PATHWAY TO PRODUCTIVITY

The Resources and Energy Industry's Workplace Priorities for the 46th Australian Parliament

AUGUST 2019

AMMA
AUSTRALIAN RESOURCES & ENERGY GROUP

THE RESOURCES AND ENERGY INDUSTRY

The success of Australia's resources and energy industry has been critical to our nation's past, and is even more critical to its present and future.

The resources and energy industry directly employs more than 247,000 people and creates around 1 million jobs through flow-on effects. Through $285 billion in exports and $35 billion in taxes and royalties each year, the industry supports regional communities and funds vital infrastructure and public services.

The resources and energy industry's contribution to the prosperity of Australia should not be taken for granted. Australians rely on the industry to produce essential resources for a range of products and services that support them daily.

Our industry's vision is for productive and competitive workplace relations, unleashed through a flexible and future-focused system, safeguarding the industry's competitiveness in the global economy.

ABOUT AMMA

AMMA is Australia's resources and energy group and has provided a unified voice for employers on workforce and other industry matters for more than 100 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

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The Pathway to Productivity is through Industrial Relations Reform

During the 46th Parliamentary term, the Australian Government has a long overdue opportunity to fix inefficiencies and reduce red tape within Australia's workplace laws, boosting our nation's productivity and competitiveness.

Resources and energy employers urge Prime Minister Scott Morrison and his team to seize this chance for critical industrial relations reform.

Through its national representative group AMMA, the industry recommends key policy changes that would improve relations between employers and employees, lift business confidence, encourage real wage rises and restore Australia's reputation as an attractive place to invest and do business.

These changes address a number of elements within Australia's industrial relations system that cause significant productivity and competitive impacts in the daily operating of resources and energy businesses.

Workplace reform priorities identified by Australia's resources and energy employers:

1. **ADDRESS THE RAPID DECLINE IN AGREEMENT MAKING**

   Simplifying enterprise bargaining will encourage employers and employees to focus on improving productivity, creating jobs and delivering wage increases at the business level.

2. **RESTORE COMMON SENSE TO CASUAL EMPLOYMENT**

   Providing certainty to employers and employees about the rights and entitlements of casual workers should be a priority.

3. **ENABLE LIFE-OF-PROJECT AGREEMENTS**

   Allowing agreements that run the life of major project construction would deliver certainty and stability, encouraging future job-creating projects for Australia.

4. **REFORM THE ADVERSE ACTION PROVISIONS**

   Amending general protection and adverse action provisions will resolve issues and restore balance to the employee protections framework.

5. **RESTORE BALANCE TO UNFAIR DISMISSAL LAWS**

   Employers should be supported in terminating employees found to have breached safety and/or community standards of conduct.

6. **IMPROVE THE PERFORMANCE OF THE FAIR WORK COMMISSION**

   Address the longstanding concerns regarding the structure, operation, processes and performance of the Fair Work Commission.

7. **PASS THE ENSURING INTEGRITY BILL**

   Protect members of registered organisations from corruption, unlawfulness and misappropriate use of funds and positions of power.

8. **ENSURE FLEXIBILITY IN INDUSTRIAL AWARDS**

   Recent decisions from the review of Australia's awards system, including that related to annualised wage arrangements, threaten to undermine flexibility and employer confidence in the system.

This summary booklet builds the business case for reform.

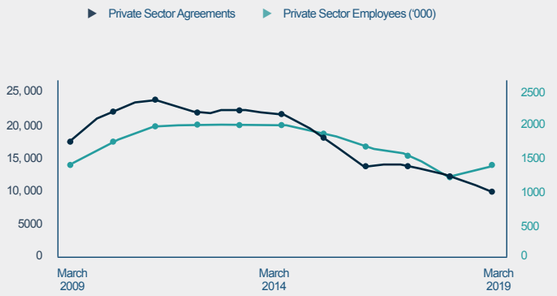
It includes clear reasoning and practical case studies for each of these eight reform priorities, all intended to assist the Morrison Government in pursuing more efficient, productive and competitive outcomes for Australian workplaces.

