MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO REVIEW OF THE *FAIR WORK AMENDMENT (SECURE JOBS, BETTER PAY) ACT 2022 AND PART 16A OF THE FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) ACT 2023*

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BACKGROUND TO THE REVIEW

Purpose and scope

On 2 October 2024, the Department of Employment and Workplace Relations (DEWR) released details of the statutory review (the Review) of the amendments to the *Fair Work Act 2009* (the Act) made by the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* and Part 16A of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (the amendments).[1]

The requirement for the Review was included under a deal between the Albanese Government and independent Senator David Pocock, to secure passage of the government's legislation.[2] The legislation requires that:

- A review be commenced by the Minister no later than two years after commencement[3]
- The review report within six months of the commencement of the review.[4]

The 2022 amendments made substantial changes to various elements of the Act. These were made in great haste, with negligible scope for proper consideration by the Parliament. For example, the timeframe set by the government for the Senate Committee inquiry was three weeks. The avoidance of scrutiny was a deliberate design feature of the government's approach, not only to the legislation, but to the purported 'consultation' process that preceded it.

Part 16A of the 2023 legislation dealt only with amendments to section 494 of the Act. This created a new loophole to enable greater union right of entry to workplaces, purportedly to 'provide assistance' to a health and safety representative' (HSR). This amendment is also considered in this submission.

On 18 October 2024, DEWR announced that submissions to the Review could be made no later than 29 November 2024. The Terms of Reference for the Review are as follows:

> *Without limiting the matters that may be considered when conducting the review of the Secure Jobs, Better Pay Act and Part 16A of the Closing Loopholes Act, the review must:*
>
> - *consider whether the operation of the amendments are appropriate and effective*
> - *identify any unintended consequences of the amendments*
> - *consider whether further amendments to the Fair Work Act 2009, or any other legislation, are necessary to: improve the operation of the amendments or rectify any unintended consequences that are identified.*

On 18 October 2024, DEWR provided further guidance outlining its expectation that submissions should be *'supported by appropriate data or other evidence'* and *'include real life examples rather than hypotheticals'* among other things. On 4 November 2024 the government issued revised Terms of Reference which provided for a draft report to be provided to the DEWR by 31 January 2025, with a final report to be delivered to the Minister by 31 March 2025.

In this submission, the Minerals Council of Australia (MCA) has made best efforts to provide data, examples and insights on the impact of the amendments in the mining industry within the limitations of the Review.

The MCA's greatest concern is that the most regressive impacts of the amendments will not be felt in the short term. The amendments include deliberate design features to fundamentally alter the nature of enterprise bargaining in Australia. These will not fully take effect for a number of years and are designed to be a 'slow burn' process.

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[1] Department of Employment and Workplace Relations, website, 'Review of the Secure Jobs, Better Pay Act, 2 October 2024.
[2] Senator David Pocock, Senate, Official Hansard, 1 December 2022, p. 2759.
[3] *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022*, s 4.
[4] *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022*, s 4; for Part 16A the timeframe is nine months

The three grave threats to the mining industry under the 2022 amendments

Under the Albanese Government's 2022 amendments, mining operations, particularly those in the Pilbara, are now vulnerable to highly damaging adverse impacts that would have been unthinkable three years ago. The common theme is that they all give unprecedented powers to unions to unilaterally assert power over workplaces, without the need to negotiate with an employer, or have the support of employees. This is unbalanced and anti-democratic. Yet it is a deliberate design feature of the government's amendments.

There is not a single element of these measures that will either enhance productivity or cooperation in workplaces. They are all doing the opposite.

