Fostering cooperative work through a modern industrial relations system.

SUBMISSION TO THE AUSTRALIAN ATTORNEY-GENERAL'S 'COOPERATIVE WORKPLACES' DISCUSSION PAPER

MARCH | 2020

About AMMA

AMMA is Australia's resources and energy industry 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.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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> AMMA will encourage initiatives within enterprises to achieve improved employee contribution to productive and mutually rewarding working relationships. AMMA will actively promote employee involvement that centres on the direct employer-employee relationship."
>
> – AMMA, *The Way Ahead*, 1988

> Underlying all of AMMA's activities is the belief that direct, cooperative and mutually rewarding relationships between employers and employees at the enterprise level are the best way to achieve efficient and productive workplaces."
>
> – AMMA, *Beyond Enterprise Bargaining*, 1999

> The change in workplace relations presented by the Fair Work Bill fails to recognise that flexibility, cooperative direct relationships with employees and reduced third party intervention has enabled the resources sector to take full advantage of the international demand for Australian resources."
>
> – AMMA, *Submission to Senate Committee Inquiry into the Fair Work Bill*, 2008

> As Australia prepares to support efforts in managing organisational change, technological and digital transformation, employers overwhelmingly believe the future of work is one built around more flexibility… Open and flexible regulatory models will be critical to unlocking these opportunities."
>
> – AMMA, *A New Horizon*: *Guiding Principles for the Future of Work,* 2018

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SUMMARY: AN IR SYSTEM FOR COOPERATIVE WORK

1. Australia's resources and energy employers commend the Morrison Government for seeking to better align workplace relations with cooperation, mutual value, harmony and productivity.

2. Cooperative and productive workplace relations is critical to the success of the resources and energy industry; and the success of the resources and energy industry is critical to Australia's economic wellbeing, strength of employment and living standards.

3. The industry directly accounts for one third of the growth in Australia's GDP with record export earnings of $282 billion.[1] The national investment pipeline contains $250 billion of new project capital which, if all was to be secured, would create around 100,000 new Australian jobs by 2025.

4. It is the strong view of AMMA, the industry's national employer group, that workplace cooperation can only be possible if underpinned by a regulatory system that is flexible and future-focused; devoid of unnecessary red tape, complexities and other barriers to employers and employees reaching productive outcomes of mutual value.

Australia must get back on the journey of IR reform…

5. For most of Australia's post-Federation history, the national industrial relations system was aligned to the nation's broader economic, employment and social development. The system of centralised determinations, conciliation and arbitration administered by a national IR tribunal functioned well for much of the 20th century as new industries emerged and the labour market matured.

6. By the 1980s it was clear this system would no longer support Australia's growth in an increasingly competitive and globalised economy. Successive bipartisan reform efforts of the Hawke, Keating and Howard Governments sought to unleash the productivity potential of Australian businesses and employees by putting the power to determine work conditions in the hands of the enterprise and ultimately the individual. The economy and labour market grew and prospered as a result.

7. This journey was explicitly ground to a halt in 2009 by the Rudd Government's Fair Work Act – stripping away flexibilities from the system, massively expanding the role of third parties in the workplace, centralising new powers with a bolstered national IR tribunal and adding unprecedented red tape and complexities into the employment system.

8. The result has been a disaster for cooperation, productivity and competitiveness of Australian workplaces. Unemployment is up, growth has stalled, and investment is tentative. After a failed 10-year experiment of trying to make 1970s-style regulation work in 21st Century workplaces, it is up to the Morrison Government to get Australia's journey of productive IR reform back on track.

The future of work is all about flexibility and choice…

9. It is increasingly clear that any productive, modern and future-focused IR system must have flexibility and choice at its foundation. The Australian workforce is evolving - technology is rapidly changing the way we work; for the first time there are four generations of employees in the workplace; skills are advancing; and employees are more individually motivated and seeking a greater direct relationship with their employer than ever before.

10. Australia's approach to regulating work must evolve with our national workforce. An IR system genuinely seeking to support employees and employers in the 'future of work' must offer greater flexibilities in the way they engage with one another. Agreement making options must be opened up and, in high-paying sectors like resources and energy, their approval and ratification made as efficient and low-cost as possible.

11. Any truly future-focused IR system must include statutory individual agreement options. This featured in Australia's modernised employment framework from 1996-2009 and was utilised in the

[1] Department of Industry, Innovation and Science, Office of the Chief Economist, Resources and Energy Quarterly September 2019 accessed 3 October 2019

spirit of cooperation in the skills-driven resources and energy sector, where the traditional adversarial approach to employer/employee relations has ceased to exist since the 1980s.

12. It is frankly ludicrous that in 21st Century Australia, with amongst the highest wages, skills, employee protections and safety net in the world, the national IR legislation would expressly prohibit highly paid individuals entering into a direct statutory agreement with their employer. Forcing this type of employee to engage with employers through a complex web of regulations and third-party involvement is hardly a recipe for cooperation, trust and mutual value in 2020 and beyond.

The IR system must drive cooperation and mutual value, not detract from it…

13. Australia's workplace legislation from 2009 to today contains significant barriers and detractors to workplace cooperation and harmony. The next IR system must correct these errors and ensure the legislative framework drives mutual value, trust and productivity:

    a) Collective bargaining should focus parties on matters pertaining to the direct employment relationship, productivity measures and outcomes of mutual value;

    b) Third parties should have a balanced and appropriate role where explicitly invited into the employment relationship, and industrial action must be a true last resort during talks;

    c) Employee protections must support management decision-making and allow employers to send clear signals to the workforce about safety and performance standards;

    d) The safety net should be simple and well understood, freeing up high-paying employers and sectors from unnecessary red tape and regulatory burden; and

    e) Administrative efficiency should be paramount, with arrangements genuinely agreed between employers and employees fast-tracked through the approvals process and not subject to unwarranted delays and third party appeals and interventions.

14. Only through addressing clear and longstanding deficiencies of the current regulatory approach can the Morrison Government ensure the IR system supports employers and employees to reach cooperative and harmonious workplace relationships. These are the critical areas in which to start.

An IR system for cooperative work needs an effective administrator…

15. An IR system that truly supports cooperative workplace outcomes must extend beyond the legislation. Such a system needs a high-performing, user-focused national IR tribunal that reflects the balance, respect and mutual value that the new IR system seeks to achieve. In the experiences of Australia's resources and energy employers, as well as other business sectors, the current Fair Work Commission fails to meet such a standard.

16. At present the national IR tribunal is suffering from a lack of employer confidence in the consistency and practical consideration in its decisions. Dysfunction and politicking is rife. A small cohort of four senior members control 87% of significant Full Bench matters and new resources with contemporary business, legal and human resources experience, including talented female tribunal members, are being completely sidelined from any decisions of significance.

17. AMMA recommends the Morrison Government pursue a full-scale review of the Fair Work Commission, undertaken by the Productivity Commission. Such a review would identify ways the national IR administrative tribunal can properly support the Government's campaign to have employer-employee relations in Australia once again grounded in their common interests – the creation and sustainability of high quality, rewarding and valuable work opportunities in a competitive and growing first-world economy.

18. Resources and energy employers are pleased to present this submission to the Morrison Government and urge it to seize the opportunity for IR reform that is critical, long overdue and clearly in the short and long-term national interest.

Figure 1.1: The Journey of Australian Industrial Relations Reform

1904 » AUSTRALIA'S IR SYSTEM BEGINS

- Conciliation and Arbitration Act 1904 passed
- Creates Commonwealth Court of Conciliation and Arbitration
- Begins settling disputes and setting Awards
- Supports Australia's emergence as a nation

1907–1950 » SOCIAL & LABOUR MARKET ADVANCEMENT

- Sick leave, annual leave and minimum wage set
- 44 hour standard working week introduced
- Improvements to women's wages
- IR system provides stability and facilitates change

1950S » SEPARATION OF POWERS

- National IR tribunal founded with separate functions to new
- Industrial Relations Court
- Awards system keeps growing, includes overtime, penalty rates and other conditions
- IR system keeping pace with significant economic development and maturing of labour market

1960-1980 » SYSTEM BREAKS DOWN

- Demands on award system become too great
- Industrial disputes escalate and reach historic high in 1974
- Wages inflation becomes serious social and economic problem
- System of centralised control, heavy regulation no longer fit for Australia's economy

1983 » THE ACCORD NEGOTIATED

- ALP Government negotiate Prices and Incomes Accord with union movement
- Restraint in wages claims traded-off with increased social spending
- Cooperative approach sees labour market problems brought under control
- Supports micro-economic reforms pursued across 1980s.

1993 » ENTERPRISE BARGAINING ARRIVES

- Industrial Relations Reform Act 1993 begins de-regulation of labour market
- Ends almost 90 years of centralised IR decision making in Australia
- Promoted workplace level cooperation and mutual value
- Would support deregulation in key economic policy areas

1996 » DEREGULATION GATHERS MOMENTUM

- Extended agreement making options for employers and employees
- Provided industrial statutory agreements (AWAs) underpinned by safety net
- Further reduced third party involvement in Australian workplaces
- Would facilitate a decade of strong economic and employment performance

2005 » MORE EFFICIENCY AND FLEXIBILITY

- Workplace Relations Amendment (Work Choices) Act 2005 further breaks down employment red tape
- New Workplace Authority agency created to streamline agreement approvals
- Unemployment drops, wages rise, economy grows
- Public support for deregulation begins to falter, IR system becomes heavily politicised.

2009 » THE JOURNEY COMES TO A HALT

- Fair Work Act 2009 overhauls IR system
- Multiple layers of regulation and safety nets created
- IR tribunal given expanded centralised decision-making powers
- Third party involvement emphasised at every opportunity
- Cooperation and productivity breaks down in Australian workplaces)
- Economic and employment metrics begin going backwards

2020 AND BEYOND » A MODERN ECONOMY SEARCHING FOR ITS IR SYSTEM

- Technology and demographics are rapidly changing the profile of Australian workplaces
- Highly skilled, individually-motivated employees seek direct engagement
- Businesses seek flexibility and productivity in a highly competitive global marketplace
- Employers and employees held back by 1970s-style IR system
- Can Australia get its journey back on track?

PART 1: THE JOURNEY OF WORKPLACE REFORM

19. Throughout most of the 20th Century Australia's industrial relations system had been largely aligned to the needs of a nation undergoing significant social, political and economic development.

20. This chapter examines how the failure of Australia's industrial relations system to meet the needs of present day workplaces is a relatively recent state of affairs - one that does a gross disservice to the important role the industrial relations system played in the early development of Australia's economy, and unwinds the 20 years of bipartisan reform efforts that commenced in the 1980s.

21. For the industrial relations system to facilitate cooperative and productive workplaces in the 21st Century, Australia must regain its mettle for industrial relations reform and seek to restructure the system so it once again aligns with the needs of the present-day economy and labour market.

1.1 Australian industrial relations: 1904-1990s

22. For eight decades after Federation, the fundamentals of Australia's industrial relation system remained virtually unchanged. The passage of the *Conciliation and Arbitration Act* in 1904 heralded 84 years of centralised determinations and outcomes relating to industrial relations in Australia.

23. In the first half of the 20th Century this system served Australia particularly well. In addition to making determinations and setting standards which would become "Industrial Awards", the Commonwealth Court of Conciliation and Arbitration played a critical role in minimising the impacts of strikes during the emergence of Australia as a self-sufficient young nation with the ambition and resources to become a global trading force.

24. This approach promoted cooperation between capital and labour early in the century where a highly combative environment meant there was minimal capacity for employers and trade unions to agree on employment conditions without third party involvement. The system also promoted stability and adaptability during key milestones including the introduction of a minimum wage, paid annual and sick leave, the 44 hour standard working week and the move towards equality for women's wages.

25. By the 1950s the award system had grown to cover even more occupations as the labour market began opening up to new industries driven by Australia's economy maturing. Greater demands were being made on the award system which grew to encompass provisions for overtime and penalty rates along with other employment conditions.

26. In 1956, a landmark High Court constitutional ruling saw the Commonwealth Court of Conciliation and Arbitration separated into two 'fit for purpose' bodies – an administrative tribunal called the Conciliation and Arbitration Commission (the first iteration of what is now the Fair Work Commission) and the Industrial Relations Court (which in 1977 transferred its powers to the Federal Court of Australia).

27. Australia's industrial relations system was no longer a mechanism for setting minimum conditions and regulating employment outcomes – it had become much more complex to serve Australia's ongoing development.

28. The first real indication that this centralised system may not be suited to Australia's long-term future emerged in the 1960s. A militant trade union movement began organising large widespread strikes in pursuit of terms and conditions well above the awards determined by the Conciliation and Arbitration Commission and its predecessor body.

29. By the 1970s this unrest had reached crisis point. In the first three months of 1974 Australia had reached a historic peak in industrial action, with a record 2.5 million working days lost to either strikes or lockouts. Not only was Australia subject to economic disruption as a result of industrial disputes, the above award payments had significant inflationary effects on wages which became a major social and economic problem as the decade wore on.

30. It had become evident that while the historic award system was appropriate for regulating labour relations earlier in Australia's economic development, parties were now making more and more

demands on the system which could not be sustained. The lack of cooperation between employers, employees and trade unions was having a detrimental impact on the economy – Australia was becoming an inflationary strike-prone nation. Addressing this would require a more cooperative approach.

31. In 1983, the Australian Labor Party (ALP), then in opposition, negotiated the Prices and Incomes Accord ("Accord") with the Australian Council of Trade Unions (ACTU) and promised other kinds of employment benefits, including superannuation, if it won office. In return for increased spending on employment initiatives and social programs, the union movement agreed to restrain wages claims by linking pay increases to cost of living and productivity factors.

32. Once again the nation's approach to industrial relations would support cooperation and meet the needs of the nation at the time. During the 1980s Australia began pursuing a number of important microeconomic reforms including deregulating a number of industries and dismantling tariffs designed to protect some Australian businesses, but ultimately shutting the nation off to the rapidly developing globalised economy.