1 Address the rapid decline in agreement making

The complexity of the bargaining framework is greatly contributing to the rapid decline in the number of employers and employees utilising enterprise agreements.

Employers and employees are having to navigate a complex bargaining system that provides fewer productivity gains, allows higher levels of third party involvement in business management and/or operational matters, requires complicated procedures and higher costs. The complexity is compounded by an overly-technical, unduly strict and inefficient application of the approvals process by the Fair Work Commission (FWC). Today, only 12% of Australia's total private sector workforce is covered by an enterprise agreement, despite enterprise-level bargaining believed to be a fundamental principle of a productive and mutually-rewarding Australian industrial relations system since the early 1990s.

AGREEMENTS CURRENT AT THE END OF EACH QUARTER



> *There has been a 53% decrease in the number of enterprise agreements current in the private sector since the Fair Work Act (FW Act) was enacted in 2009. Most of this decline has occurred in the past five years[1].*

Employers who choose to participate in enterprise bargaining are facing roadblocks in the agreement making process. Common issues include whether employees who voted up an agreement "genuinely agreed" to the proposed agreement, the application of the better off overall test (BOOT) and the very few limitations on bargaining content.

Genuinely agreed

The FWC is taking an overly-stringent approach to assessing whether an employer took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the relevant employees. This is particularly the case where there is no union party to an agreement.

THE EMPLOYER EXPERIENCE — PROVING AN AGREEMENT IS GENUINELY AGREED

Numerous reports of members of the FWC going on 'fishing exercises' to find out what hasn't been explained to employees – requiring every single item that is less beneficial to be explained, despite the legislation not requiring that. To demonstrate the impracticality, the Building and Construction Award has 146 pages and over 80 allowances.

One employer which provided a 10-page summary of each individual EA clause and its effect, which was rejected by the FWC finding the employer was required to explain exactly which provisions of the EA were better than the award and which were not.

An engineering and construction member of AMMA faced rejection of its EA, on appeal by a union not a party to the agreement, because it did not have an employee that fell within each classification under several awards its new agreement was seeking to cover.

An AMMA member had an agreement rejected by the FWC, despite being endorsed by over 70% of the workforce, after the union raised during the approval process a very technical issue it had discovered more than 12 months prior, but had failed to ever raise with the employer during long-running bargaining.

[1] *Historical Trends data – current by quarter,* March 2019 (created 31/7/19), Australian Government Attorney General's Department.

The better off overall test

Another reason why employers are choosing to abandon enterprise bargaining is the application of the BOOT. In its current form the BOOT creates uncertainty during the agreement approval process and there are calls to replace it with a no-disadvantage test, including a recommendation in the 2015 Productivity Commission Inquiry into the Workplace Relations Framework.

PRODUCTIVITY COMMISSION RECOMMENDATION 20.5

The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.

The no-disadvantage test would be conducted by the Fair Work Commission. It would assess that, at the test time, each class of employee, and each prospective class of employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).

THE EMPLOYER EXPERIENCE — APPLICATION OF THE BOOT

One employer, which does not employ casuals, was required by the FWC to include a part-time clause in its EA in case an employee requested flexibility under s.65 of the FW Act; and then was later required to provide undertakings about casual employment.

The FWC requiring undertakings about hypothetical, highly unlikely scenarios, and about matters that employers are already required to comply with under the law (such as undertakings that employers will comply with the National Employment Standards).

The FWC regularly asking for more information or undertakings to be provided by an employer on three days' notice, despite the agreement sitting in the FWC for weeks or even months.

Sporadic requesting of undertakings or information, such as the FWC raising a number of issues with an agreement in the first round of approval, and then finding further issues requiring information or undertakings in subsequent rounds.

Prohibited content

Employers remain highly concerned about the very few limitations on enterprise agreement content, with unions often pushing for content that infringes on operations. Some of these include restrictions on the manner in which employers utilise labour or engagement of casuals, contractors or labour hire, rates that are payable to contractors, and requirements that an employer must reach agreement (as opposed to consult) with unions before it is entitled to introduce changes to working hours and rosters.

