up for a long-term decline in investment could also have strategic implications for Australia.

[14] Australian Bureau of Statistics, *International Trade in Goods and Services, Australia*, table 3, released 6 October 2022.
[15] Government of Western Australia, Department of Mines, Industry Regulation and Safety, *Mineral and petroleum industry activity review 2021-22* (accessed 11 November 2022).

PROVISIONAL SUPPORT FOR SOME ELEMENTS OF THE BILL

- The MCA recommends the Senate pass the changes in Parts 14 and 16 which on balance improve application of the better off overall test and enterprise bargaining approvals.
- The MCA acknowledges there may be a place for multi-employer bargaining in low-paid industries, but the bill must ensure the 'supported bargaining stream' is genuinely confined to low-paid industries.
- The MCA recommends the Senate pass the changes in Part 23 to provide for cooperative workplace agreements.
- The MCA broadly supports reforms to gender pay equity and implementation of the Respect@Work recommendations while noting there may be opportunities to improve the provisions through a proper consultation process.

The MCA acknowledges the bill includes some positive changes that represent incremental improvements to the workplace relations system. However, even these incremental changes would benefit from further consultation, as in some cases, they introduce new and unnecessary complications to the workplace relations system.

Application of the better off overall test and enteprise bargaining changes

Part 16 of the bill will introduce new provisions for applying the better off overall test. The proposed reforms to the application of the better off overall test would generally improve the process for approving enterprise agreements and encourage more agreement-making.

The requirement that the Fair Work Commission (FWC) may only have regard to 'patterns or kinds of work or types of employment that are reasonably foreseeable' at the time the test is applied is a welcome clarification that will make the application of the test more practical, not requiring consideration of hypothetical patterns of employment.[16]

However, the MCA notes the reforms introduce new complications. For example, it will be possible for a bargaining representative to apply to the FWC for a reconsideration of whether the agreement passes the better off overall test – a result which reduces certainty, potentially increases costs, reduces the incentive to engage in bargaining. This could be partially offset by introducing a time limit before an agreement can be 'reconsidered'.

Part 14 of the bill will replace the existing 'genuine agreement' requirements in section 188 with a 'statement of principles', making Part 14 less technical and prescriptive. The FWC will be able to disregard 'minor procedural or technical errors' relating to process requirements in the bargaining process, which will significantly improve the agreement making process.

On balance, the MCA recommends the Senate pass the changes in Parts 14 and 16.

Supported bargaining agreements

Part 20 of the bill seeks to reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FWA, replacing and broadening the present system with the 'supported bargaining stream'. Under this measure the FWC will be able to initiate a multi-employer agreement if it determines it is appropriate for the parties to bargain together. In doing so the FWC must consider, among other things, the 'prevailing pay' and conditions in the relevant industry.

[16] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, s. 193A.

The MCA acknowledges multi-employer bargaining might have merit in some low-paid industries where workers have little bargaining power. However, it should not apply to high-paying industries or become a widespread feature of Australia's workplace relations system.

While the MCA does not oppose the government's objective of reforming the low-paid bargaining stream to give low-paid workers better access to bargaining, it is imperative this stream be targeted to low paid workers. Currently the bill does not provide sufficient protection for high paid industries such as mining and there is significant scope for multi-employer agreements to 'creep'. This could be addressed by introducing a definition of low-paid industry that appropriately confines such agreements.

It should also be noted that many low-paid industries where workers have little bargaining are industries in which government policy plays a large role in determining wages and conditions, including aged care and early childhood education. The bill and the explanatory information contain no evidence the government has considered other policy alternatives beyond multi-employer bargaining that might be at its disposal to lift wages in these sectors.

The MCA recommends amendments be made to ensure the supported bargaining agreements remain confined to low paid industries.

Cooperative workplaces agreements

Part 23 of the bill provides for cooperative workplace agreements to be made under a voluntary stream of multi-employer bargaining focused on small business. Protected industrial relations is not available in this stream, and the stream is opt-in and opt-out (see Figure 1).

The MCA recommends the Senate pass this part of the bill as it provides for voluntary multi-employer bargaining in line with the government's commitments at the *Jobs +Skills Summit*.