33. The Accord played its role during this time by moderating wages growth and helping the labour market through the adjustment towards less regulated, less protectionist economic policy. However it soon become clear the Accord provided little scope for individual companies to respond to their unique operating requirements or adjust to the major changes in their competitive environment.[2]

34. Industry and government began looking to a better suited, longer-term option. It was this process that led to the shift towards enterprise bargaining.

1.2 Major industrial relations reform efforts

35. By the 1990's, wholesale and major reform had begun with the move to an enterprise bargaining based system. Significant reform was introduced by the Keating ALP Government's *Industrial Relations Reform Act 1993* which sought to make the enterprise the primary level at which employment outcomes including wages and conditions were negotiated.[3]

36. This was the first genuine attempt at deregulating Australia's industrial relations system, ending almost 90 years of centralised decision making on behalf of employers and employees by the national employment tribunal.

37. Most importantly, in the context of this discussion paper, the transition from a centralised wage fixation system towards enterprise-based bargaining ensured that the framework provided greater options for cooperation in the workplace. The enterprise bargaining system carried with it the expectation that employers and employees should work together at the enterprise level to agree on conditions of employment, subject to the safety net of awards, and that this ability to agree on the unique circumstances of individual enterprises would lead to greater productivity and competitive outcomes.[4]

38. This new system provided individual enterprises with the autonomy to deal directly with their employees and a mechanism to balance the bargaining powers when setting wages and conditions at the workplace level.

39. A new legal right for both employees and employers to threaten and/or take industrial action against one another, within the strictly limited parameters of the Act's bargaining provisions, was also a modern feature of the system. It was widely recognised that achieving the right balance would foster cooperation and thus contribute to improved productivity.

[2] G.W. McGill (1999) *Beyond Enterprise Bargaining,* AMMA, p 7.
[3] KPMG (2015) Workplace Relations and the Competitiveness of the Australian Resources Sector, AMMA.
[4] Productivity Commission Final Report, Volume 2, p 647.

40. The fundamental changes in the system that had already begun to occur were consolidated and extended by the Howard Coalition Government with the introduction of the *Workplace Relations Act 1996.*

41. These reforms built on the collective agreement options introduced by the previous government and further provided access to individual statutory agreements known as Australian Workplace Arrangements (AWAs). This new framework supported more direct relationship between employers and employees, with a reduced role for third party involvement, particularly where no conflict existed between the employer and employee parties. The approach provided greater flexibility and recognised, for the first time, that many employees in the increasingly skills-based modern labour market were perfectly capable and willing to look after their own interests.

42. As noted in the second reading speech (emphasis added):

> *The reforms portray a fundamental break with the past, introducing another paradigm shift to the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long—that employees are not only incapable of protecting their own interests, but even of understanding them, without the compulsory involvement of unions and industrial tribunals.*[5]

43. With this policy breakthrough it was clear that Australia was on the right path to achieving an industrial relations system that would keep pace with the evolving economy and labour market in a highly competitive global market. The system now provided employers and employees with flexibility and choice to engage in a variety of agreement making options, both collective and individual, which suited the needs of the enterprise and its workforce.

44. By the late 1990's, these successive reform efforts had resulted in significant improvements across key measures of Australia's economic and employment performance through real wages growth, significant labour productivity increases and steady employment growth due to a modest downward trend in real unit labour costs.[6]

45. Further reforms to the industrial relations system, and in particular the bargaining framework, continued with the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices). In combination with other micro and macro-economic reforms, the Work Choices legislation attempted to consolidate and build upon the direction of previous reform periods and reflect the dynamic and increasingly competitive economic environment facing Australian businesses large and small.

46. In AMMA's view the general objectives of the 2005 reforms reflected a natural and appropriate progression of the successive industrial relations deregulation efforts that preceded it. Notably, creating a new streamlined statutory agency – the Workplace Authority – to certify individual statutory agreements made between employers and employees would introduce a level of efficiency not previously seen in Australian's employment system and remove a key administrative burden from the Australian Industrial Relations Commission, thus leaving the tribunal to specialise in dispute resolution, safety net and award matters.

47. Nonetheless, this part of Australia's industrial relations journey was too short-lived for the nation to properly realise and assess the benefits. History shows some elements of Work Choices, notably the removal and/or softening of some longstanding employee protections, laid the platform for the labour movement to campaign effectively against the Howard Government's deregulation agenda, led by the highly successful ACTU "Your Rights at Work" campaign.

48. As since publicly noted by members of the Howard government, politically speaking the reforms "went too deep", with a significant portion of the general public uncomfortable with the pace and depth of labour market deregulation.

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[5] Second reading speech, House of Representatives, Thursday, 23 May 1996: http://www.airc.gov.au/kirbyarchives/2009exhibn/legislation/1996_2rd.pdf

[6] Peter Dawkins, 'The Australian Labour Market in the 1990s', 2000.

49. The biggest travesty of the brief Work Choices era is that it created an environment in which labour market reform and deregulation was suddenly viewed as deeply contrary to the interests of the working and middle classes – a view that seems to be held as strongly today as it did then. Until this point workplace deregulation and increased flexibilities went hand-in-hand with economic reform supporting employment growth, increased living standards and social change. Now it was a deeply divisive poisoned chalice.

50. Following its win at the 2007 Federal Election, instead of amending or winding-back its least desired elements of Work Choices, the incoming ALP Government sought to introduce an entirely new industrial relations system, one with far more in common with the pre-Accord heavy regulation era than the bipartisan reform efforts of the 1990s. Instead of course correcting, the long-term journey of Australia's industrial relations evolution would be completely knocked off track.

1.3 "Fair for who?" The new/old approach to workplace relations

51. The *Fair Work Act 2009* (FW Act), in name and stated intention, appeared to herald a unique new approach to workplace regulation in Australia. Unlike the reforms of the previous 25 years that focused on balancing appropriate protections with economic performance, productivity, competitiveness and flexibility, the new system would for the first time put "fairness" as its core.

52. It is exceptionally peculiar that the FW Act would expressly object to employers and employees determining which arrangements they deem fair and in their best interests. This is evident in the objects of the FW Act containing a policy objective of a major political party expressed in section 3(1)(c) as:

> *(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; …*[7]

53. AMMA has been unable to find any other analogous or similar federal legislative objective which is a clear expression of policy intent by a political party (and its key stakeholders i.e. the unions) rather than the stated objectives, purpose or intended national benefits of the legislative framework.

54. The underlying logic of the Rudd Labor Government's introduction of the FW Act appeared to be that enterprises and employees have different, competing and even conflicting interests that must be closely managed through pervasive regulation and heavy involvement of the national industrial relations tribunal, risibly renamed "Fair Work Australia" and later the "Fair Work Commission".

55. In addition to outright banning of statutory individual agreements – which had been a cornerstone of Australian industrial relations for the prior 13 years during a period of significant economic and employment prosperity for Australia – key features of the FW Act included:

- A "multi-layered" approach to the safety net involving new blanket "national employment standards" as well as a "modernised" awards system that remained the only one of its type in the world;
- Unprecedented new union rights of entry into workplaces, based on possible industry coverage instead of actual union membership or even employee wishes;
- Bolstered unfair dismissal protections for employees including for those working in small businesses;
- A completely new area of employee protections called the "general protections" that could see employers faced with uncapped penalties for allegations of taking "adverse action" against employees on the basis of a virtually limitless number of matters;

[7] Fair Work Act 2009, s.3 (1)(c).

- New rules mandating incoming businesses abide by historic / legacy employment terms and conditions when taking over business undertakings / contracts; and
- A new enterprise bargaining system that included:
  - Significant expansion of representational rights that would facilitate multiple unions sitting at the bargaining table even if they had as little as one individual nominating them as their bargaining representative;
  - Significant expansion of the types of matters and claims permitted in bargaining, such as matters pertaining to union interests and business operational decision making, well beyond the interests of employees and their terms and conditions;
  - Significantly expanded role of the national industrial relations tribunal in conciliating and arbitrating protracted bargaining disputes, including making orders and settling longstanding disagreements;
  - Significantly increased access for employee parties to organise, threaten and take protected industrial action, including organising ballots and notifying of industrial action before bargaining discussions had even begun;
  - Mandating of unions as parties to all greenfields (new project) agreements; and
  - A significantly more complex process, including multiple new "tests of fairness" often based on theoretical or hypothetical scenarios, for employers seeking approval of enterprise agreements by the national industrial relations tribunal.

56. The introduction of the FW Act in 2009 was clearly not part of the broad post 1980s move away from centralised conciliation and arbitration to a less regulated, less complex industrial relations system where flexibility and choice reigned supreme.

57. While purporting to be a "fair new system", in the most fundamental and important ways, the FW Act was instead a huge backwards step. Employee relations in Australia were to again be heavily regulated, watched over by an all-powerful national industrial relations tribunal, and promoting at every possible step the involvement of third parties including the tribunal and trade unions (despite private sector union membership being 14%[8] at the time and having since fallen further).

58. The system had not looked anything like this since the 1970s.

1.4 Experience of the resources and energy industry

59. At least since the reform efforts commencing in the 1980s, Australia's resources and energy employers have generally been ahead of the curve on industrial relations.

60. When the Hawke Labor Government was negotiating and implementing the Accord, many areas of the resources industry were already self-deregulating. Perhaps the best example is the hard rock mining sector in the mid-1980s, where several leading employers offered wages multiple times the award and utilised common law contracts to limit or remove entirely third party involvement from their workforce relationship. The productivity and competitive gains from such an approach, implemented cooperatively with employees, were tremendous.

61. In 1988 AMMA, which had been heavily involved in this process, released *The Way Ahead* as a blueprint for industrial relations reform. The vision was that cooperative, productive, flexible and mutually rewarding relationships at the enterprise level were essential if Australia was to improve its domestic and international competitiveness and enhance its living standards.[9]

62. Most notably, *The Way Ahead* put significant emphasis on management performance being key to reducing third party involvement in workplace relations. It foreshadowed the importance of

[8] Australian Bureau of Statistics, 6333.0 - Characteristics of Employment, Australia, August 2018
[9] AMMA (1988) *The Way Ahead*, p 2.

enterprise level control over labour relations, five years prior to the Keating Government introducing enterprise bargaining, as well as a reduced role for the national industrial relations tribunal:

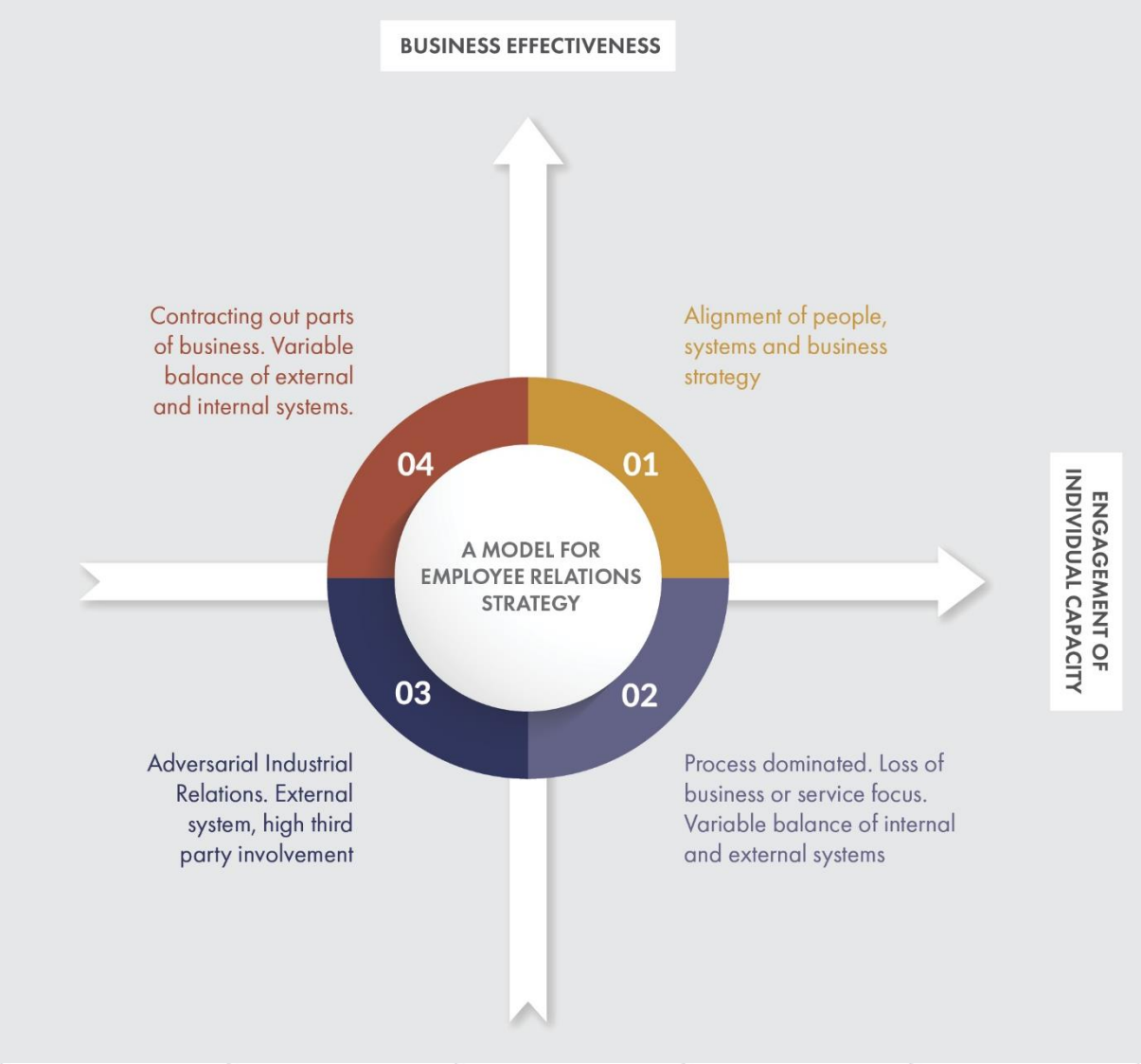
> *By recognising that employers and employees must establish mutual confidence and support in moving to co-operative self-regulation, (AMMA will) assist member companies in the development and implementation of employee relations practices and processes which promote enterprise level relationships and remove the need for third party involvement.*[10]

63. In 1999, six years after the introduction of enterprise bargaining and three years into the availability of statutory individual agreements, AMMA again released a vision for the future of industrial relations reform, demonstrating the forward thinking of its membership.