Unnecessary complexity and inefficiencies of this type has greatly contributed to the rapid decline in the number of employers utilising enterprise agreements and employees engaging in collective bargaining. There is an opportunity for the government to simplify Australia's agreement making system and encourage employers and employees to once again bargain over matters that will directly improve productivity and deliver wage increases at the business level.

Recommendations:

- Amend or clarify section 180(5) of the Fair Work Act 2009 regarding "genuinely agreed" to simplify the process for employers, employees and the FWC in approving agreements.
- Replace the BOOT with a simplified "no disadvantage test" that is a truly global test, not a line-by-line exercise in pedantry.
- Allow additional discretion for agreement approval taking into account the vote, views of all parties and the need to provide timely certainty to the business and its employees.
- Fast track approvals for agreements covering a majority of employees over a prescribed wage level / percentage above the safety net.
- Enforce stricter adherence for the FWC benchmark to approve agreements (i.e. 14 days).
- Consider reinstating the prohibition of certain content ("prohibited content") in enterprise bargaining that existed under the *Workplace Relations Act 1996*.

2 Restore common sense to casual employment

Casual employment plays an important role in providing flexible employment options for both employers and employees. However, thousands of Australian businesses remain exposed to billions of dollars of claims, after the Federal Court last year issued a decision changing the long-held interpretation of casual employment.

Until recently, workers who were engaged and paid as casuals pursuant to an industrial instrument were considered “casual employees” for the purposes of the FW Act.

The Full Federal Court decision in WorkPac v Skene effectively overturned the common understanding of the entitlements afforded to casual employees. While there were unique circumstances to this matter, the Court seemingly reversed the general principle that where an employee had accepted a higher rate of pay for being casually engaged, they should not be able to also claim for back-paid permanent entitlements such as annual leave and redundancy.

The *Fair Work Amendment (Casual Loading Offset) Regulation 2018,* introduced in December 2018, partially addressed this area of huge uncertainty by allowing employers to offset casual loading paid in an employee’s hourly rate against future claims for unpaid entitlements. While the Regulations are important, there needs to be a more permanent legislative solution to protect thousands of Australian businesses against potential claims for back-paid entitlements of current and former casual employees.

THE EMPLOYER EXPERIENCE — EXPOSURE TO SIGNIFICANT CLAIMS

In September 2018, it emerged that class action law firm Adero Law intended to use the Skene principle to target WorkPac, Programmed, Onekey Resources and Hays Recruitment for $325 million in unpaid entitlements. These companies are large providers of labour to Australia’s resources industry, including the coal sector which is Australia’s second largest exporter and employs 40,000 people. Such a law suit threatens the financial viability of these businesses, which are critical to the health of Australia’s resources industry and related export revenues.

In the wake of the Skene decision, AMMA is aware of several employers who have received enquiries from long-term casual employees who believe they may be owed back-paid entitlements. This is despite, in many cases, those employees actively choosing to be casually employed and even rejecting past offers of conversion.

The risk exposure for individual employers, both in the resources sector and the broader economy, may run into billions of dollars and place businesses into receivership. Further, the issue raises the spectre of a feeding frenzy of US-style class action claims.

Where employers are exposed to such payments it may not be viable for operations to continue resulting in administrators being appointed and posing a significant drain on the Federal Government’s Fair Entitlements Scheme. Providing certainty to employers and employees about the rights and entitlements of casual employees must be a priority for the 46th Parliament of Australia.

Recommendations:

- Defend the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* against any challenge.
- Amend the National Employment Standards in the FW Act to clearly define a casual employee as one that has been “engaged and paid as such”.

3 Enable life of project greenfields agreements

Future resources and energy investment is being impacted by unnecessary limitations in Australia’s industrial relations system which leave multi-billion dollar projects exposed to strike action in the middle of the construction period. With nation-building resources and energy projects taking on average seven years to build, enabling greenfields agreements to cover the life-of-project construction would provide certainty around cost and timing and assist in securing the next wave of major project investment.

