MCA briefing note

INTERIM REPORT OF THE STATUTORY REVIEW OF THE 2022 'SECURE JOBS, BETTER PAY' LEGISLATION

February 2025

Background

On 3 February, the Albanese government released the draft report for the statutory review of its 2022 '*Secure Jobs, Better Pay'* legislation.[1] The report contains 19 recommendations.

The Review was conducted by two academics, Emeritus Professor Mark Bray and Professor Alison Preston.

Overall, the reviewers have produced a highly academic report that sidesteps the key controversial issues such as multi-employer bargaining but lends support to the government's changes. It is a disappointing, yet entirely unsurprising document.

There is an opportunity to respond to the draft report and its recommendations by **16 February 2024**, which the MCA will do. The final report is due to be provided to the government by **31 March 2024**.

This note considers the report's overall approach and its analysis and recommendations in relation to those aspects of the legislation that have been of greatest concern to the mining industry.

Key concerns

- The Report sidesteps and downplays the enormous changes that have been made by the imposition of multi-employer bargaining
- The Report ignores the legitimate concerns around the unjustified expansion of union power, particularly in relation to forced collective bargaining without employee support
- The authors of the Report have engaged in their own subjective analysis and based many of their conclusions on their own personal preconceptions and academic biases. This brings into question their independence.

Multi-employer bargaining – endorsement of government's position

This issue has been of grave concern to the MCA since the Fair Work Commission's decision in August 2024 to compel three New South Wales coal mines into forced multi-employer bargaining on the basis that they mine the same commodity in the same state.

The review recommendations have effectively sidestepped the major controversial issues in relation to the legislation, including multi-employer bargaining and intractable bargaining.

[1] Emeritus Professor Mary Bray and Professor Alison Preston, *Draft report of the Secure Jobs, Better Pay Review*, 31 January 2025 (Draft report): https://www.dewr.gov.au/workplace-relations-australia/resources/draft-report-secure-jobs-better-pay-review.

The most significant flaw in this report is its failure to acknowledge the fundamental shift in Australia's bargaining system that the legislation made by making multi-employer bargaining compellable. It does this by enabling competing employers, for the first time, to be forced in against their will. The report's analysis of the 'amendments and intent' makes no mention of this fundamental change. This is extraordinary. The only acknowledgement of the involuntary element was a passing reference that *'this case was the first significant contested single-interest employer authorisation application.'*

In response to concerns of the Minerals Council and various other business voices that the reach of multi-employer bargaining was far beyond, and directly contrary to what the government promised (i.e. 'same commodity, same state'), the Review concluded that:

> *"The Review Panel does not share the concern of some stakeholders that further amendments are needed to stem the scope of the stream"*

The Report's analysis of this issue is highly partisan. The reviewers deny there is evidence the change will *'negatively impact productivity, the labour market, or employers'*. They also dismiss concerns that the legislation is deliberately designed to expand multi-employer bargaining at the expense of single-enterprise bargaining as being '*highly hypothetical*'.

The chapter on this topic concludes by asserting, without evidence, that:

> *'The Review Panel also notes that the international experience points to potential economic benefits'* from multi-employer bargaining.

The report provides no evidence, nor even a citation for this assertion. This is unusual in a report that contains a total of 1,185 footnotes and citations. It appears to be a statement of the personal preferences of the authors.

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

Unilateral commencement of bargaining by unions – endorsement of government's position

The Report's analysis of the new forced bargaining provisions are equally concerning.

The legislation introduced a new power for unions to compel employers to commence collective bargaining for a new agreement within 5 years of the expiry of an existing agreement. This can be done unilaterally by a union, without any need to demonstrate any employee support or interest. The MCA has been strongly critical of this new power to force employers into what could be a divisive, litigious and ultimately pointless process.

This is a further issue in which the authors' personal preferences appear to have had a disproportionate influence. The authors express their own view that, prior to 2022, *'employers had so much power over the bargaining process, including initiating bargaining.'*

The report rejected widespread employer concerns that it removes the requirement for employee 'majority support', which was intended to provide that bargaining was a democratic process. Instead, the report cites with approval the submission of the ACTU, that the requirement to demonstrate actual worker support *'may impose administrative burden on unions…'*

The Report then concludes that this amendment has been successful simply because it has been used*:*

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

The question of whether even a single employee supports their use was clearly not of concern. To the extent that it is a concern, it is a concern only to the extent that demonstrating any employee support is an *'administrative burden'* for unions.

Intractable bargaining – no recommendations 'at this time'

The reviewers state they will not make specific recommendations *'at this time'*, leaving open the possibility that recommendations may be made in the final report.