1. **Multi-employer bargaining**
    - The recent test case covering NSW coal mines ruled that competing businesses must now be forced to bargain together simply because they mine the same commodity in the same state. This was sufficient to meet the new legislative test of a 'common interest'.
    - This precedent can now be extended to all businesses that mine iron ore in Western Australia, opening the door to industry-wide 'bargaining' and industry-wide strikes – a return to 1970s-style industrial confrontation and disruption.
2. **Forced bargaining without employee support**
    - Enabling unions to unilaterally initiate bargaining in the absence of majority support by employees is a significant shift in power away from workers and businesses towards unaccountable union officials.
    - Any employee 'bargaining representative' can unilaterally force employers to bargain within five years of the nominal expiry date of the previous enterprise agreement.[5] This can also be used in pursuit of multi-employer agreements.
    - The exposure for businesses in the Pilbara is significant. There are over 100 collective agreements in WA mining industry, around 40 of which are within the five-year timeframe.
    - Remarkably, certain unions are now agitating for the 5-year limit to be removed.
3. **'Intractable' bargaining and arbitration**
    - Multi-employer 'bargaining' will inevitably be complex and unproductive. It is highly unlikely that any agreement will be reached between large, competing businesses. Unions will be able to apply for 'intractable bargaining declarations' once the minimum nine-month bargaining period has passed.
    - The system can be gamed to 'run down the clock' to 9 months and trigger arbitration by the Fair Work Commission. This destroys the previous nature of enterprise bargaining agreements, which will no longer be agreed outcomes, but imposed as arbitrated 'determinations'.
    - Importantly, workers will have no opportunity to vote on what is imposed on them.

The cumulative effect of these changes will be that all three aspects of enterprise bargaining agreements that have existed since the 1990s will be removed – they will no longer be enterprise-based, there will be no real bargaining, and there will be no actual agreement.

[5] *Fair Work Act 2009* (Cth), s 173 (2A).

SUMMARY AND RECOMMENDATIONS

1. Involuntary multi-employer bargaining must be repealed

Multi-employer bargaining is inappropriate for the mining industry due to the industry's current successful workplace arrangements, which provide high paying, secure jobs and harmonious workplaces. Mining industry investment is also sensitive to industrial relations uncertainty and industrial action, which are encouraged under the amendments.

Recommendations

a. Abolish the 'single interest' stream of involuntary multi-employer bargaining[6]

b. Retain the 'supported bargaining' stream – and ensure it is does not exceed its intended purpose of assisting workers in low paid industries

c. Retain the voluntary 'cooperative workplaces' stream where business and workers are free to choose multi-employer bargaining, where their interests genuinely align.

2. Union loopholes to force bargaining without employee support must be repealed

Changes to the bargaining system have allowed unions to force employers into enterprise bargaining without the need for any support of the workforce. This is anti-democratic. It forces bargaining processes where they are neither desired nor appropriate.

In the mining industry, forced bargaining will achieve nothing more than needless confrontation and litigation. It directly threatens hundreds of cooperative arrangements that are currently in place, which have delivered high wages, high productivity and workplace harmony. In short, there was no 'problem' to solve in the mining industry, nor did the government ever assert that there was.

Recommendation

a. Repeal the ability for unions to unilaterally force employers into involuntary bargaining without any need to demonstrate majority employee support

b. Oppose any moves by unions or other parties to expand this loophole.

3. The 'intractable bargaining' regime must be repealed in its current form

The productivity benefits of enterprise bargaining are only realised where enterprise agreements are actually agreed by the parties. Forcing arbitrated outcomes on businesses undermines the very idea of enterprise agreements. It also undermines the quality of outcomes, breaking the crucial balance between pay and productivity on which the system of enterprise bargaining had, until now, been based.

Amendments inserted into the 2023 legislation by the government and the Greens political party prohibit the Fair Work Commission (FWC) from ever issuing a determinination which is 'less favourable' in any respect to a union or employee.[7] This is a deliberate loophole. It will invariably mean the bargaining system will be abused and 'gamed' by unions. It is unprecedented and, until the current government, it would have been unconscionable for any form of litigation to be 'rigged' in such a way that one class of litigants are guaranteed to never lose.

Whilst not technically part of the amendments that are the subject of this Review, it is impossible for the reviewers to conduct an accurate assessment of the 2022 changes to bargaining without considering the impact of the 2023 Government-Greens party amendments, which will fundamentally compromise the very nature of the bargaining system.