This reform was recommended by the Productivity Commission in its 2015 review of Australia’s workplace relations system. It has also been suggested more recently that this reform could have bipartisan support.

> **PRODUCTIVITY COMMISSION RECOMMENDATION 20.4**
>
> The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an enterprise agreement to specify a nominal expiry date that... matches the life of a greenfields project.

The case for ‘life-of-project agreements’ has been argued by employers since before the FW Act commenced in 2009. Industry foresaw that the ability for protected industrial action to be taken mid-construction would present significant risk and uncertainty around project costs and timeframes. This concern came to fruition, with several major resources and energy projects being exposed to threats of protected industrial action only 12 months or less from expected construction completion.

THE EMPLOYER EXPERIENCE — DISRUPTIONS TO LARGE SCALE PROJECTS

The Chevron-operated Gorgon LNG Project was subject to a number of concerted union campaigns leveraging an imbalanced industrial relations system to delay and frustrate project completion. In November 2014, with construction 87% completed, negotiations with three unions for a new enterprise agreement broke down and industrial action was threatened, but eventually averted. In August 2015, almost 2000 workers threatened to strike unless its roster demands were met. Again this was ultimately avoided but not before signiifficant delays and cost impacts to the project.

A similar scenario was narrowly avoided at another multi-billion dollar LNG project. Again, with less than 12 months until construction was to be completed, the project was threatened with industrial action by unions seeking to reduce the roster of the construction workforce, which would increase the costs and draw out the timeline for project completion. Multiple Protected Action Ballot Orders (PABOs) were issued in the final phase of construction, with strikes narrowly avoided.

Not only does the threat or actual occurrence of industrial action impact individual projects, but it ultimately diminishes Australia’s reputation as a stable and attractive place to build world-class resources and energy projects. Fixing this unnecessary risk is critical to securing the next wave of major project investment.

If the milestone dates of a project extend beyond the nominal expiry date of the project agreement, there should be an option for the parties to apply to the FWC to arbitrate for an extension of the project agreement, during which the protection from industrial action would remain.

Recommendations

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

4 Reform the Adverse Action provisions

The adverse action provisions of the FW Act create serious and escalating challenges for employers through excessive risk exposure and the costs of managing unmeritorious claims. The provisions also place significant pressure on the Federal Court system due to the failure of the FWC to effectively manage growing numbers of claims at conciliation.

The Adverse Action provisions were introduced by the former Labor Government in 2009 as a vast and unjustified extension of employee protections that existed under previous Australian workplace laws. The provisions appear to have no economic or social purpose, outside of creating a growing field of litigation. Adverse Action claims have become very attractive to applicants due to the unlimited compensation, difficulty in defending a claim and orders that can be made by the courts.

> *The number of general protections applications involving dismissal increased by 10 per cent, to 4,117 in 2017–18 from 3,729 in 2016–17[2].*

The growing number of Adverse Action claims can be attributed to the unlimited cap on compensation and the financial and reputational cost of defending claims leaving employers with no choice but to pay significant financial settlement sums regardless of whether the claim holds any merit. The nebulous concepts of "workplace rights" and "adverse action" make proactive compliance difficult to achieve. Legitimate performance management is also more regularly challenged. Employers are exposed to claims up to six years from when an action is alleged to have occurred. Defending claims is extremely difficult.

It is necessary that the FWC appropriately deal with Adverse Action claims as intended under the FW Act. This would see matters resolved at the FWC level instead of seeing vexatious claims reach the costly court jurisdiction and forcing employers to pay settlements.

THE EMPLOYER EXPERIENCE — EXPOSURE TO VEXATIOUS CLAIMS

In a 2018 survey of resources and energy employers, 53% reported some exposure to the Adverse Action provisions. 86% said the potential for unlimited compensation and the reverse onus of proof would lead them to seek settlement of any claim, regardless of merit.