The reviewers are not entirely supportive of the government's intractable bargaining system. They state they are *'unconvinced'* about the intended effect of additional government-Greens amendments, which were part of the subsequent 2023 legislation and now provide that a union can never be worse off in any respect in an arbitrated bargaining outcome.

However, they argue that the use of *'bargaining tactics'* is not inherently wrong, and that FWC arbitration as the end point of the bargaining process introduces 'a level of risk' to both unions and employers. They do not acknowledge that the 2023 amendments now mean that all such risk lies with only one side.

Union right of entry to 'assist Health and Safety Representatives'

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

These amendments created a very deliberate 'loophole' in which right of entry can be exercised by a union official without giving the usual notice period and without them meeting the requirements that otherwise apply to permit holders, including that they a 'fit and proper person'. The loophole is so wide that even union officials who have had permits revoked for misconduct, or had a permit denied on the basis they were not 'fit and proper' can nonetheless exercise entry at any time under the guise of a 'request' to 'assist' a HSR.

Disappointingly, the review did not accept these concerns. The reviewers concluded that '*more actual evidence of misuse is required'* before considering any change. The Report acknowledges concerns at the potential for abuse, but suggest this abuse should be allowed to play out and be documented before any action is taken to address it.

The report did also note the incongruity of including this particular amendment, passed in 2023, amongst the Secure Jobs Better Pay amendments:

> *'If Parliament has genuine concerns about the immediate operation of amendments in the future, the Review Panel suggests that significantly more work should be undertaken to collect empirical data and evidence before commencing a statutory review.'*

This criticism has some merit. The relevant amendments were not announced by the government prior to their introduction to the Parliament. They were government amendments that were introduced after the Senate Committee inquiry process had concluded and were 'rammed through' on the final sitting day of 2023 without any debate. They had zero public or Parliamentary scrutiny. In this case, the concerns of the reviewers regarding the approach of the government and the Parliament are well-founded.

Fixed term contracts – acknowledgment of employer concerns

In its chapter, the report comes as close as it does anywhere to critiquing the government's approach, both in term of its rationale for the changes, and their actual impact.

The reviewers provide some sympathy for employers' view that *'the fixed-term contract amendments were an overly complex solution to the perceived problem'*.

In terms of the impact of the changes, the review notes that they have not seen a reduction in the used of fixed term contracts. It found that:

> *"…contrary to the intentions of the Secure Jobs, Better Pay Act, the number of employees on fixed-term contracts has reached its highest level in a decade."*

The Report also notes *'there is no difference in transition outcomes from fixed-term contracts after the passage of the Secure Jobs, Better Pay Act';* and that *'there is no difference in the earnings of employees on fixed-term contracts vis-à-vis permanent contracts'.*

The Report makes a welcome recommendation that '*the Australian Government should reconsider the approach to limiting the use of fixed-term contracts*'.

One option it suggests is to remove the absurdly complex and unclear list of exemptions that have been inserted into the Act and instead *'replace the current Fair Work Act framework with a principles-based approach that gives the FWC more powers and responsibility (e.g. through modern awards)'.*

Under this approach, limits on fixed term contracts would be included in awards rather than in legislation and only in awards covering those sectors where there is a perceived problem, which does not include mining.

General comments on the Review

The draft report endorses the SJBP changes as '*on the whole, achieving the Australian Government's intent, operating appropriately and effectively and with minimal unintended consequences'.*[2]

The reviewers recommend a further review be conducted *'in 2 to 3 years' time'*, citing 'gaps' in the available data and the need for more time for bargaining cycles to play out.

Much of the report reads at times like an academic literature review. Indeed, one of the authors, Emeritus Professor Bray, is cited on no less than 24 occasions in his own report. The other reviewer, Professor Preston is cited on two occasions.

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

At certain points the reviewers have ignored or unilaterally changed their terms of reference. For example, they state that

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

In this way, the reviewers allow themselves to sidestep and completely downplay of the significance of the change from enterprise-level to multi-employer bargaining, which the legislation is designed to bring about. The differences between the two concepts are enormous, as are their consequences. They should not be treated as an academic word game.

The reviewers also implicitly endorse the Labor government's push to radically intervene and change the bargaining system. For example, the adopt a view that *'the economic situation of Australian workers declined during the period between 2012 and 2022*' and that '*whatever the cause, the urgency of the problem and the need for change were undeniable*'. This is not independent analysis, it is political partisanship.[3]

[2] Draft report, p. 13.
[3] Draft report, p. 79-80.