Gender equity reforms

The bill provides for a range of reforms to make gender equity an objective of the FWA, prohibit pay secrecy clauses and allow the FWC to order pay increases for workers in low-paid, traditionally female-dominated industries. Part 8 of Schedule 1 to the bill also seeks to implement recommendation 28 of the *Respect@Work Report* by prohibiting sexual harassment in connection with work in the FWA.

The MCA broadly supports these reforms while noting there may be opportunities to improve the provisions through further consultation.

Figure 1: Summary of multi-employer bargaining changes

Type of multi-employer bargaining scheme	Is the scheme voluntary?	Can Protected Industrial Action be taken?	Do good faith bargaining obligations apply?	Can compulsory arbitration be utilised?	Can employers be added to an agreement?
Existing multi-employer bargaining schemes					
Voluntary multi-employer bargaining	Yes	No	No	No	No
Low-paid authorisations	No, by application to the FWC.	No	Yes	Yes	Yes
Single-interest employer authorisations	Yes, by application to the Minister and FWC.	Yes	Yes	No	Yes – by consent
Proposed new multi-employer bargaining schemes					
Cooperative workplaces stream	Yes (s 181(1)).	No (s 413(2))	Yes (s 228-229)	No (s 234)	Yes – with employer consent (s 216C)
Supported bargaining stream	No, by application to the FWC by employers or bargaining representatives (s 242).	Yes (s 413(2))	Yes (s 228-229)	Yes (s 234)	Yes – both with or without employer consent (s 216A and s 216B)
Single-interest employer authorisations	No, by application to the FWC by employers or bargaining representatives (249(3))	Yes (s 413(2))	Yes (s 228-229)	No (s 234)	Yes – both with or without employer consent (s 216DB)

MULTI-EMPLOYER BARGAINING (SINGLE INTEREST STREAM)

- There is no case for the bill's expansion of multi-employer bargaining to high-paying and productive industries such as mining.
- Multi-employer bargaining:
  - Will increase disputation in a harmonious industry
  - Will not support sustainable wage increases in mining
  - Will threaten investment in the mining industry
  - Undermines small businesses in mining industry supply chains.
- The bill's multi-employer bargaining measures cannot be supported as they:
  - Create situations that override both the will of the employer and the workforce
  - Allow for an employer to be forced to agree to unsustainable wages and conditions
  - Impose few limits on the size and scope of the businesses that could be 'roped in' to an agreement
  - Allow very little scope for multi-employer agreements to be unwound
  - Allow competitors to be forced into the same enterprise agreement.

The bill's most problematic and controversial feature is the expansion of non-voluntary multi-employer bargaining to all sectors of the economy via the bill's changes to the single-interest stream (Part 23).

As can be seen in Figure 1, the bill makes single-interest employer authorisations compulsory after successful application to the FWC, in contrast to the previous situation where ministerial and commission approval were required to implement a multi-employer agreement in the single-interest stream.

Once established, the bill would allow a multi-employer agreement to be expanded with or without the consent of the employer that would be made subject to the agreement and allows very little scope for multi-employer agreements to be unwound.

Multi-employer bargaining will increase disputation in a harmonious industry

The bill would make it possible to take protected industrial action across the entire multi-employer agreement.[17]

The danger of allowing multiple employers, large and small, to be included in industrial action is that entire supply chains could be subjected to protected industrial action. As multi-employer agreements spread, they will enable unions to shut down whole industries – or large parts of an industry – with protected industrial action over matters not relevant to the performance of individual operations.

The strong contribution of mining – and the opportunities for minerals development and value-adding – must not be compromised by a reckless return to industrial disruption which characterised multi-employer bargaining in the 1980s.

The case study below on the consequences of a six-week strike at an Australian port illustrates the potential extent of the economic damage that could be done to multiple enterprises within a supply chain. Similar scenarios could apply at pinch points in other supply chains as well.

[17] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 s. 413(2)

Box 2: Industry-wide bargaining would disrupt critical trade at great cost to Australians

In the mining industry business success is more dependent than ever on the efficiency of the entire export supply chain, from research, exploration, mine or plant development, production, transport, and final shipment. In addition, mining supply chains depend on both local and imported sources.

The danger of allowing multiple employers to be included in bargaining is that large and small employers across an entire supply chain would be subject to protected industrial action. For example, at Australia's ports, employers of tugboat operators, ships' pilots, stacker reclaimer operators and portside maintenance employees could be adversely affected in addition to commodity producers.