Several AMMA members have received claims from former employees claiming they were dismissed due to their union involvement, when they were dismissed for performance issues. There is a growing sense that the Adverse Action provisions are being strategically preferred to unfair dismissal due to the higher chance of monetary settlement.

An AMMA member received an Adverse Action claim from a former employee, almost a year after their resignation, claiming they resigned due to unfair treatment from their line manager. The claim was found to be baseless, with the former employee "fishing for a payout".

Recommendations:

Legislative reform could focus on these areas:

- Clearly define how exercising a "workplace right" applies in relation to Adverse Action claims and amend the FW Act to introduce exclusions for complaints that are frivolous and vexatious.
- Introduce a high income threshold for General Protections claims as well as a cap on the compensation that can be awarded.
- Introduce a "genuine reasons" defence to relieve risk and uncertainty for employers seeking to undertake appropriate and genuine employee performance management.
- Cease outsourcing Adverse Action claims to public servant conciliators and allocate all Adverse Action claims to the appropriately qualified statutory-appointed tribunal members.
- Remove the reverse onus of proof for Adverse Action claims and the additional protections covering anti-discrimination (more than adequately covered by anti-discrimination laws).

[2] Annual Report 2017-18, June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.

5 Restore balance to unfair dismissal laws

Under the FW Act employers are not able to dismiss employees for serious misconduct without fear of them seeking compensation and / or winning their jobs back. This has seen ludicrous outcomes at the FWC where employees dismissed for serious misconduct have been reinstated and / or awarded compensation.

> *In 2017-18, in 9% of unfair dismissal matters before the FWC, reinstatement was awarded to employees where the FWC determined the dismissal was harsh, unjust or unreasonable.*[3]

Businesses need to be able to take action to protect their employees, customers and the general public. Employers are increasingly exposed to unfair dismissal matters before the FWC despite having to conduct often lengthy investigations prior to making a decision to dismiss an employee.

There should be no question of reinstatement where an employee is terminated for serious misconduct. Where a business has made the decision to terminate an individual's employment based on the facts and circumstances at hand in the wake of serious misconduct that decision should stand. The FWC should not substitute its own decision for that of the employer. The ability for an employer to take action to maintain a safe and healthy work environment for all employees is critically important, including for example after operating heavy machinery whilst under the influence of drugs, or for proven allegations of sexual harassment or violence in the workplace.

THE EMPLOYER EXPERIENCE — UNBALANCED UNFAIR DISMISSAL LAWS

An employer in the resources industry dismissed an employee after he made abusive comments to a contractor (who later attempted suicide), including saying, "You're a f**king scab". On appeal the Full Bench found the termination was harsh, as his scab comment was only one act of harassment, and occurred in the context of a protracted industrial dispute that had resulted in significant tension in the workplace. He was awarded over $68,000 in compensation.

A fuel tanker driver was dismissed for driving his 14.5 tonne tanker 28 km/h above the speed limit on a noted high-risk stretch of road. The FWC found there was a valid reason for the dismissal however reinstated the driver for reasons including due to his contrition and the likely impact of dismissal given his age (65) and length of service (39 years).

A crane operator on his final warning was dismissed after dropping a large steel coil onto a walkway – a critical safety incident that occurred due to his third breach of policy in 12 months. The FWC found a valid reason for dismissal but reinstated the operator due to factors including his age, length of service and mortgage. Incredibly, the FWC member took into account his own experiences in dealing with the employer when he was a union organiser many years ago.

Recommendations:

Amend the unfair dismissal provisions of the FW Act to:

- Exempt terminations for serious offences and misconduct from contesting dismissal.
- Provide that where a valid reason for termination exists, the termination should stand.
- Ensure each unfair dismissal application is determined on its merits only, not influenced by employee circumstances (such as age, length of service, personal circumstances etc.).
- Preclude workers earning above a high income threshold from unfair dismissal claims.
- Increase application and hearing fees.

[3] Annual Report 2017-18, June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.