64. *Beyond Enterprise Bargaining* argued employers and employees must be free to develop the work relationships best suited to their circumstances. This was critical if employers were to capture individual capability as a means to business effectiveness, thus ensuring Australian enterprises were well placed to meet the challenges of a competitive global environment. [11]

65. The following model of work organisation and regulation was provided to illustrate the strategic choices which should be available to companies and their employees in any system of employment.

Figure 1.4: A model for employee relations strategy[11]



[10] AMMA (1988) *The Way Ahead*, p 3.
[11] G.W. McGill (1999) *Beyond Enterprise Bargaining,* AMMA

67. This model depicts that employers can sit within any of the four quadrants depending on the quality of their systems for organising work. Ideally, most employers strive for an effective system of work which captures individual capabilities (as depicted in Quadrant 1) to achieve productivity and competitive objectives in the global market:

> *The assumption underpinning this aspect of the model is that it will be the quality of the systems of the organisation, (for example, systems of task assignment and review, work performance review, remuneration, recognition and reward, training and development, selection, promotion and career advancement) that determine the extent to which the employee will willingly give their best efforts at work[12].*
>
> *The implication of all this in terms of industrial relations legislative policy is, of course, that organisations ought not to be constrained in the choice of pathway to achieve the outcomes that they and their employees consider are best for them. In practice, however, the choice of an organisation to work in the top right hand quadrant is still constrained…[13]*
>
> *The legislative framework must provide the opportunity for organisations to establish such systems of internal regulation and employees must be free to determine whether, in their judgement, these systems are adequate.[14]*

68. Six years later the Howard government's 2005 reforms moved broadly in the direction promoted by *Beyond Enterprise Bargaining*, that being further deregulation of the employment relationship to promote the ability for individuals to assess and 'buy into' management excellence and a strong employee value proposition.

69. Where alignment to the Work Choices laws was askew, however, was that *Beyond Enterprise Bargaining* argued that the erosion of a strong safety net to underpin choice and flexibility would undermine the process.

70. The principles and positions of *Beyond Enterprise Bargaining* are just as relevant and applicable today, some 21 years on from its publication, than ever. This is particularly the case when considering the rapid changes in demographics, skills and employee attitudes in the resources sector detailed in AMMA's 2018 report *A New Horizon* (explored in Part 2 of this submission).

71. Instead of the model put forward by AMMA in 1999, which reflected a natural progression of the bipartisan reform journey, resources and energy employers had to deal with the introduction of the FW Act.

72. During the Rudd Government's consultation phase for the FW Act, AMMA was by far the most vocal critic of the legislation and its "back to the future" approach. The group argued the return to heavy handed regulation and insertion of third parties into the employment relationship at every opportunity would be disastrous for employer-employee cooperation, and the productivity and competitiveness of Australian businesses.

73. This would particularly be the case for the resources and energy industry which was flourishing under the labour market reforms of the 1990s and early 2000s.

74. AMMA's early warnings proved to be 'on the money'.

75. Following the introduction of the FW Act, AMMA in collaboration with RMIT University conducted a longitudinal study to track the changes in the overall sentiment towards workplace relations in the resources and energy industry.

76. This research project, based on surveys conducted every six months across 2010-2012, provides unparalleled insights into the impact on high performing workplaces of the sudden change in the nation's approach to industrial relations regulation.

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[12] G.W. McGill (1999) *Beyond Enterprise Bargaining,* AMMA, page 49
[13] G.W. McGill (1999) *Beyond Enterprise Bargaining,* AMMA, page 52
[14] G.W. McGill (1999) *Beyond Enterprise Bargaining,* AMMA, page 52

- In Report One (June 2010), RMIT researchers found the biggest issue with the FW Act was enterprise bargaining under the new system, with employers trying to come to grips with their rights and obligations under 'good faith bargaining' which meant many of them were having to negotiate with unions for the first time[15].
- In Report Two (January 2011), the "satisfaction index" (percentage of employers satisfied with their workplace relations environment) had fallen from 76% to 65%.
- By Report Three (June 2011), the satisfaction index had fallen further to 61.7% and employers were reporting "serious concerns" about levels of labour productivity. Researchers noted their productivity measures were in "dangerously low terrain".
- Report Four (December 2011), showed just 28.2% of respondents had even attempted to negotiate productivity increases, and of those who had, just 11.5% were successful.
- By Report Five (June 2012) the number of employers engaging in the survey to lodge their concerns about productivity under the FW Act had doubled.
- In Report Six (August 2013), 87.5% of respondents had reported failure to negotiate any productivity offsets as part of agreements under the FW Act, three-quarters believed their productivity levels had fallen, and 9-in-10 had received some form of adverse action / general protections claim.

77. None of these results should come as a surprise to Australia's policymakers. During the decade following the FW Act's implementation, the business community has constantly reported to successive ALP and Coalition governments the uncooperative nature of the legislation and the impacts on labour productivity and business competitiveness.

78. Before the FW Act, it seemed Australia was on the right path to achieving a modern and effective industrial framework that delivered on its regulatory purpose and met the nation's economic and societal demands.

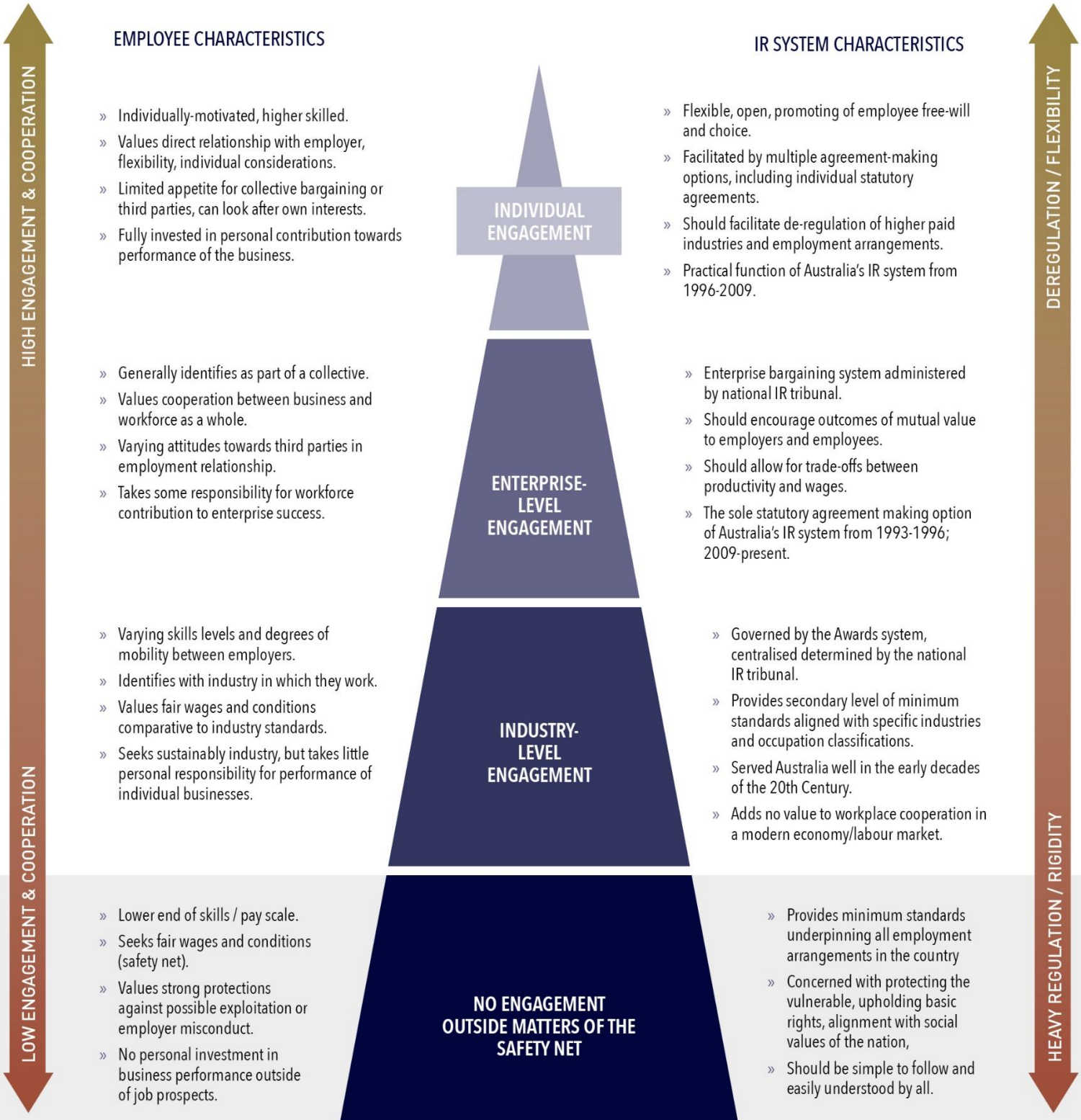
79. The overwhelming evidence, across all business sectors, shows Australia's industrial relations system has lost its way. It no longer supports national goals including to promote cooperation and harmony within Australian workplaces, nor does it support competitive and productive Australian businesses that can drive employment growth, economic prosperity and living standards.

80. Merely tinkering at the edges of the Fair Work system will not address this. A fundamental change in approach is urgently needed.

Recommendation 1
AMMA strongly recommends the Morrison Government pursue an assertive campaign of meaningful industrial relations reform, strategically targeting areas of poor alignment to modern-day Australian workplaces and setting the nation up for growth and prosperity in the future.

[15] Dr Stephen Kates (2010) *The AMMA Workplace Relations Research Project*, RMIT University.

FIGURE 2.1 – LEVELS OF ENGAGEMENT AND COOPERATION



PART 2: FUTURE WORK REGULATION: FLEXIBILITY AND CHOICE

81. Flexibility, convenience and freedom of choice are held as key values of work in Australia. This is particularly the case in the resources and energy industry – the highest paying industry in Australia and one undergoing a revolution in innovation, skills and workforce demographics.

82. This chapter demonstrates why flexibility and choice must be at the centre of a new approach to industrial relations regulation in Australia.

83. The key lies with two core components – greatly expanded agreement making options for employers and employees, including restoring a statutory individual agreement option; and deregulation across all other areas including a diminished role for the national employment tribunal.

2.1 'Future of work' trends in the resources and energy industry

84. In 2018, AMMA undertook a widespread study into 'future of work' trends within the resources and energy industry to examine how the regulatory system could better facilitate future employment opportunities and directly enhance Australia's economic and social well-being.

85. The results and conclusions were published in the research paper *A New Horizon: Guiding Principles for the Future of Work,* available on AMMA's website.

86. This study identified that Australia's present-day resources and energy workforce is experiencing an emergence of new classes of highly skilled workers who function more independently than in the past; moving away from collectivist attitudes towards workplace relations and preferring to build their own direct relationship with the goals of their employer.

87. The upshot of increases in individual motivation is stronger direct engagement between employers and employees across the resources and energy industry, somewhat aligned to the models examined in AMMA's 1999 publication *Beyond Enterprise Bargaining.*[16]

88. This movement is being widely experienced amongst resources and energy employers and has significant implications for the future of collective bargaining and the role of third parties. Specifically, *A New Horizon* found four broad trends within the resources and energy workforce:

    a) Technology is dramatically changing the profile of the Australian resources and energy industry workforce and thus changing the nature of work. This is facilitating a demographic shift in the industry towards more technically skilled people, and less traditional blue collar roles. As a result the workforce is less homogenous in the types of skills, patterns of work, skills and ways of thinking they deploy on a daily basis.

    b) Employees are becoming more individually motivated. They seek greater individual flexibility in their work, are seeking and negotiating employment arrangements that best fit their individual needs, and have less interest in third party representation in the workplace.

    c) With technology as an enabler, employees are more focused on individual performance, rewards and remuneration, and are seeking more empowerment to work flexibly and guide their futures. They are no longer "thinking collectively" and identifying with the "whole" but rather identifying with their individual employment relationship.

    d) Employers and employees are directly engaging, despite the best efforts of the Fair Work system to encourage collective bargaining and third party involvement. Even where enterprise agreements are in place, workforces are showing a desire to talk with their employers directly to resolve workplace issues.

[16] AMMA (2018) *A New Horizon* p 25.

89. To quantify the extent these trends are being felt across the industry, *A New Horizon* presented the following research findings (percentage share of employers agreeing with statement):

- The "one-size-fits-all" approach to work regulation is increasingly outdated – 97%
- Individuals should be free to "opt out" of collective bargaining at any time – 94%
- The work regulation system should allow for a wider range of agreement making options – 94%
- Collective bargaining should be de-emphasised in Australia's future of work – 92%
- Australia's employment safety net should be significantly simplified – 87%
- The traditional "power struggle" between employers and employees no longer exists – 72%

90. The qualitative evidence from the *New Horizon* study, compiled from anonymous interviews with dozens of executives across the resources and energy sector, offers strong insight into the practical implications of this data. Much of it centred on the need for greater flexibility and choice to both cater for and leverage the opportunities presented by these significant workforce trends.