If a union representing any one of those groups had the capacity to take protected industrial action, it would simultaneously affect all shippers. This means that a strike of just six weeks' duration could impose significant opportunity costs. To illustrate:

- At Port Hedland the cost would be about $9 billion in lost iron ore export revenue and $551 million in lost royalties for WA residents
- At the Port of Newcastle, forgone coal export revenues alone could be $3.1 billion and royalties of $190 million
- At the Port of Brisbane, industrial action could impact trade worth $52 billion per year including critical imports and exports of refined oil, agricultural seeds, cotton, meat products, paper, and wood pulp.[18]

Damage from protected industrial action would be felt across the supply chains of other export sectors and importers as well. For example, at the Port of Newcastle it would affect supply chains that provide inputs to the many medium and small businesses throughout the Hunter region that support the coal value chain.

The cumulative damage that could be wrought upon the nation's productive industries would be ruinous. No change with such a high potential for damage should be allowed to pass parliament.

Multi-employer bargaining will reduce already low productivity growth

At the government's *Jobs + Skills Summit* the Prime Minister emphasised the importance of forging a new culture of cooperation for mutual benefits:

> Australia needs an inclusive and balanced workplace relations system that can support parties reaching agreement on workplace conditions, adapt to new forms of work, and enable employers and workers to share the gains from productivity improvements.[19]

The Prime Minister's statement highlights the need for flexibility in workplace relations and acknowledges that productivity growth delivers wages growth.

The bill's expansion of multi-employer bargaining would undo decades of bipartisan reform by replacing voluntary bargaining between employers and workers at individual enterprises – where productivity and real wages are generated – with the imposition of blanket, industry-wide outcomes through industrial action or compulsory arbitration.

The Productivity Commission has warned that:

> Any changes to the Fair Work Act to increase the use of multi-employer and industry/sector wide bargaining are likely to have uncertain implications for productivity… and should be undertaken with caution and be subjected to detailed, rigorous and transparent analysis[20]

The Productivity Commission also noted that multi-employer bargaining could require diverse firms to compromise some of their firm-specific requirements and flexibilities to reach agreement with other

[18] Bureau of Infrastructure and Transport Research Economics, *Australian Sea Freight 2018-19*, July 2021, Table 1.3.
[19] Commonwealth Treasury, Jobs + Skills Summit Issues paper, Canberra, 17 August 2022, p. 5.
[20] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market, Interim report no. 6*, 13 October 2022, p 62.

businesses.[21]

Reintroducing industry-wide bargaining – a practice not seen in Australian mining since the early 1980s – would needlessly impose uncertainty and rigidity on a world-leading industry that is already producing a growing number of highly skilled, highly paid and secure jobs.

It would simultaneously increase the cost of doing business by adding to the current complexity of operating by introducing new business constraints, leading to lower expected returns to investment.

Multi-employer bargaining will not support sustainable wage increases in mining

Since the beginning of last century, it has been through labour productivity growth that Australians have benefited from increased incomes and leisure. About two-thirds of Australia's long-term growth in per capita income is attributable to improvements in how labour and capital work together to produce goods and services (multifactor productivity), with the other third coming from increases in the amount of capital per worker (capital deepening).[22]

The Australian Government is rightly concerned that overall labour productivity growth in Australia has been unsatisfactory for successive years and that, as a result, aggregate wage growth has been sluggish.

Over the past five years, market-sector labour productivity growth in Australia has averaged only 0.63 per cent a year, compared to 1.99 per cent over the past 25 years and 2.87 per cent during the era of microeconomic reform.[23]

However, caution must be taken in interpreting aggregate results. Some sectors are more innovative, more productive and more able to generate real wage increases than others.

Between 2000-01 and 2020-21, wages growth far exceeded labour productivity growth in Australian mining. While labour productivity declined by 8 per cent over the period, average weekly earnings for full-time workers grew by 99 per cent.[24]

All Australians have benefited from the mining industry's success. The Centre for International Economics estimates that the ongoing expansion of mining made Australian households $14,800 better off in 2020 than they otherwise would have been and made all workers better off by $120 a week.[25]

The bill's measures to introduce multi-employer bargaining will not make mining operations more productive or workers better off. Instead, employers and employees will be shoehorned into one-size-fits-all agreements that do not cater for their diverse needs. This will lead to perverse outcomes for wage growth, employment, and economic growth over the medium to long term.