6 Improve the performance of the Fair Work Commission

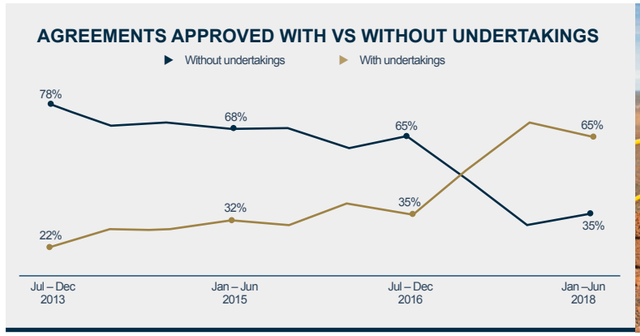
The experiences and frustrations of employers regarding the structure, operation, processes and performance of the FWC are well-documented. Enterprise agreements are taking on average 76 days, and in many cases several months, to approve. This delays pay rises for employees and forces employers to operate under outdated terms and conditions. Many ultimately bypass the enterprise bargaining system altogether.

There is also a great degree of variability in agreement approval under the FW Act, including inconsistent approaches by the FWC as to whether an agreement meets statutory criteria, the BOOT, or requires undertakings in order for agreements to be approved. As a result of the pedantic assessment process employers are increasingly required to make undertakings, adding to the administrative burden on employers seeking approval of enterprise agreements. There needs to be significant improvement to the approval process for employers to have confidence in the system into the future.

THE EMPLOYER EXPERIENCE — DELAYS AND FRUSTRATION AT THE FWC

One AMMA member waited 125 days to receive agreement approval, delaying pay rises and other benefits for employees. With approximately 80 enterprise agreements being made by this employer, most are requiring undertakings which were virtually unheard of five years ago.

One contractor providing services to an onshore and offshore gas employer has been fighting to have its enterprise agreement approved by the FWC since its approval by employees and lodgement with the FWC more than 12 months ago.



In December 2018, the FWC approved 65% of enterprise agreements with undertakings compared to December 2016 where the same percent of enterprise agreements were approved without undertakings.[4]

Other areas of concern about the performance of the FWC include the unfair dismissal and general protections matters. The FWC is failing to effectively mediate Adverse Action matters at the tribunal level, instead seeing a record number of matters reach the costly Federal Court jurisdiction. The high degree of inconsistency in decision making from the FWC is causing great frustration and confusion for employers.

Recommendations:

- Enact the changes to agreement approvals and unfair dismissal laws recommended within this policy booklet.
- Appoint new tribunal members with real-life business experience to restore confidence in the FWC as an administrative tribunal that understand the practical realities of running a business.
- Create a new specialist appeals jurisdiction within the FWC to provide clarity and consistency to stakeholders and be consistent with the process in many other courts and tribunals.

[4] Annual Report 2017-18, June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.

7 Pass the Ensuring Integrity Bill

Confidence in the conduct and operation of all Registered Organisations, including trade unions and employer groups, is essential to the success of the resources and energy industry. *The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* ("Ensuring Integrity Bill") contains a range of measures seeking to lift the standards, behaviours and transparency of Registered Organisations in Australia.

The Ensuring Integrity Bill is good Australian public policy that has been stalled before the Senate since October 2017. It seeks to restore regulatory balance and, in turn, regenerate public confidence in relation to the conduct and operation of Registered Organisations in Australia.

Applying equally to all Registered Organisations, including trade unions and employer groups, its provisions are well-balanced and consistent with a number of key recommendations of the Royal Commission into Trade Union Governance and Corruption.

The cost impact of continuing and expanding lawlessness is of great concern for resources and energy employers. Since the Royal Commission handed down its findings, Australia's most recidivist law-breaking union, the Construction, Forestry, Mining and Energy Union (CFMEU), was allowed to merge with another highly militant law-breaking union, the Maritime Union of Australia (MUA), in the absence of a public interest test which the Ensuring Integrity Bill would have introduced.