91. Examples are as follows:

> *"The future of workplace relations should allow for fair working arrangements but have the flexibility to shift with changing business needs. This is particularly important as our workplaces evolve with new technologies and related skills. The current regime is far too rigid and does not allow or account for the rapid change and developments occurring within the industry."* - Mineral sands mining executive.
>
> *"Our future workforce will be varied and consist of a range of individuals, each with competing priorities and preferences for the way in which they work and are remunerated for that work. As an employer we will need to be agile to these demands to keep individuals engaged. This is not consistent with collective approaches to workplace regulation."* – Human resources executive, transport and logistics service supplier.
>
> *"Change is occurring as companies and their leaders engage with their employees, create a great place to work and truly listen and lead their workforces."* - Mining executive.

92. The overarching finding is that the labour market is trending towards greater direct engagement in the workplace and less third-party involvement, with employers reporting positive outcomes across culture, productivity and employee satisfaction as a result.

93. While traditional approaches to industrial relations have been based on the historic adversarial nature of employer/employee conflict, dominant features of today's workplaces are collaboration, productive engagement, mutual trust and recognised value between employers and employees. This is best facilitated through a lighter touch regulation model.

94. It has been the experience of resources and energy employers that businesses and individuals are being let down by Australia's workplace relations system that fails to recognise the paradigm has shifted. Most resources and energy employers cite the primary challenge for achieving productivity gains through greater workplace cooperation and harmony is the inflexibility and limitations of the existing framework.

95. To achieve cooperative and productive workplace relations Australia does not require a highly prescriptive and heavily regulated workplace framework which emphasises collective organisation and third-party intervention. The regulatory environment must offer the flexibility and choice required to cater for the widespread changes in skills, work methods and patterns, motivation and attitudes amongst both employers and employees.

2.2 Expanded options for agreement making and engagement

96. A key consideration for future workplace regulation is that flexible and innovative new models of employment will become more important as broad demographic trends flow through the labour market.

97. Changing work environments, remote connection technologies and increased flexibility mean organisations globally are predicted to have smaller pools of core full-time employees, supplemented by specialist external consultants and contractors to deliver specific projects. Such trends in resourcing and service delivery are becoming more prevalent in today's workplaces.

98. It is concerning that there have been national political campaigns against these legitimate resourcing and service delivery models, characterising them as "insecure work" and proposing more intervention and hyper-regulation to discourage flexibility in the future. The already overly regulated industrial relations system does not need more regulation to support the future of work.

99. The opening up of agreement making options to cater for new models of employment is key to redefining the role of workplace regulation from a compliance burden to a productivity enabler.

100. Resources and energy employers support a myriad of collective, individual, union and non-union agreement making options, all designed to accommodate the increasingly diverse requirements of competitive businesses and future generations of employees.

101. Increased flexibility in the agreement making and bargaining framework is likely to have a number of implications for employers and employees. The major implication of this reform is employment engagement choice for both employers and employees which will promote more cooperative and harmonious interactions and lead to improved productivity performance.

102. A flexible approach to the regulatory framework would empower individuals to make their own decisions about what type of terms and conditions under which they wish to be employed. This would recognise that people are increasingly engaged for the value creation made possible through their unique skill set.

> *"An overreliance on collective bargaining is an outdated concept that leads to agreements not always being fit-for-purpose. The system should provide more power to individuals to be able to bargain and agree on what's important to them." Energy sector executive.*[17]

103. For the system to progress and keep pace with emerging workforce trends, it should expand the options for people to enter into genuinely beneficial arrangements which suit the needs of the parties and the enterprise. It should also strike a balance between workplace flexibility and employee representation.

104. The involvement of third parties in employment matters more often than not increases disputation and conflict, creates delays and hurts productivity. An industrial relations framework should, as much as possible, encourage and facilitate parties to cooperate by working through issues with one another and reach agreement on resolutions and outcomes.

105. Another important concept for future work regulation is facilitating the ability for individuals to remove themselves from collective representation at work as they see fit. Any system that forces an employee to be collectively represented under an enterprise agreement simply because the majority of the workforce (often a very marginal majority) prefers to be engaged that way, impedes on that individual's freedom of choice in the workplace.

106. A system allowing employees to "opt-out" of EBA coverage must carefully balance any additional administrative complexity with gains across productivity, engagement and culture. Where employees wish to be individually engaged, the system should make such an arrangement simple and easy for parties to agree. This is fundamental to promoting cooperation and harmony in future Australian workplaces.

[17] AMMA (2018) *A New Horizon*, p 45.

2.3 Statutory individual agreements – the glaring omission

107. Australia's current approach to workplace regulation has left resources and energy employers significantly limited in their options for making competitive and productive workplace arrangements suited to the individual operating requirements of their business.

108. The most glaringly obvious omission from the current system is the lack of any option for statutory individual agreement making. This is a significant flaw in the current regulatory framework; a retreat from the proven and effective approach of 1996-2009, and a significant bar to freedom of choice and self-determination for globally competitive businesses and for working Australians.

109. The Fair Work system fails to recognise that the majority of workplaces do not operate in a collectivist structure. Indeed, many employers in the resources and energy industry are today choosing to ignore the limited options for statutory agreement making under the FW Act and instead are utilising common law employment contracts, underpinned by the awards safety net and supplemented by operating policies and procedures.

110. Supporting this is the Australian Government's own data[18] showing a rapid decline in the number of employers and employees engaging in enterprise bargaining since the introduction of the FW Act:

    - 10,877 in term / current enterprise agreements as at September 2019 covering 2,160,400 employees
    - 11,335 in term / current enterprise agreements as at June 2019 (previous quarter) covering 2,189,600 employees
    - 24,589 in term / current enterprise agreements as at September 2010 (first year of the FW Act) covering 2,415,400 employees

111. Under the prior industrial relations system, the resources and energy industry was among the strongest user of statutory individual agreements ("Australian Workplace Agreements"). In an industry that has consistently paid around 2.5 times the award rates, it cannot be seriously argued that the use of AWA's in the resources and energy sector was ever designed to underpay people.

112. Rather, individual statutory agreements provided employers with greater certainty and stability in their employment arrangements, including protection against strike action, in return for the highest wages in the country and capacity to cater for the individual needs and choices of their employees.

113. By promoting high value flat rats and agreed salary arrangements, this mechanism also simplified the remuneration process for employers and employees, minimising risk of underpayments associated with the complex awards system and enterprise agreements often containing multiple allowances and overtime provisions.

114. As noted in the previous chapter, a fundamental policy objective of the FW Act is to strictly outlaw the making of statutory individual agreements. This distinct prohibition ignores the validity of individual agreement making by having the regulatory framework determine for employers and employees that such arrangements are not fair and therefore can never be a part of the system.

115. In the absence of statutory individual agreements, resources and energy employers have attempted to make use of the only available mechanism to make variations on a collective enterprise agreement allowable under the FW Act - individual flexibility arrangements (IFAs).

116. The utility of IFAs was specifically examined in the AMMA/RMIT research project of 2010-2012, with resources employers particularly concerned with their effectiveness as replacement for AWAs.

117. The survey results found that resources and energy employers encountered significant difficulties in achieving workplace flexibility through the use of IFAs with a consequently low take-up being

[18] Australian Government, *Trends in Federal Enterprise Bargaining*, September 2019.

reported. Data following the fourth survey found that no respondents found "significant value" in IFAs under the FW Act and, importantly, 44.2% categorically stated they were of "no value at all".[19]

118. By the end of the survey series, only 4.3% of the resources and energy employers surveyed were using IFAs, reflecting their failure to provide flexibility and support individual employee choices as an alternative to statutory individual arrangements, and demonstrative of their extremely low usefulness to the industry generally.[20]

119. Today's workers, and even more so into the future, are highly skilled and well respected for their individual value and contribution to organisational performance and culture. The historical perception that workplace regulation is required to determine employment matters for employees because they are low-skilled and vulnerable to exploitation or unethical conduct by their employer is no longer true.

120. Under a modern, flexible and competitive industrial relations system, there is no reason why employers and employees should be prohibited from making individual statutory agreements that better meet the individual needs of an employee and the business, particularly when such agreements have similar features and characteristics to existing enterprise agreements, being underpinned by a strong safety net.

121. Retaining a system of workplace regulation which dictates to employees how they must be engaged by their employers will do very little to facilitate cooperative and harmonious workplace relations.

2.4 The benefits of restoring statutory individual agreements

122. Following the 1996 Howard reforms there was significant uptake in the use of AWA's across the resources and energy industry. The success and satisfaction with these arrangements was demonstrated by their continual roll-over by mutual agreement between employers and employees.

123. Indeed, many AWAs entered into pre-Work Choices were still being utilised in the early years of the FW Act. All evidence points to these arrangements being of mutual value to employers and employees in the resources industry where workers are paid well in excess of any safety net.

124. An AMMA commissioned 2015 KPMG Report provided significant economic and labour market evidence through consultation with industry in support of a range of industrial relations reforms which included scope for individual statutory agreement making. Consultation with industry indicated that the costs associated with collective agreement outcomes are higher than individual agreements, mostly driven by the conditions included in these agreements, often relating to matters not directly relevant to the employment relationship (see "permitted matters" in Part 3) and not necessarily wages or employee outcomes.

125. The benefits of restoring the option for individual agreement making to the resources and energy industry include:

- Reduced costs of current agreement making (ranging from approximately $150 per worker per annum to over $6,000 per worker per annum or 0.1 to 4.8 percent of labour costs);
- Higher productivity (overall increase between 2 and 5 percent);
- Reduced union site entry (representing a labour cost of between $1,000 and $150,000 per annum on average for every 500 workers or less than 0.0 to 0.2 percent of labour costs); and
- Reduced industrial action (representing an average annual cost of $81 million).[21]

[19] Dr Stephen Kates (2011) *The AMMA Workplace Relations Research Project*, RMIT University.
[20] Dr Stephen Kates (2013) *The AMMA Workplace Relations Research Project*, RMIT University.
[21] KPMG (2015) Workplace Relations and the Competitiveness of the Australian Resources Sector, AMMA.

126. There is also a very strong argument that all Australian employees significantly benefited from the additional labour market flexibility afforded to it by multiple agreement making options.

127. Under the Howard Government (1996-2007), during which individual statutory agreements were a key feature of national industrial relations policy, real wages growth averaged 1.8% - three times the rate of growth (0.6% average) recorded under the Labor Governments of 2007-2013.

128. Further, when the Coalition left office in 2007 unemployment was at 4.4%. Shortly after, when Howard's economic and labour market policies were still having a key effect, it had fallen to 4.1%.

129. Unemployment when the former ALP Government left office, after five years of the Fair Work high-regulation system, had risen to 5.7% and since only fallen slightly to 5.3%.

130. Underemployment, youth unemployment and long-term unemployment were also at recent historic lows in 2008 and have all risen consistently since, to among the highest recorded in recent decades[22].

131. Restoring the ability to enter into a statutory individual agreement would lead to a more flexible system, making it easier, faster and less costly to establish agreements and thus employ people as our economy and workplaces continue to evolve.

> *"There was great appeal in the individual agreements that existed under previous workplace relations laws. Employees in our industry were happy to have individual agreements and for business it provided a degree of industrial certainty." Hard rock mining executive.*[23]

132. AMMA has long supported a form of an individual statutory agreement, with characteristics akin to enterprise agreements, which do not undercut in any way the safety net. This would see individual statutorily agreements subject to the better-off-overall-test against minimum entitlements under modern awards and the National Employment Standards, just as enterprise agreements are now.

133. A modern Australia should have more options for individuals being paid well above statutory minimum standards to bargain with their employers and agree directly on their employment conditions.

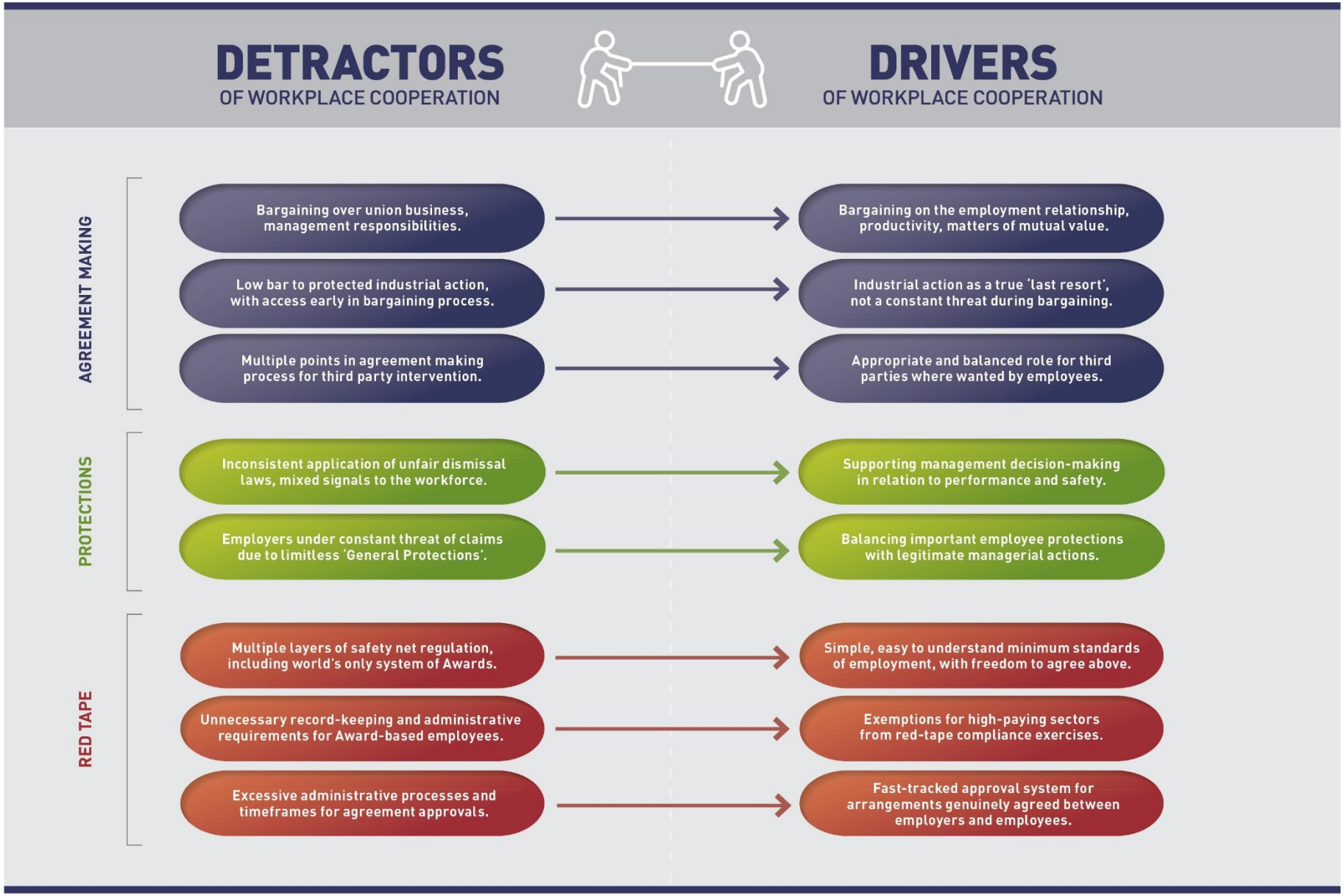
134. A system of workplace regulation where power is equally balanced, mutual value recognised and individual effort rewarded will encourage and support more productive and harmonious workplaces.