Multi-employer bargaining will threaten investment in the mining industry

Multi-employer bargaining will cement Australia's reputation among international investors as a high-cost jurisdiction with complex and prescriptive workplace regulations.

Policies that improve productivity and competitiveness are integral to attracting investment in mining and minerals processing, which will ultimately benefit all business, households and workers.

The structure of the Australian economy and the important long-term contribution from capital investment to productivity growth means that Australia must be internationally competitive at attracting investment if it is to achieve sustainable, strong economic growth.

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[21] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market, Interim report no. 6*, 13 October 2022, p 62.

[22] Productivity Commission, *PC Productivity Insights: Recent Productivity Trends*, No.1/2020, February, 2020, p.1.

[23] Centre for International Economics, *Estimating the economic benefits of mining expansion and further productivity reforms*, report prepared for the Minerals Council of Australia, Canberra, 31 May 2021, p. 15.

[24] Australian Bureau of Statistics, *Estimates of Industry Multifactor Productivity*, 2020-21 financial year, released 13 December 2021, table 6; *Average Weekly Earnings, Australia*, November 2021, released 24 February 2022, table 10h.

[25] Centre for International Economics, *Estimating the economic benefits of mining expansion and further productivity reforms*, report prepared for the Minerals Council of Australia, Canberra, 31 May 2021, p. 15.

An effective productivity agenda is one that focuses on workplaces. 'Pro-productivity' policies can facilitate prosperity and employment by encouraging firms to invest in capital and allowing them to manage the use of that capital efficiently.

Since 2013, the rates of growth in Australia's productivity and net capital stock have weakened. Over the last decade Australia has gone from one of the best performing OECD countries for private sector capital investment to one of the poorest performing.[26] When adjusted for inflation, Australia's net capital stock is now growing at the lowest rate in 60 years and the resources sector's capital stock has plateaued since about 2015-16.[27]

In the absence of another mining investment boom, or something similar, Australia is at risk of experiencing continued weakness in business investment, which in-turn will further weaken capital deepening and be a drag on productivity growth.

Australia has the opportunity to undergo another expansion in mining to supply the growing global consumption of mineral and energy commodities arising from increasing urbanisation and incomes, and the transformation to net zero emissions and technology-led productivity growth.

Capital investment of between $20 and $30 billion per year is required to simply maintain current production levels. If we are going to increase the capacity of existing mines, or open new mines – including in the commodities needed for our global transition to net zero – capital investment will need to increase by an order of magnitude.

Australia has over 100 prospective mining and processing projects totalling about $50 billion of investment and potentially providing around 30,000 construction jobs and 20,000 operating jobs.[28] Converting these prospective projects into actual investment greatly depends on how policy settings affect their return on investment compared to opportunities in other mining countries.

While the outlook for demand for the mineral and energy commodities Australia produces is strong, there is little evidence to suggest that Australia is on the cusp of another major expansion in mining and with it, a substantial increase in capital investment.[29]

Global commodity markets are highly competitive and there is strong international competition for investment in exploration, mine development and downstream processing facilities. Mineral provinces in other countries that offer high-grade deposits or lower construction costs, operating costs and taxes are providing superior capital returns for investors.

Multi-employer bargaining will undermine regional businesses that support mining supply chains

Australian mining supports an extensive range of small, medium, and large businesses and communities through its supply chains – from specialist providers in machinery and equipment manufacturing, civil engineering and construction and road and rail transport, to generic suppliers in clothing manufacturing, food and beverage services and accommodation.

Deloitte Access Economics estimated that Australian mining and its specialist suppliers support approximately 1.1 million jobs, both directly and indirectly through their purchases.[30] Many of these jobs are found in regional communities across Australia and sustain those communities through the income and services they provide.