THE EMPLOYER EXPERIENCE — LAWS REQUIRED TO KEEP TRADE UNION POWER IN CHECK

The CFMMEU now wields unprecedented power for a private sector trade union in Australia, with its amalgamated resources including:

- around 145,000 members;
- approximately $310 million in assets; and
- more than $146 million in annual income.

Such significant resources have emboldened the CFMMEU to be even more brazen in its law-breaking, disregard for the Courts and rule of law, and in wielding political power. Its size and financial backing now allows it to have:

- less regard to union member views and interests;
- less need for compliance with workplace laws, given penalties pale in comparison to income and are not an effective deterrent; and
- greater control of the Australian Council of Trade Unions (ACTU) and, in turn, influence of the Australian Labor Party (ALP).

The imminent escalation of unlawful conduct promised by unions is alarming for employers in the resources and energy sector. As a result of the merger, there will be a coordinated effort to impose its unlawful and disruptive tactics across the entire resources supply chain – "from pit to port" – servicing many of Australia's largest and most important resources projects.

The international reputation of Australia's ports and resources supply is at stake, as is the global trade of Australian commodities which is a key pillar of our national economy and living standards - the industry paid an estimated $177 billion in company tax and royalties in the decade to 2015-16.

Recommendations:

- Secure the support for the Ensuring Integrity Bill in Parliament to safeguard the community and regenerate public confidence in relation to the conduct and operation of Registered Organisations in Australia.

8 Ensure flexibility in industrial awards

The antiquated industrial award system in Australia – comprised of 122 sets of minimum standards applying across historical, outdated industry categories – makes an already over-regulated industrial relations framework even more complex and difficult for employers and employees to navigate.

Noting Australia is the only country in the world with an industrial award system, AMMA's longstanding position is that awards should be abolished entirely in favour of a simplified safety net. Nonetheless, should the nation persist with industrial awards, it is essential the system provides necessary flexibilities as to not stifle competitiveness and productivity of Australian businesses in the modern, evolving economy.

Unfortunately, this is exactly what the impact of the Fair Work Commission's February 2019 decision on annualised wage arrangements will do.

Delivered under the ongoing awards review process, the decision impacts annualised wage provisions in 19 modern awards. Instead of simplifying and providing clarity in the award system, the decision has instead created unnecessary complexity and regulatory burden on employers to remain compliant.

THE EMPLOYER EXPERIENCE — IMPACTS OF THE ANNUALISED WAGE CHANGES

Employers have expressed significant concerns about the loss of flexibility for both employers and employees resulting from the introduction of the new model annualised wage clauses. These new provisions in 19 commonly-used awards introduce a number of compliance requirements on employers engaging employees on annualised wage arrangements, including:

- Advising employees in writing and keeping records on how the annualised wage is calculated, breaking it down into separate components factoring in ordinary hours, overtime and penalty assumptions;
- Making additional payments to employees if they work hours outside the outer limits of their annualised wage arrangements;
- Keeping records of start and finish times and unpaid breaks which must be signed by employees each pay period; and
- Conducting annual reconciliation against the relevant award and rectify any shortfall within 14 days.

The new provisions become operative from 1 March 2020, providing employers with less than sufficient time to review current annualised wage arrangements and redraft clauses in employment contracts.

This decision results in a major imposition on employers to achieve compliance, requiring businesses to invest in and implement new technology or payroll processes to capture and record detailed hours of work to conduct the compulsory reconciliation processes. The new time-keeping requirements are enormously out-of-step with 21st century employment practices. The administrative burden and costs are a major concern, but so too is the cultural impact of imposing strict administrative procedures on modern workforces.

The resources and energy industry pays, on average, over 2.5 times the award requirements. There is no amount of calculations or interpretations for annualised wage arrangements that would ever see people paid below the relevant awards.