Recommendation 2
Australia's future workplace regulation must: • provide multiple agreement making options to cater for increased choice and flexibility demanded by future employers and employees; and • include a new form of individual statutory agreements entered into by an employer and employee, with similar characteristics, approval processes and enforceability as a collective agreement, including no industrial action during the life of the agreement.

[22] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/EmploymentAustralia

[23] AMMA (2018) *A New Horizon*, p 44.

Figure 3.1: Detractors and drivers of cooperative workplace



PART 3: DETRACTORS OF COOPERATIVE WORKPLACES

135. The evidence is clear that Australia's current model of employment regulation is poorly suited to the attitudes and demands of modern-day businesses, workers and economies. This is creating barriers to cooperative and harmonious workplaces relations, rather than supporting these goals.

> *"The system needs to draw employers and employees onto the same page and remove points of conflict. At present, it does the opposite, causing conflict through various mechanisms where it otherwise wouldn't exist." Diversified supply sector executive.*[24]

136. Since the introduction of the current framework, AMMA has closely recorded the impact of its key features on workplace cooperation, productivity and competitiveness. This work has been recorded across the following significant projects all available to the Morrison Government in its assessment of present-day workplace cooperation:

- The AMMA-RMIT Workplace Relations Project (2010-2012).
- AMMA's Submission to the Gillard Government's 2012 Review of the FW Act.
- 2013 AMMA policy paper *Fair for Who? The rhetoric vs reality of the Fair Work Act*
- AMMA commissioned KPMG Report *Workplace relations and the competitiveness of the Australian resources sector* (2015)
- AMMA submission to the Productivity Commission review into Australia's workplace relations framework (2015)
- AMMA research report, *A New Horizon: Guiding principles for the future of work* (2018)

137. This unparalleled body of research has placed AMMA in a highly informed position to report on the operation and performance of the Fair Work system, and advocate for reforms in key areas which would improve relations between employers and employees and minimise the FW Act's impacts on productivity and competitiveness.

138. This chapter of AMMA's submission summarises those key areas in which the FW Act is clearly detracting from workplace cooperation and productivity.

139. If the Morrison Government is to make any headway into improving cooperation and productivity of Australian workplaces, it must look to urgently address these aspects of the system which continue to fail businesses and workers in achieving fair and mutually rewarding outcomes.

3.1 The bargaining framework

140. Collective agreement making at the enterprise level has supposedly been a cornerstone of productive and mutually rewarding workplace relations since the early 1990's. It was introduced to allow employers and employees to negotiate pay and conditions above the award safety net in return for productivity trade-offs at the enterprise level that were mutually beneficial for both parties.

141. Today, enterprise bargaining is no more than a process for rolling over one generation of agreement into the next, save for increased pay levels, with ideas to improve productivity or efficiency through workplace changes being forced off the table.

142. Employers face unnecessary complexities and inefficiencies in the bargaining process, many of which promote third party involvement in business management and operational matters, but none that encourage more workplace cooperation which can achieve productivity gains.

[24] AMMA (2018) *A New Horizon*.

3.1.1 Matters permitted in agreement content

143. One of the significant challenges in the FW Act's bargaining processes, which clearly undermines employer-employee cooperation, is the overly broad range of permitted matters which can be included in enterprise agreements.

144. From 1993 to 2009, enterprise agreements could only include terms that related to the employment relationship and unions could only take legally protected industrial action in pursuit of such claims.

145. In 2009 the FW Act largely removed the concept of 'prohibited content', allowing for a significantly expanded range of permitted matters in enterprise agreements, including that with limited or tenuous-at-best links to the employment relationship. Notably, permitted content could now also include matters pertaining to the relationship between the employer and its employees' union/s.[25]

146. Predictably, this has encouraged unions to pursue more and more matters relating to areas of their interest and furthering their industry objectives, industrial agendas or income generation activities rather than the terms and conditions of the employees they represent.

147. Further, unions are often bargaining over matters of direct management prerogative and pushing for agreement content that infringes on the operation of the business. Common examples include requiring an employer to agree (as opposed to consult) with unions over any changes to working hours or rosters; and restrictions on the use of casuals, contractors or labour hire employees.

148. Where there is already a "shopping list" of matters outside of the employment relationship imposed on them, there is little room for employers and employees to engage more cooperatively and harmoniously in the workplace.

149. The failure to restrict the scope of subject matter that can be bargained for in enterprise agreement making, and thus over which protected industrial action can be taken, is an obvious weakness of the system. For employers this has reduced "bargaining" to processing unproductive, costly union claims to secure relief from the threat of protected industrial action, with consideration of enterprise competitive pressures rarely or never raised.[26]

150. This dynamic forces businesses to concede to union demands in order to meet operational and production targets rather than providing a mechanism which focuses on achieving mutually beneficial outcomes for both employers and employees.

151. There is an opportunity for the Morrison Government to simplify agreement making and encourage employers and employees to once again bargain cooperatively over matters that will directly improve productivity.

152. In particular, the Government could consider reinstating the prohibition of certain content in enterprise bargaining that existed under the *Workplace Relations Act 1996.*

153. A critical outcome of such reform would be that employee representatives could only advance their bargaining position in relation to matters pertaining to the employment relationship, and not any wider 'wish list' of union claims that have more to do with how the union wants to conduct its business, than the interests of employers and employees.

Recommendation 3
To significantly improve the ability for enterprise agreement making to facilitate cooperative and productive outcomes, AMMA recommends: • Limiting content of agreements to matters that pertain to the employer-employee relationship; • Reinstating the prohibited content provisions of the *Workplace Relations Act 1996;* and • Tightening bargaining rules to ensure industrial action is not taken over prohibited content.

[25] Fair Work Act, s 172.
[26] AMMA (2018) *A New Horizon.*

3.1.2 Industrial action

154. While strike activity has been prevalent in Australia's industrial relations history, the workplace reforms passed in 1993 first introduced the right for parties to take "protected" industrial action while bargaining for a collective agreement. By formalising the process with criteria and rules, this reform assisted in significantly reducing the amount of time lost to industrial disputes.

155. Despite there being fewer actual days lost to industrial action today, the FW Act's industrial action provisions are often used by unions as a form of leverage to extract concessions from employers with little consideration for the requirement to bargain in good faith towards mutually beneficial outcomes. This is largely a result of the FW Act allowing industrial action to occur in a wider variety of contexts than under the workplace laws of 1993-2009.

156. The purpose of protected industrial action is so that employees or employers can support or advance their claims during bargaining in relation to an enterprise agreement.[27] The fact that employees and employers can bargain over a broader range of permitted matters inexplicably enhances their ability to organise and take industrial action in a wider range of contexts to pursue their claims.

157. Resources and energy industry employers have suggested that industrial action, by even a small number of workers, can have significant financial implications. These costs can range from $1 million to $10 million per day of action.[28] Along with the financial damage inflicted, industrial action has the potential to create uncertainty regarding the viability of businesses and negative relations in the workplace impacting on trust, respect and productivity.

158. In the early period of the FW Act, the enhanced context in which industrial action could be taken, allowed parties to take protected industrial action without the parties having formally commenced bargaining as was the case in the *JJ Richards*[29] decision.[30] Despite the stated objective of enterprise bargaining being that both employers and employees should have the freedom to decide whether to enter into a collective agreement, industrial action was being used to compel employers into making an agreement often with terms less than favourable to their operational needs.

159. Employers are being exposed to the threat of industrial action as soon as an enterprise agreement nominally expires up until a new agreement is in place. The bargaining framework has left very little productivity gains to be made and very little value or benefit to an employer, apart from the certainty of workplace arrangements and security from industrial action for a period of time.

160. In addition, employees' power to take legally protected industrial action is disproportionate to the options for industrial action that are available to employers. Under the FW Act, the only option available for employers is to lock employees out of the workplace.[31] This avenue provides no real recourse for employers, results in further damage to the business and ultimately moves the parties further apart.

161. A workplace system that encourages unions and the employees they represent to threaten and/or inflict damage on employers in order to push their agenda is counterintuitive to promoting cooperative and harmonious workplace relations.

162. If the system is to achieve its objective, it must enable parties to advance their bargaining positions in a more cooperative and harmonious manner than that of the combative and adversarial protected industrial action provisions of the FW Act.

[27] Fair Work Commission, 'Industrial action benchbook," last updated 7 October 2019.
[28] KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, AMMA.
[29] JJ Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53 (20 April 2012).
[30] AMMA's advocacy efforts led to a recommendation by the Fair Work Act Review Panel in 2012 and eventually to legislative change by the current Federal Government inserting s 437(2A) into the FW Act which took effect on 27 November 2015.
[31] Fair Work Act, ss 19(1)(d) and 411.

163. There should be a requirement for parties to demonstrate they have attempted to bargain in good faith and establish that the claims which are subject to bargaining disputes are mutually beneficial to all parties and/or are actually sustainable for the business to adopt.

164. The system should minimise to the extent possible the risk of employees resorting to forms of industrial action in prosecution or defence of their claims. Threatened and actual taking of industrial action dramatically shifts bargaining into an unavoidable adversarial contest. There appears to be a clear understanding that industrial action, in whatever form, is antithetical to harmonious, productive and cooperative workplace relationships and should be avoided at all costs.

Recommendation 4
To address the impact of threatened and actual protected industrial action on cooperative and productive workplaces, AMMA specifically recommends the following reforms: • Limit industrial action to claims pertaining to the direct employer-employee relationship; • Implement controls regarding threats of industrial action that are later withdrawn; • Introduce a requirement for parties to be genuinely trying to reach an agreement linked to good faith bargaining; and • Limit the ability to take industrial action to only those below a high-income threshold.

3.1.3 Third party interference in agreement making

165. It is a fundamental and appropriate principle of any balanced industrial relations system that employees have access to workplace representation as a measure to promote and protect their employment rights and interests.

166. While the portion of the national workforce that could be said is vulnerable to exploitation and unethical conduct by employers is smaller than it has ever been, under the Fair Work system there are more unwanted guests intervening in the employment relationship than ever before.

167. Under the *Workplace Relations Act 1996,* resources and energy industry employers had the capacity to deal directly with their employees as a collective or individually without any involvement from unions or industrial tribunals in setting wages and conditions, if that was the wish of both parties.

168. This is no longer the case, with the FW Act seeking to enshrine a role for unions in enterprise bargaining wherever possible. This environment has worked to undermine and impede the building of direct cooperative relationships between employers and employees.

169. The current framework provides countless interventions to third parties as a means to addressing the perceived unequal bargaining positions of employers and employees, raising an inequality of a different type. The Act allows unions to make an application to be covered by an agreement; to make submissions to the FWC as to whether agreements should be approved; and to appeal to stop or overturn the approval of an agreement. Not only is this ability to intervene counterproductive to workplace cooperation, it is further demonstrative of the complexity of the system that such opportunities to exploit poor employer/employee understanding arise frequently.

170. This can occur despite employers and employees having already participated in a bargaining process and where employees have voted in favour of the proposed set of terms and conditions. The fact that the FW Act allows third parties to involve themselves in agreement making at any stage in the bargaining process undermines the willingness and effort of employers and employees to engage cooperatively and harmoniously to reach agreement.

171. This is particularly evident when unions seek to oppose the approval of an agreement, to which they were not a party, even after employees have endorsed the proposed terms of the agreement and the FWC is satisfied it meets the statutory criteria.

172. In recent times even the Fair Work Commission has questioned the validity of this strategy, however such public reprimanding has not seen any decline in this type of activity. A tribunal member recently criticised the Construction, Forestry, Maritime, Mining and Energy Union's (CFMMEU) intervention in the agreement approval process, questioning whether it was pursuing its own agenda or assisting the tribunal under the FW Act, stating:

> "…*what I'm trying to understand is, how is it that when you sought permission to be involved in this approval process when you weren't a bargaining representative for the agreement, how this is assisting the Commission when it appears to me that the objections made have been merely made for the sake of making objections and delaying the approval process, which isn't something that assists the Commission."*[32]

173. Unions assert their rights to intervene in workplaces under the guise of freedom of association and assisting the administrator with its functions. The principle of freedom of association is that employees have a genuine choice on whether or not they wish to have their interests represented and by whom. There is no legislative preventative stopping unions from inserting themselves into bargaining, even where they were not nominated by employees as their representatives, and seeking to delay and frustrate the process.

174. By exerting their powers in circumstances where they are not sought, unions are dragging organisations into a more bureaucratic, more costly and less direct management style and detracting from the ideal of more cooperative and harmonious self-regulation. It is the direct engagement between employer and employees which encourages cooperation and harmony.