[26] P. Bazel and Mintz, J., Corporate tax reform to help address Australia's weak investment performance, Research report prepared for the Minerals Council of Australia, School of Public Policy, University of Calgary, 2022, p.5.
[27] Australian Bureau of Statistics, *Private New Capital Expenditure and Expected Expenditure*, Australia, June 2022, released 1 September 2022.
[28] Minerals Council of Australia calculations based on Department of Industry, Science, Energy and Resources, *Resources and Energy Major Projects: 2021*, viewed 20 September 2022.
[29] Minerals Council of Australia, *Commodity Demand Outlook 2030*, 2020.
[30] Deloitte Access Economics, *Mining and METS: engines of economic growth and prosperity for Australians*, 29 March 2017.

Box 3: Mining is essential for regional Australia

Mining makes an enormous contribution to regional Australia, supporting thousands of suppliers including small, medium and large manufacturers, professional services firms, specialist equipment suppliers, catering, transport and more.

These innovative Mining Equipment, Technology and Services (METS) businesses in turn support local economies and thousands of regional jobs.

A survey undertaken for the NSW Minerals Council found that in 2020-21 the mining companies surveyed spent $14.6 billion in the NSW economy.

Other contributions highlighted show that in the period:

- Mining companies supported 3,160 local suppliers and contributed $4.6 million to community organisations in the Hunter Valley
- In the town of Macquarie, mining supported 488 local suppliers and more than 1,500 full-time equivalent jobs
- In Singleton, the companies supported 86 per cent of regional employment and spent over $900 million on local business and government payments.

Jobs, businesses, and regions around Australia will come under threat if multi-employer bargaining undermines mining industry investment and productivity.

The bill (and subsequent amendments) create situations that override workplace democracy

As currently drafted, the bill allows for an employer to be subjected to a single-interest multi-employer bargaining authorisation if the FWC determines that a 'majority of the employees who will be covered by the agreement' are in favour of this. Clearly, such an outcome would lead to perverse, undemocratic outcomes, as it would allow a defined segment of an employer's workforce to be 'roped in' to a multi-enterprise agreement when most of the employees and the employer did not want such an outcome.

The MCA recognises the government has put forward amendments to the bill to require that there be majority support from the employees of *each employer* to be included in the multi-employer agreement. While the amendments are an improvement, they also create new situations where the will of the workforce and the employer can be overridden by the existence of a multi-employer agreement. This includes a requirement that an employer obtain written agreement from an employee organisation before requesting approval of a multi-enterprise agreement – effectively preventing an employer from putting an agreement directly to an employee vote.

Under the bill and the amendments, once established, multi-employer agreements would be very difficult to replace with single enterprise agreements. This outcome works contrary to the government's recognition that single enterprise agreements are preferable to multi-enterprise agreements because they deliver better productivity outcomes.

Box 4: Employees can have a different view to their union

After a period of enterprise bargaining, one coal mining company recounted four cases in which an enterprise agreement proposal was put to a vote of its employees – even though the proposal did not have the full support of the union. In each case the vote was successful despite the union's reticence. The company found that in some cases the union felt bound to not publicly endorse an enterprise agreement despite its members voting for it.

Under the bill (and subsequent government amendments), a union with only one member would be able to prevent a vote on a multi-employer agreement even though a substantial proportion of the workforce at particular locations would support the agreement.

The bill allows for business to be forced to agree to wages and conditions they cannot absorb

Because employers can be coerced into agreements through a majority vote of their workforce (or a segment of it defined by a relevant union) employers will be exposed to wage claims that their business may be unable to meet.

For example, a union could identify a part of a mining company's workforce that it wishes to make subject to a multi-employer agreement, then gain the support of that cohort of workers by promising that they will obtain a large wage increase through incorporation into a multi-employer agreement.

The bill offers no way of ensuring that the business will be able to absorb the resulting costs. The abuse of bargaining power that the bill would facilitate would ultimately drive more layoffs, reduced job opportunities and in some cases business closure – as well as negative effects on investment due to the increased investment risk.

The bill creates opportunities for abuse of bargaining power in other ways. For example, employers that are part of a multi-employer bargaining application may be prevented from sharing relevant information that could support their bargaining position, because they cannot share commercially sensitive information with their competitors. On the other hand, the union would gain insight through the bargaining processes into the operations of each business, providing an unfair advantage.

The bill's broad common interest test places very few limits on which businesses can be 'roped-in' to a multi-enterprise agreement

The bill would remove the current requirement that employers operate 'cooperatively rather than competitively' and replace it with a new test which would enable the FWC to consider factors such as 'geographic location', a common regulatory regime, the nature of the enterprises and the terms and conditions of employment in those enterprises.