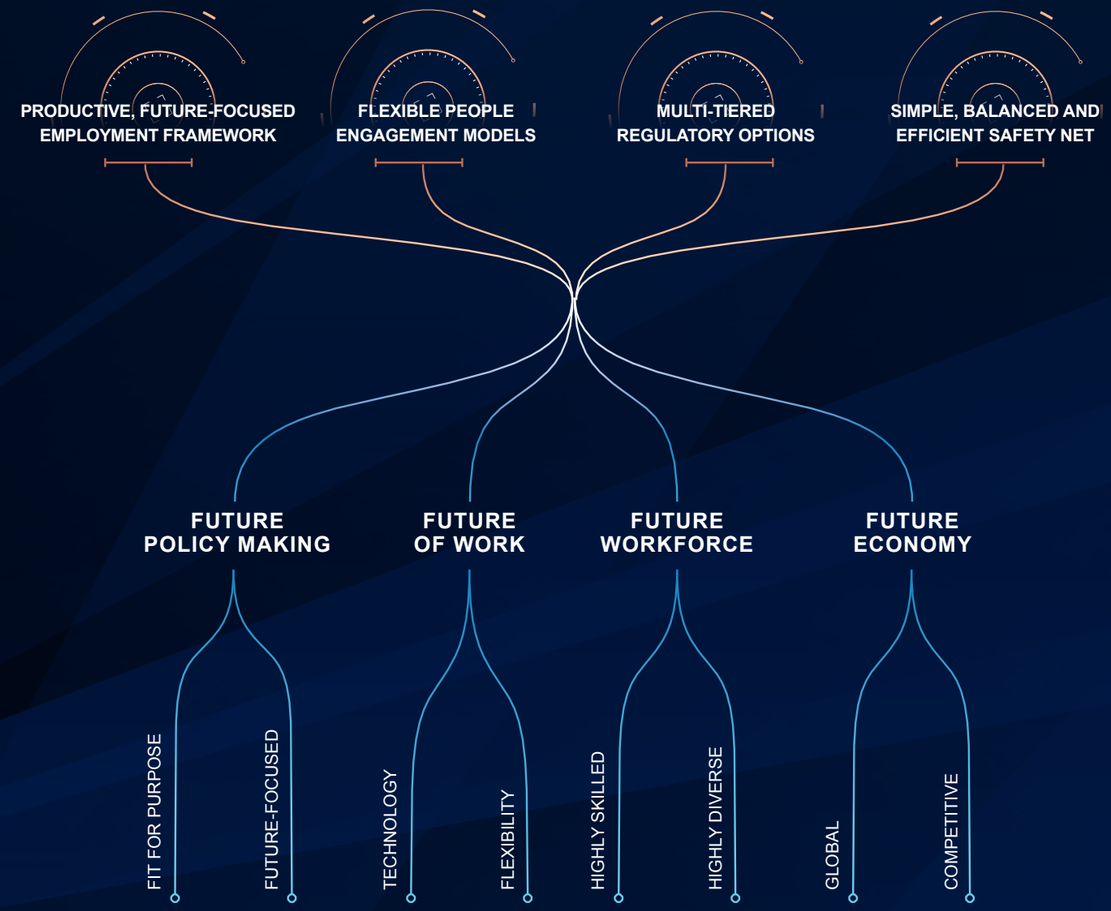
This time and resources would be far better spent on productivity and safety initiatives.

Recommendations:

- Amend the modern awards provisions in the FW Act (s.139) to simplify and minimise the regulatory burden required to demonstrate employees are not disadvantaged by annualised wage arrangements.
- Ensure future reviews of Australia's industrial awards broadly consider whether the system is providing necessary flexibility to employers and employees, rather than focusing solely on the matter of employee advantage / disadvantage.
- Provide for less administrative requirements and greater exemptions in the awards system for high-paid industries.

A NEW HORIZON

Guiding Principles for the Future of Work



"The only way forward for Australia's future workplaces is less regulation, fewer restrictions and through policymakers resisting the push for intervention and protectionism." — *A New Horizon: Guiding Principles for the Future of Work.*

Learn more about AMMA's long-term vision for the future of work regulation at amma.org.au