175. The interference from third parties only serves to create disputation and conflict, cause delays and impact productivity in pursuit of their own representational and commercial agenda. Having to go back to employees to renegotiate due to technical failings in the approval process also further disengages the workforce. A system where employers are not only having to deal with the concerns of their own employees, but that of non-participatory third parties to the employment relationship is wholly incompatible with the concept of cooperative and harmonious workplaces.

176. While employers respect the role of unions when preferred by their employees, workplaces are trending towards greater direct engagement and less third-party involvement. This is resulting in positive cultures, high productivity and employee satisfaction.

> *"Our workforce is showing a desire to talk to us directly to resolve any workplace issues. With our employees more individually focused and less collective, third parties are becoming irrelevant to negotiations." Gold sector executive.* [33]

177. Where employers and employees are engaging with one another and without union intervention, whether in a bargaining process or dealing with other workplace matters, there should be no capacity for a third party to become involved unless they are invited to do so by either party.

178. The system should remove the ability for third parties to intervene in the employment relationship where employers and employees have demonstrated they can work cooperatively and harmoniously to achieve workplace outcomes.

Recommendation 5
To address the impact third party interference has on cooperative and productive workplaces, AMMA specifically recommends the following reforms: • Expand agreement making options to include, collective, individual, union and non-union statutory agreement making options; and • Limit the ability for unions to apply as an "aggrieved person" to inform the FWC on the approval process of already approved enterprise agreements.

[32] Downer EDI Mining–Blasting Services Pty Ltd [2019] FWC 5615 (16 August 2019), p [85].
[33] AMMA (2018) *A New Horizon*.

3.2 Excessive employee protections

179. Another feature of the FW Act significantly detracting from workplace cooperation and harmony is the vastly expanded system of employee protections.

180. The unfair dismissal and 'adverse action' provisions in the current framework expose employers to significant risks when attempting to manage performance, behavioural and safety issues in the workplace. As with enterprise bargaining, this is further complicated by the inconsistent application of these provisions by members of the national industrial relations tribunal.

181. Consultation with industry from 2015 has indicated that unfair dismissal and/or adverse action claims are received for between 20 and 40 percent of terminations.[34] While employers recognise the importance of employee protections, too often they are being abused and misused to the detriment of workplace cooperation and harmony.

3.2.1 Unfair dismissal provisions

182. The traditional notion born of labour law's premise of this unbalanced power between the worker and the employer has seen the FW system go too far in prioritising the personal circumstances of a dismissed employee over reasonable management action of the employer. Under the FW Act's unfair dismissal provisions employers are not able to dismiss employees for serious misconduct without the constant fear of employees seeking compensation and/or winning their jobs back.

183. Even where employers make the decision to dismiss an employee on the basis of a thorough and often lengthy investigation, the provisions in the FW Act have had the effect of encouraging employees to claim they have been unfairly dismissed from their job rather than take responsibility and accept the decision of the employer.

184. Employers have a responsibility to take action to protect other employees, customers and the general public from serious misconduct. It is the employers' prerogative to determine what is best for the enterprise and fulfil its duty to maintain a productive, safe and healthy work environment.

185. The unfair dismissal provisions provide the capacity for an employee to be reinstated where the FWC determined the process was procedurally unfair, despite there often being a valid reason for the dismissal. The system also allows the tribunal to consider mitigating factors in determining the appropriate remedies which can include both or either reinstatement or compensation.

186. Further, the FW Act's overly liberal and subjective unfair dismissal provisions is seeing the FWC increasingly substitute its own decisions for that of employers. This is a pandemic where even employees found to have breached serious safety protocols in the resources and energy industry have won back their jobs and/or been awarded compensation:

> *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 28km/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 this 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 considered his own experiences in dealing with the employer when he was a union organiser many years ago.*

[34] KPMG (2015) *Workplace Relations and the Competitiveness of the Australian Resources Sector*, AMMA.

187. Decisions such as these are even more concerning given in most states employers are now potentially subject to criminal charges associated with deaths in the workplace. These decisions undermine employer approaches to safety at a time where safety improvements are viewed of paramount importance.

188. When employees are found to have engaged in such conduct, it not only breaks down trust in the employment relationship but jeopardises the culture of an organisation and the safety of others in the workplace. The type of behaviour would not be tolerated or accepted in the broader community therefore it seems unreasonable to ask employers to tolerate and accept it in the workplace.

189. Where an employee is found to have breached workplace policies or engaged in serious misconduct there is unequivocally a loss of trust and confidence in the employment relationship.

190. Without trust and confidence in the employment relationship there is very little capacity for employers and employees to engage in cooperative and harmonious workplace relations.

Recommendation 6
To address the impact of unfair dismissal provisions on cooperative and productive workplaces, AMMA recommends the following reforms: • Exempt terminations for serious offences and misconduct from contesting dismissal; • Provide that where a valid reason for termination exists, the dismissal should stand; and • Ensure unfair dismissal applications are determined only on the merits of the case and not influenced by employee circumstances.

3.2.2 General protections (adverse action) provisions

191. Even more controversial than the current unfair dismissal laws are the general protections provisions, also known as "adverse action". Adverse action claims are a new addition to Australia's workplace system under the FW Act and pose serious and escalating challenges to resources and energy industry employers.

192. The adverse action provisions are a vast and unjustified extension of employee protections that existed under previous Australian workplace laws which were limited to prohibitions on unlawful termination for discriminatory reasons or in breach of freedom of association laws. These provisions further skew the imbalance of employer and employee rights by creating even greater risk to employers' ability to take legitimate action in the workplace.

193. The nebulous concepts of "workplace rights" and "adverse action" make proactive compliance difficult for employers to achieve. It is now the case that legitimate performance management is more regularly challenged by employees who are becoming increasingly aware of their ability to bring claims and receive settlement money.

194. With a reverse onus of proof, uncapped compensation and six-year period for which a claim can be made, the adverse action provisions heavily encourage settlement and thus incentivise unmeritorious claims seeking payment of "go away money". The significant financial and reputational costs of having to defend such claims often leaves employers with no choice but to pay financial settlement sums regardless of whether the claim holds any merit.

> *In a 2018 survey of resources and energy employers, 53% reported some exposure to the Adverse Action provisions with 86% of them saying the potential for unlimited compensation and the reverse onus of proof would lead them to seek settlement of any claim, regardless of merit.*[35]

195. The adverse action provisions of the FW Act provide employees with a mechanism to reprimand their employers when they aren't happy with a business decision or response to a workplace matter.

[35] AMMA (2018) *A New Horizon*.

It encourages employees to make vexatious claims without having to prove the action was averse to their workplace rights. The time, costs and burden of disproving such claims makes 'working around' an uncooperative and unproductive employee the more attractive option for employers.

196. In managing adverse action claims, resources and energy employers have noted that the experience of dealing with an aggrieved person in the workplace can have an impact on existing and ongoing employment relationships. When employees make claims of adverse action against management decisions, it impacts the cooperation and harmony in the workplace in a number of ways.

197. Engaged and motivated employees find themselves dispirited as they observe their colleague avoiding accountability for their underperformance, the consequences of which are left to be carried out by the rest of the workforce or felt through financial damage to the business. An unproductive and/or uncooperative employee is left as a cost to the business, unable to be held to account or disciplined in any way by management who are concerned by the vast repercussions possible under the FW Act.

198. How can employers and employees be expected to have cooperative and harmonious relations where the workplace system encourages "problem employees" to challenge legitimate management decision making or disciplinary action? The adverse action provisions are widely available for misuse by employees (and inventive lawyers) looking for ways to get an outcome in their favour and have a negative impact on the vast majority of employees doing the right thing and seeking to add value to their employer and the business.

199. The adverse action provisions ultimately reward employees for behaviour that wouldn't be accepted in the general community and where their performance is below the required standard. The current system does more to promote litigation and adversary through general protections than it does to encourage employers and employees to work cooperatively and harmoniously to address concerns in the workplace.

Recommendation 7
To address the impact general protections / adverse action claims have on cooperative and productive workplaces, AMMA recommends the following reforms: • Introduce a "genuine reasons" defence for employers taking legitimate management action; • Remove the reverse onus of proof for Adverse Action claims; • Clearly define a "workplace right" in relation to Adverse Action claims and introduce exclusions for unmeritorious claims; and • Introduce a high income threshold and cap on compensation that can be awarded.

3.3 Awards and the safety net

3.3.1 Simplifying the safety net

200. The FW Act introduced the National Employment Standards, setting the floor and mandated outcomes in the system for the minimum terms and conditions of employment. Despite the introduction of this new safety net of minimum employment standards, Australia also retained its legacy industrial awards system.

201. The result is that the current system of workplace regulation is a complex web of legislative and regulatory protections, comprising 10 categories each comprising various minimum entitlements (the NES), 122 industry-specific industrial awards (some exceeding 100 pages in length) plus any additional provisions negotiated in enterprise agreements.

202. Acting as a "middle tier" of regulation, the award system in particular is a confused, unnecessary part of the current workplace system which contributes to the difficulties faced by both employers and employees in the employment relationship.

203. While there was a process of modernising the award system which saw thousands of awards reduced to 122 modern awards, industrial awards still remain a feature of the workplace system. This has created significant confusion and overlap between awards and the National Employment Standards (NES), which is harming compliance, employees and employers.

204. As explored in Chapter 1 of this submission, the award system played a key role in Australia's industrial relations journey, particularly in the early and mid-20th Century where new industries were emerging and the setting of industry standards was appropriate and necessary. However, by the turn of the 21st Century this antiqued system has more than served its purpose. In the modern workplace environment the Awards system is nothing more than a confusing and unnecessary part of the regulatory system where the NES now exists.

205. Still in existence in the 21st Century, the outdated awards system ignores that contemporary employers within the same industries are highly individual in their competitive pressures, operating processes, skills, and technology and workforce strategies.

206. This collectivist approach to classifying workers seeks to pigeonhole occupations into particular industries which doesn't reflect new and emerging types of work or modern workplaces. The role of modern awards has now shifted from being instruments for determining actual wages and conditions to contributing to a far broader and more complex national safety net.[36]

> *"The complexity of awards urgently needs addressing, with poor ambiguous wording creating confusion and conflict between employers and their workforces." Oil and gas executive.* [37]

207. If the award system is to remain a prominent feature of Australia's workplace system, then it must not stifle the flexibility for employers to reward and remunerate individuals more closely aligned to the value they provide to the business. This reflects the modern reality that employers tend not to view workers as a collective resource like any other economic input, but as individuals with distinct skills and experiences. [38]

208. Significantly simplifying the safety net will go a long way to achieving more cooperative and harmonious workplaces.

3.3.2 Annualised Salary Arrangements

209. Despite the FWC's four yearly modern award review process ceasing, there are still decisions coming out of the FWC relating to industrial awards which continue to stifle flexibility and create additional regulatory and administrative burdens on employers.

210. The most damaging and very recent example of the incompatibility of the awards system with modern cooperative and productive workplace relations, and the FWC's poor application of it to modern businesses, is the February 2019 decision on annualised salary arrangements.[39]

211. The decision introduces new model clauses pertaining to annualised wage arrangements to be included in 19 modern awards. In handing down the decision, the FWC considered the introduction of the new clauses necessary to protect employees from potential underpayments and achieve the modern awards objectives.

212. The model clauses will introduce a number of administrative and compliance requirements on employers engaging employees on annualised wage arrangements, including:

- Advising employees in writing and keeping records on how the annualised salary has been calculated, breaking it down into separate components factoring in ordinary hours, overtime and penalty assumptions;

[36] AMMA (2018) *A New Horizon*.
[37] AMMA (2018) *A New Horizon*.
[38] John Slater (2017) *Industrial Relations in Australia: A handbrake on prosperity*.
[39] 4 yearly review of modern awards - Annualised Wage Arrangements [2019] FWCFB 1289.

- Making additional payments to employees if they work hours outside the outer limits of their annualised salary 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.

213. These new arrangements essentially take industries that have moved away from the time-based employee management of former decades, back to the dark ages. The new time-keeping requirements for contemporary workplaces requiring employees to stamp in and out of the workplace is enormously out-of-step with 21st Century employment practices.

214. This decision is not only inconsistent with the objective of modern awards, it is antithetical to cooperative and harmonious workplace relations. Not only are employers affected by the significant new administrative burden created by the changes, employees are losing the autonomy to work when and how they want in order to provide the most value to the business.

215. Instead, employees will be confined to the strict and rigid application of their annualised salary arrangement.

216. As suggested earlier in this submission, it is the flexibility and choice both employers and employees have in determining how they engage with each other in the workplace that leads to more cooperative and harmonious workplace relations.

217. 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 with workplace regulation.

Recommendation 8
To address the impact the modern awards system has on cooperative and productive workplaces, AMMA recommends the following reforms: • Investigate options for the Australian Government to reduce the complexity of the awards system or even abolish it entirely; and • Overturn the FWC's decision regarding the new administrative requirements associated with annualised wage arrangements.

PART 4: THE SYSTEM NEEDS AN EFFECTIVE ADMINISTRATOR

218. The performance of the national workplace relations framework is not only determined by the alignment of the legislation to the modern employment environment, but also extends to the institutions that administer and apply them. For this reason it is critical Australia's employment institutions are well functioning, high performing organisations which apply our workplace laws in a manner which is practical and supportive of the common goals of employers and employees.

219. Unfortunately, it is the experience of resources and energy employers that Australia's national industrial relations tribunal, the Fair Work Commission (**FWC**) is failing to support cooperative and productive outcomes in Australian workplaces.

220. AMMA recently called for a full-scale, independent review of the performance, structure and functions of the national workplace tribunal and to recommend ways to reform the tribunal to better facilitate cooperative and productive outcomes in modern Australian workplaces.

4.1 Delays in enterprise agreement approvals

221. The most common areas of grievance for resources and energy employers are the inconsistencies and unjustifiable delays in enterprise agreement (**EA**) approvals at the FWC.