Businesses that are in competition or undertake very different business activities and substantial difference in size and scope should not be able to be drawn into the one multi-employer bargaining agreement. This is especially so in mining where mining operations have very different workforce requirements and cost-bases, geographies and skills requirements (see Box 5).

For example, a mining operation in a remote location in the Pilbara needs to provide for the housing and transport of the workforce, requiring a host of health and safety and/or rostering considerations that may not be relevant to a mine near a regional town.

Combined with the significantly greater power that multi-employer bargaining would give to unions to cause damaging industrial action, any expansion of multi-employer bargaining would need to be balanced with a stronger public interest test.

Complexity, delay, cost and disputation

As the case study below illustrates, re-negotiating a multi-employer agreement would inevitably take much longer than negotiating mine-by-mine leaving sites exposed to protected industrial action for longer. The effect of multi-employer bargaining will include lower productivity, reduced job opportunities, lower investment, and reductions in the size of the workforce, with adverse consequences for the regions and townships around these mines.

Box 5: Multi-employer bargaining will mean more complexity, delay, cost and disputation

A large mining company runs five mining operations in Queensland. Each operation has its own unique circumstances, reflected in enterprise agreements that are designed to suit workforce and business needs at each site.

Remuneration varies between sites – workers at the highest paid mine receive 33 per cent more than the lowest paid mine.

Different circumstances and conditions at each operation are reflected in terms that apply at each site:

- Some mines are located closer to population centres while others are more remote – accordingly agreement terms vary in their provision for roster patterns, shift lengths, accommodation and travel arrangements
- Some mines cover a very large area which tends to mean productivity is optimised with longer shift times than at smaller mines
- Mines vary in types of skills and workers they need to be able to attract, depending on the nature of the ore body, whether it is open cut or underground and the stage of the operation – this is reflected in employment categories and incentives designed to attract employees who have those skills
- Mines have different cost-bases depending on the quality of the ore they produce, the scope and size of the operation, the life span of the mine and other factors that influence the wages and other costs the mine can absorb.

Each mine has differences in cost pressures, profit margins, geographies and workforces, which results in different needs between the mines for both the business and employees.

Forcing diverse mines into multi-employer agreements would be exceedingly complex, costly and time consuming, requiring agreement from many interested groups. If agreement could be reached it would inevitably result in standard terms and conditions being applied across mine sites that do not reflect the conditions at each site.

Once a multi-employer agreement expired, multiple sites would be opened up to protected industrial action at the same time. Re-negotiating the agreement would inevitably take much longer than negotiating mine-by-mine leaving sites exposed to strikes for longer.

The overall effect of multi-employer bargaining could include lower productivity, reduced job opportunities, lower investment and reductions in the size of the workforce, with adverse consequences for the regions and townships around these mines.

INTRACTABLE BARGAINING DECLARATIONS

- The MCA cannot not support the proposed introduction of intractable bargaining determinations.
- Such a system will be open to abuse and will decisively shift the workplace relations system from a system based on voluntary agreement-making to one based on centralised fixing of wages and conditions.

Part 18 of the bill gives an employee bargaining representative the right to apply to the FWC for a 'intractable bargaining declaration', enabling the FWC to determine a bargaining outcome for a single enterprise agreement or a multi-enterprise agreement under the supported bargaining stream.

The FWC may make such a declaration if:

- It has previously exercised its powers to deal with the dispute about that agreement
- There is 'no reasonable prospect of agreement being reached' if the declaration is not made, and
- It is 'reasonable in all the circumstances to make the declaration, taking into account the views of the bargaining representatives for the agreement'.

The bill provides for a 'post-declaration negotiating period' at the discretion of the FWC which provides a final opportunity for the parties to reach agreement. If no agreement is reached, the FWC must proceed to make an intractable bargaining workplace determination.

The MCA considers that the introduction of intractable bargaining declarations will induce a fundamental shift away from voluntary bargaining to arbitrated outcomes.

The approach is likely to be extensively used and is open to abuse. The possibility of a determined outcome shifts bargaining power decisively in favour of the employee organisation. Arbitrated outcomes that are not tethered to the productivity or cost base of the relevant mining company will be inevitable.