222. Despite the collapse in the number of EA's (examined page 19) being submitted to the FWC for approval, the median time for enterprise agreement approval in 2017-18 was 76 days. In 2019, the FWC stated in its annual report this median approval time had been reduced to 35 days.

223. It is AMMA's understanding this "improvement" was in-part impacted by a large number of very similar construction industry EAs being approved immediately prior to the 2019 Federal Election, along with some changes to the FWC's administration processes.

224. Evidence from several AMMA members also indicates approvals have not improved:

    a) One AMMA member waited 125 days to receive agreement approval, delaying pay rises and other benefits for employees, primarily due to the "unheard" number of undertakings required.

    b) Another AMMA member fought for over 12 months from lodgement to have its enterprise agreement approved by the FWC.

    c) Another 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.

225. A key underlying cause for these delays has been the overly-technical and highly inefficient application of the approvals processes by some members of the FWC. This unnecessarily strict approach has resulted in a great degree of inconsistency from the FWC as to whether agreements meet statutory criteria, the Better Off Overall Test (BOOT), or require undertakings in order to be approved.

226. The FWC is also taking an overly stringent approach to assessing whether employers take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, have been explained to the employees covered by the agreement. This is more often the case where no union has been named as a party to the agreement, or the union opposes an agreement, in comparison to union-endorsed agreements:

> *The FWC has rejected an AMMA member's agreement 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 failed to ever raise during long running negotiations.*[40]

[40] AMMA (2019) *Pathway to Productivity*.

227. As a result of the pedantic assessment process employers are increasingly required to make undertakings, often based on highly unlikely hypothetical scenarios, adding to the administrative burden on employers seeking approval of enterprise agreements.

228. It is further ludicrous that the FWC has now set itself a deadline of up to four months to process and approve "complex" enterprise agreement applications. This is simply unacceptable for AMMA members, many whom are contractors in the highly competitive resources and energy sector and require quick turnaround of in-term agreements to successfully tender for work and keep people in employment.

229. This is not just a resources and energy sector problem. In the retail industry, for example, an agreement lodged on 12 December 2018 was ultimately approved on 11 November 2019, following a FWC appeal process. The effect was 32,000 employees waiting 11 months for a pay increase[41].

230. With specific consideration of workplace cooperation, it is important to note that employers are facing these roadblocks at the FWC after already having bargained and successfully reaching agreement with employees.

231. The willingness of employers and employees to work cooperatively to reach agreement on terms and conditions is undermined when the FWC rejects an agreement and sends the parties back to the bargaining table. The degree of variability in agreement approval under the FW Act unravels any prospect of cooperative and harmonious relations between employers and employees when participating in enterprise bargaining.

232. By rejecting an enterprise agreement and reigniting the bargaining process, the FWC evokes conflict and suspicion between the parties who must then persist with renegotiations to reach mutually beneficial outcomes which satisfy the system. This is particularly frustrating when the FWC itself is responsible for promoting and supporting cooperative and productive workplace relations.

233. The workplace system needs simplification and consistency to once again encourage employers and employees to engage cooperatively in the bargaining process to achieve mutually beneficial outcomes that will directly improve productivity and deliver wage increases at the enterprise level.

234. A good first step is to address the inconsistencies coming out of the FWC caused by the overly legalistic, strict and inefficient application of the agreement approvals process.

235. The FWC is an administrative tribunal, not a court. It should prioritise administrative efficiencies above all else and focus on effectively processing the FW Act's fundamental employment instrument.

236. The real value for employers in the somewhat transactional process of enterprise bargaining is derived from the ongoing relationship with employees and an engaged and productive workforce. Tribunal members must keep this at the forefront of consideration when assessing an enterprise agreement for approval.

Recommendation 9
To address the impact the enterprise agreement approval process has on cooperative and productive workplaces, AMMA recommends: • 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; • Enforce stricter adherence of FWC benchmarks to approve enterprise agreements; and • Fast track approvals for agreements covering a majority of employees over a prescribed wage level / percentage above the safety net.

[41] FWC Appeal Decision [2019] FWCFB 7599

4.2 Application of employee protections

237. Part 3.2 of this submission outlines the challenges employers have experienced under the FW Act's employee protections regime. In the areas of unfair dismissals and adverse action claims, the approach of the FWC is just as damaging to workplace cooperation and harmony as the legislation itself.

4.2.1 FWC approach to unfair dismissal matters

238. 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 (see examples page 29). Despite this, some members of the FWC appear determined to undermine the responsibility of business managers to protect their employees, customers and the general public.

239. The current system allows the FWC to substitute its own decision for that of the employer when determining an unfair dismissal outcome. This has become highly challenging for employers as it provides tribunal members with unprecedented discretion to award remedies for unfair dismissal based on their own interpretation of what is 'harsh', even after finding a valid reason for termination exists. In 2018-19, the FWC awarded reinstatement in 9% of the unfair dismissal applications considered by tribunal members.[42]

240. That the tribunal can overturn an employer's decision to dismiss an employee found to have engaged in serious misconduct significantly undermines the authority of employers to take action against "troublesome employees", and undermines management strategies to maximise cooperation and productivity:

> *"There's not a lot of confidence in the unfair dismissal provisions and the way they're applied. Before you terminate an employee, no matter how bad the misconduct or policy breach, you need to have some fairly complex and expensive discussions with your lawyers about the merits of the case."* - Engineering and construction company executive.[43]

241. The unfair dismissal system needs to achieve fair and balanced outcomes that recognise managerial decision making is paramount unless there are exceptional circumstance that warrant the tribunal's intervention.

242. Where an employee has not conducted themselves consistent with workplace policies and community standards, there is a serious loss of trust and confidence in the employment relationship. Without those two fundamental attributes, it is difficult to see how employers and employees can be expected to work cooperatively and harmoniously in the workplace.

4.2.2 FWC approach to general protections / adverse action

243. The FWC's approach to general protections / adverse action matters are further creating significant impacts on cooperation and harmony in Australian workplaces.

244. The FWC is failing to effectively mediate these matters at the tribunal level, instead seeing a record number of matters reach the Federal Court jurisdiction, clogging up the court system and costing employers hundreds of thousands of dollars in legal fees.

245. A key reason for this is the FWC's over-reliance on public servant conciliators to deal with adverse action claims. While several AMMA members have reported professional and satisfactory outcomes, others have complained that some conciliators seem more determined to see matters settled (paying of "go away money") instead of assessing the merits of claims, to which there often are none.

[42] Fair Work Commission, Annual Report 2018-19 – Table D6, published September 2019.
[43] AMMA (2018) *A New Horizon*.

246. Such complaints are clearly not uncommon with the FWC's annual reports showing 113 formal complaints were made about staff conciliators over the past four years – or 4.5 times the number of complaints made about tribunal members themselves. Notably, these are just the formal complaints; most users of the FWC's services are repeat customers and would be reluctant to lodge a formal complaint.

247. As a point of principle, it is bad policy to have virtually anonymous public servants working to 'settle' adverse action matters where a more experienced FWC member would have more gravitas in advising unmeritorious applicants that their cases have no prospects of success.

248. There is also an alarming lack of transparency around these conciliators, last reported in the FWC's 2017-2018 Annual Report to number 36, and who are paid circa $125,000-$150,000 per annum to perform duties that should be allocated to statutorily-appointed tribunal members. Information on their prior careers, the appointment process and selection criteria is nowhere to be found.

249. The role of public servant conciliators should be limited to assisting tribunal members, not replacing them. Statutorily-appointed members of the FWC should deal with Adverse Action claims as intended under the FW Act. This would see a greater number of matters resolved, or in many cases dismissed, at the FWC level instead of seeing vexatious claims fail in conciliation and reach the costly court jurisdiction.

250. Such an outcome would send clearer signals to employees about proper use of the general protections provisions, remove the constant threat of an adverse action claim for managers making legitimate decisions in the interest of the workplace, and overall support more employers and employees discussing and resolving disputes at the workplace level through a non-litigious manner.

Recommendation 10
To address the impact the FWC's administration of employee protections has on cooperative and productive workplaces, AMMA recommends: • Exempt terminations for serious offences and misconduct from contesting dismissal processes and decisions; • Limit the ability for the tribunal to substitute its decision for that of an employer to only cases where a valid reason did not exist for termination; and • Cease outsourcing adverse action matters to public servant conciliators and allocate all claims to appropriately qualified statutorily appointed tribunal members.

4.3 Structure and resourcing of the FWC

251. It is perhaps not surprising that employers have significant concerns about key elements of the FWC's administration and performance, given the ongoing politicisation and dysfunction surrounding the structure and resources of the tribunal, ranging from its presidential structure to the allocation of important Full Bench matters.

252. Much of this concern initiated with the former Gillard Government's 2013 decision to appoint two new Vice Presidents, seemingly hand-picked by the ALP and the tribunal's President Justice Iain Ross (a former ACTU assistant secretary who himself was relatively new to the role), to have greater seniority and thus effectively demote the two longstanding Howard Government-appointed vice presidents[44].

253. The political nature of these appointments was highly controversial at the time, considered unprecedented in nature and raised criticism from various legal and industrial relations experts in Australia:

[44] "Fair Work appointments 'flawed, disrespectful' (30-03-2013) *The Australian* newspaper

The Law Council of Australia warned that if the two current vice-presidents were not installed in the new positions, it would reduce their status and possibly "reduce the independence of the tribunal".

The council also expressed grave concern at changes expanding the powers of the president, allowing Justice Ross to take over matters referred to the full bench or another member. It warned the change could be perceived as an attack on the independence or competence of the full bench[45]*.*

254. Concerns of the business community (and other industrial relations stakeholders) that the former Labor Government had been trying to capture the long-term leadership and direction of the FWC with key ALP appointments, have unfortunately since proven justified.

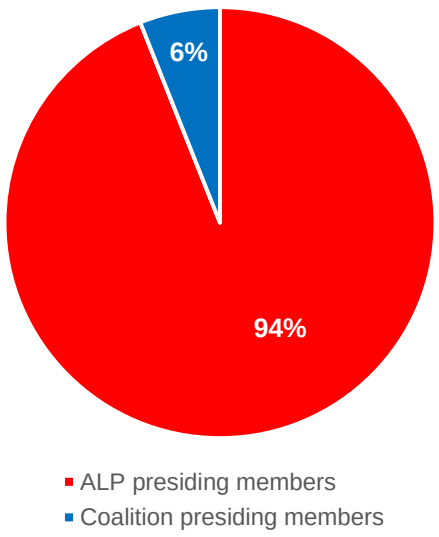
4.3.1 Coalition appointees frozen-out from Full Bench matters

255. Recent analysis by AMMA identified significant concerns regarding the allocation of Full Bench determinations amongst tribunal members. The function for managing the appeals roster and the composition of Full Benches is particularly important as it sets the direction for how the tribunal deals with matters that come before it.

256. The analysis of data compiled through publicly available Full Bench matters from 2017-2019 shows:

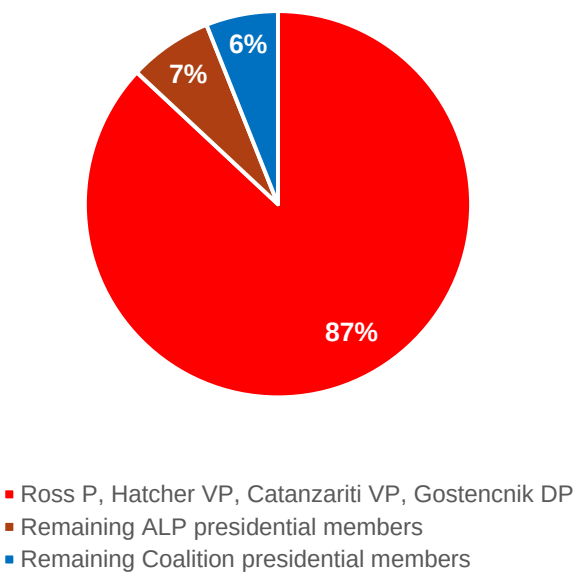
- 94% of all Full Bench matters were presided over by Labor Government appointed tribunal members (Chart 4.3.1).
- 87% of all Full Bench matters were presided over by either President Ross, Vice President Hatcher, Vice President Catanzariti or Deputy President Gostencnik; all appointed by the former Rudd/Gillard Labor Government (Chart 4.3.2) to key leadership positions in the tribunal.
- 75% of all Full Bench matters were determined by a majority Labor-appointed bench (typically two Labor appointees and one Coalition appointee).
- Only one of the six tribunal members appointed in December 2018 has participated in Full Bench proceedings (two matters of minor significance).

Chart 4.3.1 Fair Work Commission Full Bench presiding members by Government appointment



[45] "*Fault lines start to appear as Fair Work Australia attempts to get its house in order*" (05-03-2013), *The Australian*

Chart 4.3.2 Fair Work Commission Full Benches presided by senior tribunal members



257. These figures demonstrate that out of a 42-person administrative tribunal just four members, all appointed by the former Labor Government, have an overwhelming influence on the most significant decisions of the FWC.

258. This is not only contrary to the public interest, but also a grossly ineffective use of the tribunal's resources. The 20 new appointments made by the Coalition since 2013 include barristers, employment lawyers and senior executives, all with contemporary legal and business experience.

259. Many have been appointed as Deputy President with annual remuneration of $471,000. There is no justification for freezing-out highly qualified Coalition-appointed members from Full Bench matters. These significant new resources available to the FWC, paid for by the Australian taxpayer, should be put to use in the interest of decision making at the tribunal aligned with and supportive of modern day cooperative work outcomes.

4.3.2 Underutilisation of female talent

260. Equally concerning is the underutilisation of female members of the FWC.

261. Since coming to office in 2013 the Coalition has made great inroads into the gender balance of the tribunal. In 2014, women comprised 24% of all tribunal members and just 26% of presidential-level members. As of February 2020, women now comprise 40% of all tribunal members and one-third (33%) of all presidential-level members.

262. This significant redress of the FWC's gender balance problem, in just seven years, is to be highly commended. However, AMMA's analysis of FWC Full Bench decisions from 2017-2019 shows female presidential-level members have been shockingly sidelined from presiding over important Full Bench matters:

- Of all the Full Bench matters over the past three years (713 decisions, 2017-2019), female deputy presidents presided over just 3% (22 of 713 matters) (Chart 4.3.3).
- Removing the now-retired former ALP-appointed female deputy president, Anne Gooley, from this analysis and the number drops to less than 1% (7 matters total).
- In 2019, at a time in which women comprised one-third (33%) of all presidential-level members, they presided over a shockingly low 1.7% of Full Benches matters (4 of 235 matters).

Chart 4.3.3 Fair Work Commission Full Benches by presiding members' gender (2017-2019)

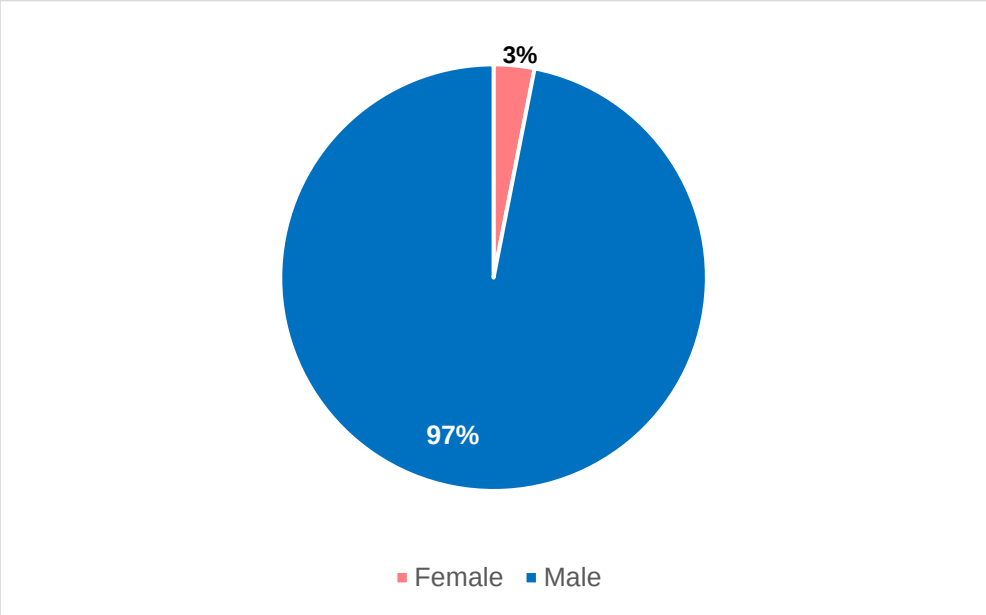
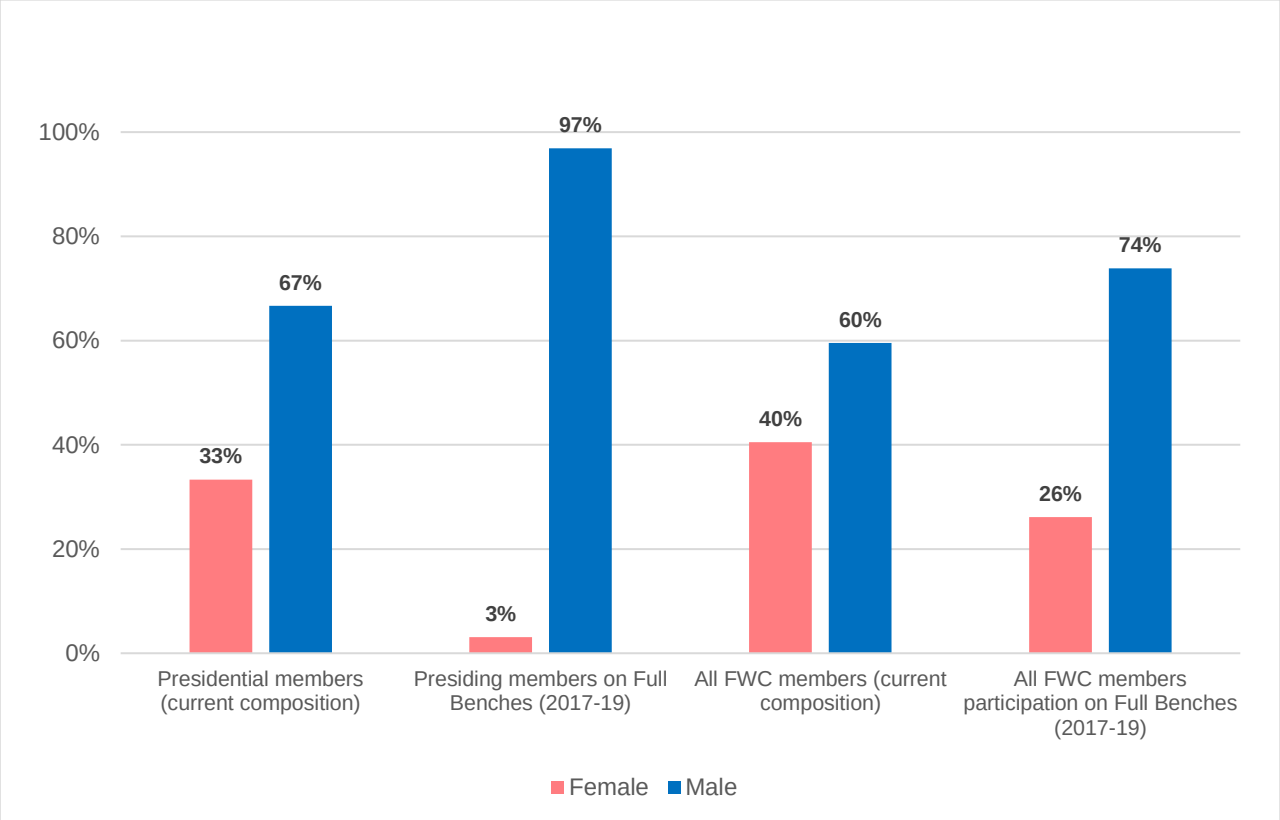


Chart 4.3.4 Female representation at the Fair Work Commission



263. Questions should be asked as to why highly-qualified female presidential members of the FWC, with the same statutory standing as their male counterparts, are being sidelined from leadership decision making processes.

264. The issue of female underrepresentation in organisational leadership is one of great significant in today's workplace. Female leaders bring additional diversity in talent, viewpoints, experience and skills. Companies which continue to recruit their leaders from narrow pools of homogenous candidates suffer across all business and social performance metrics as a result.

265. This is being recognised and addressed in corporate boardrooms and male-dominated industries across Australia. For example, ASX200 companies have lifted their overall female board representation from 8% to 30% since 2008. In 2019, 40% of all board director appointments to ASX200 companies were women.

266. Simply, there is no justification for the FWC to be utilising its existing female leadership talent in less than 2% of important matters. If the tribunal fell under the watch of the Australian Shareholders Association or the Australian Institute of Company Directors, both organisations which are heavily driving the campaign for greater female leadership equality in Australian businesses, they would surely come under significant criticism for sidelining their female members from leadership decisions.

4.3.3 Part four summary

267. Clearly the dysfunction and inefficiencies at the FWC are compounding challenges employers and employees and experiencing with the Fair Work legislation. Improving the performance of the tribunal would go a long way towards resolving many of the concerns of employers with Australia's present day workplace relations system.

268. AMMA encourages the Morrison Government to consider a full scale review of the FWC to examine how its resources and public funding could better support positive workplace outcomes to the benefit of the Australian economy and wider community.

269. Terms of reference could include recommending processes for transparent review of Full Bench allocations, assessing individual tribunal member workloads and performance, and regular assessment of whether the approach and performance of the FWC overall is supporting more cooperative, productive and harmonious outcomes in Australian workplaces.

270. The Productivity Commission may be an appropriate vehicle to lead such a review, given its past experience in reviewing the functioning of the entire workplace relations system in 2015, and to ensure such a review is fundamentally grounded in productivity, administrative efficiency and reducing red tape for employers and employees alike.

Recommendation 11
To address the dysfunction and inefficiencies at the FWC which is impacting the effective decision making of the tribunal, AMMA recommends: • Conduct a full-scale review of the Fair Work Commission to examine how its resources and public funding could better support positive employment outcomes; and • Establish processes for transparent review of Full Bench allocations and assessing individual tribunal member workloads and performance.

CONCLUSION

271. AMMA advocates on behalf of the nation's resources and energy employers to achieve the industry's vision for cooperative and productive workplace relations, unleashed through a flexible and future-focused system, safeguarding the industry's competitiveness in the global economy.

272. To achieve this vision, Australia must have the appropriate legislative framework, administered by a practical-focused and high-performing national workplace tribunal, to support employers and employees to achieve more cooperative and harmonious workplace relations across the economy.

273. This is particularly true for the resources and energy industry which is undergoing a revolution across skills, demographics, employee attitudes and productivity-enhancing technologies.

274. After a prolonged period – under both ALP and Coalition Governments - where the critical need for meaningful industrial relations reform was largely ignored, AMMA commends the Morrison Government for seeking to align the functions and performance of the national employment framework with the future aspirations of Australian employers and employees.

275. The overarching concern of resources and energy industry employers is that the current workplace system has significantly limited the capacity for employers to engage directly with their employees to establish mutually beneficial outcomes and considers the interests of both the enterprise and the workforce. The ability to engage directly on workplace matters is at the heart of achieving the most cooperative and harmonious industrial relations.

276. AMMA urges Australia's national policymakers to consider and address the rigidity and complexity of our workplace relations system and seek to remove the significant red tape and regulatory burdens that are impacting both employers and employees to achieve cooperative and harmonious workplace relations.

277. AMMA would welcome the opportunity to provide further counsel, evidence, employer feedback and/or any other information that would assist the Attorney General in investigating this issue.

RECOMMENDATIONS

Recommendation 1

AMMA strongly recommends the Morrison Government pursue an assertive campaign of meaningful industrial relations reform, strategically targeting areas of poor alignment to modern-day Australian workplaces and setting the nation up for growth and prosperity in the future.

Recommendation 2

Australia's future workplace regulation must:

- provide multiple agreement making options to cater for increased choice and flexibility demanded by future employers and employees; and
- include a new form of individual statutory agreements entered into by an employer and employee, with similar characteristics, approval processes and enforceability as a collective agreement, including no industrial action during the life of the agreement.

Recommendation 3

To significantly improve the ability for enterprise agreement making to facilitate cooperative and productive outcomes, AMMA recommends:

- Limiting content of agreements to matters that pertain to the employer-employee relationship;
- Reinstating the prohibited content provisions of the *Workplace Relations Act 1996;* and
- Tightening bargaining rules to ensure industrial action is not taken over prohibited content.

Recommendation 4

To address the impact of threatened and actual protected industrial action on cooperative and productive workplaces, AMMA specifically recommends the following reforms:

- Limit industrial action to claims pertaining to the direct employer-employee relationship;
- Implement controls regarding threats of industrial action that are later withdrawn;
- Introduce a requirement for parties to be genuinely trying to reach an agreement linked to good faith bargaining; and
- Limit the ability to take industrial action to only those below a high-income threshold.

Recommendation 5

To address the impact third party interference has on cooperative and productive workplaces, AMMA specifically recommends the following reforms:

- Expand agreement making options to include, collective, individual, union and non-union statutory agreement making options; and
- Limit the ability for unions to apply as an "aggrieved person" to inform the FWC on the approval process of already approved enterprise agreements.

Recommendation 6

To address the impact of unfair dismissal provisions on cooperative and productive workplaces, AMMA recommends the following reforms:

- Exempt terminations for serious offences and misconduct from contesting dismissal;
- Provide that where a valid reason for termination exists, the dismissal should stand; and
- Ensure unfair dismissal applications are determined only on the merits of the case and not influenced by employee circumstances.

Recommendation 7

To address the impact general protections / adverse action claims have on cooperative and productive workplaces, AMMA recommends the following reforms:

- Introduce a "genuine reasons" defence for employers taking legitimate management action.
- Remove the reverse onus of proof for Adverse Action claims;
- Clearly define a "workplace right" in relation to Adverse Action claims and introduce exclusions for unmeritorious claims; and
- Introduce a high income threshold and cap on compensation that can be awarded.

Recommendation 8

To address the impact the modern awards system has on cooperative and productive workplaces, AMMA recommends the following reforms:

- Investigate options for the Australian Government to reduce the complexity of the awards system or even abolish it entirely; and
- Overturn the FWC's decision regarding the new administrative requirements associated with annualised wage arrangements.

Recommendation 9

To address the impact the enterprise agreement approval process has on cooperative and productive workplaces, AMMA recommends:

- 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;
- Enforce stricter adherence of FWC benchmarks to approve enterprise agreements; and
- Fast track approvals for agreements covering a majority of employees over a prescribed wage level / percentage above the safety net.

Recommendation 10

To address the impact the FWC's administration of employee protections has on cooperative and productive workplaces, AMMA recommends:

- Exempt terminations for serious offences and misconduct from contesting dismissal processes and decisions;
- Limit the ability for the tribunal to substitute its decision for that of an employer to only cases where a valid reason did not exist for termination; and
- Cease outsourcing adverse action matters to public servant conciliators and allocate all claims to appropriately qualified statutorily appointed tribunal members.

Recommendation 11

To address the dysfunction and inefficiencies at the FWC which is impacting the effective decision making of the tribunal, AMMA recommends:

- Conduct a full-scale review of the Fair Work Commission to examine how its resources and public funding could better support positive employment outcomes; and
- Establish processes for transparent review of Full Bench allocations and assessing individual tribunal member workloads and performance.