In the mining industry, past practice has shown that in arbitration the FWC usually adopts an outcome that is somewhere in between the positions of the parties, as the commission is not well positioned to assess the capability of the employer to absorb wage increases or adjust to inflexible terms. This leaves the system based on compulsory arbitration open to ambit claims for wages and conditions.

Businesses and employees are best placed to understand their business needs and negotiate an outcome. To introduce the possibility of an arbitrated outcome will change bargaining dynamics for the worse, acting as a disincentive for good faith bargaining.

Where an agreement cannot be reached, this does not necessarily equate to a poor outcome. In the mining industry, some employers have adopted a direct engagement model that does not rely on enterprise agreements. This approach has delivered wage increases and better conditions in the mining industry.

The MCA recommends that the Senate not pass Part 19 of the bill or introduce intractable bargaining determinations as they are open to abuse and would decisively shift the workplace relations system from a system based on voluntary agreement-making to one based on centralised fixing of wages and conditions.

TERMINATION OF AGREEMENTS

- Reform should focus on making the process of terminating an expired enterprise agreement less onerous and costly.
- This will incentivise agreement-making and support the termination of outdated agreements with inflexible terms.

Part 12 of the bill could introduce changes that discourage employers from applying to the FWC to terminate an enterprise agreement that has passed its nominal expiry date. This is achieved through introducing a new 'guarantee of termination entitlements', which operates to preserve favourable redundancy entitlements as if the enterprise agreement were still in operation.

The bill also provides that the FWC must terminate an agreement if its continued operation would be unfair for employees, it does not cover any employees, or in certain circumstances where there is a potential of employees' employment being terminated on grounds of redundancy due to the employer's insolvency or bankruptcy.

The MCA cannot support the government's proposed changes under this section, which would work to disincentivise agreement making in the mining industry and bake-in historic, outdated, irrelevant and restrictive terms.

Under current law, it is already exceedingly difficult and costly for an employer to succeed in a unilateral application to terminate an enterprise agreement. First, termination is subject to a statutory test under section 226 of the FWA. This requires that the FWC must be satisfied that it is not contrary to the public interest to terminate the agreement, and that it is appropriate to do so having regard to the views and circumstances of the parties.

Further, agreement termination applications are rare due to the costs and resources required to make an application to the FWC. Even if an application succeeds, the FWC will often require undertakings from the employer that preserve pre-termination terms and conditions, including pay.[31]

Box 6: Inflexible terms at Port Kembla Coal Terminal

Port Kembla Coal Terminal successfully applied to terminate an agreement in March 2018, with termination to be effective on 29 April 2019. Senior Deputy President Hamberger declared that inflexible conditions relating to the company's self-managed team system 'need to go'.

Operations manager John Gorman said in January 2018 that Port Kembla's cost of exporting coal was 300 per cent more than the Port of Newcastle and that:

> Workers dictate the days when they work and their start and finish times.
>
> They approve their annual leave, approve their training assessment. We can't reward good performance and we can't manage poor performance …
>
> They get paid 22 per cent superannuation and they get paid up to 100 sick days a year.

From the time of application, it took 519 days for the FWC's termination order to take effect.[32]

This application would be unlikely to succeed under the proposed bill. Unproductive arrangements would be locked in indefinitely unless there is a significant threat to the viability of the employer's business.

Rather than imposing further barriers to agreement termination, reform should focus on making the process of terminating an expired enterprise agreement less onerous and costly. This will incentivise agreement-making and support the termination of outdated agreements with inflexible terms. This

[31] Examples include: Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540; Murdoch University [2017] FWCA 4472; AGL Loy Yang Pty Ltd T/A AGL Loy Yang [2017] FWCA 226 and on appeal, CFMEU v AGL Loy Yang [2017] FWCFB 1019; Port Kembla Coal Terminal Limited [2018] FWCA 2391.

[32] Port Kembla Coal Terminal Limited [2018] FWCA 2391 – NB the termination date was set at 12 months from the date of the Fair Work Commission's decision to allow the parties time to negotiate a replacement agreement.

could be achieved by implementing a more practical test for the FWC to apply when considering termination applications (for example, six months after the nominal expiry date of the agreement, it should be open for an employer to terminate an out-of-term enterprise agreement).