[6] *Fair Work Act 2009* (Cth), s 248.
[7] *Fair Work Act 2009* (Cth), ss 270A(2) and 270(3).

Recommendation

a. Repeal 2023 Government-Greens party amendments, that have created loopholes allowing the bargaining system to be manipulated to trigger arbitration, in which a particular side is guaranteed to always win

b. Ensure that the 2022 amendments operate in a manner that encourages negotiated outcomes and does not incentivise intractable bargaining tactics.

4. Unions must be better regulated to prevent corruption and abuses

Under the government's workplace relations changes, unions have been given more coercive powers, including:

- Increased right of entry powers, with deliberate loopholes that facilitate their abuse
- The ability to force businesses and workers into bargaining with no worker support
- Vastly expanded powers for union delegates, even in non-union workplaces.

However, the institutions and safeguards for ensuring union accountability have been weakened, particularly with the abolition of the Australian Building and Construction Commission (ABCC). With these expanded powers, there is a greater need for strong regulation to prevent corruption.

Recommendation

a. Re-instate an industry-specific regulator for the building and construction industry, with greater resources and powers than the ABCC. This should include the ability to enforce not only workplace laws but other laws, particularly relevant criminal laws.

5. New union right of entry loopholes must be repealed

The 2023 amendments created a new loophole that can be used to allow union officials who are not 'fit and proper' persons to hold entry permits to enter sites if they assert that they are 'assisting' a health and safety representative.[8] There is no excuse for allowing individuals who have failed basic character requirements to enter worksites.

Recent developments in the WA resources sector have seen the expansion of the use of union right of entry through union 'alliances', which have resulted in union permit holders from one union using another union's coverage rules to maximise their right of entry activities. A lack of enforcement of union coverage rules and insufficient safeguards has meant union right of entry is now open to abuse like never before. This is a very deliberate design feature of the government's legislation.

Recommendations

a. Repeal the last-minute change made by the government in 2023 that creates a loophole allowing criminals and other disqualified persons to enter worksites under the pretext of 'assisting' health and safety representatives

b. Develop better safeguards on the overuse and misuse of union right of entry permits, including removing the loophole that has removed the FWC's usual powers to deal with abuse of the system through excessive right of entry visits.

[8] *Fair Work Act 2009* (Cth) ss 494(4) - (5).

'Revitalising' collective bargaining – What does this mean in practice?

The terms of reference of this Review seek the views of interested parties on whether the operation of the amendments '*are appropriate and effective'* and to *'identify any unintended consequences'.*

These terms of reference should be applied not only from the from the perspective of various parties' subjective views of what they consider 'appropriate' or 'effective' but also against the objects of the Act itself.

The objects of the Act include, principally, *'to provide a balanced framework for cooperative and productive workplace relations*' (emphasis added).[9]

The amendments are fundamentally contrary to this object of the Act. As the practical evidence already demonstrates – and will demonstrate more over time – they have the exact opposite effect. The removal of the balanced framework is not an 'unintended consequence' but deliberate and intended consequence by the government.

If the principal object of the Act was '*to provide an unbalanced framework for the arbitrary imposition of unaccountable union power in order to reduce cooperation and productivity*', then the amendments can only be considered an enormous success. However, given that the objects of the Act still prioritise the principles of balance, cooperation and productivity, the amendments must be assessed in this light. In this respect, they cannot be considered either 'appropriate' or 'effective'.

The most obvious example of this failing is in relation to what the government described as its intent to *'reduce barriers', 'expand access'* and '*revitalise'* bargaining through the amendments.[10]

The government appears to assume that more collective bargaining is always a good thing, regardless of the circumstances in which it occurs, or how unfair or unbalanced the actual bargaining system is.

The amendments allow a union to force an employer into 'bargaining' against their will without any employee support. They then allow the union to trigger an arbitrated outcome without requiring the endorsement of either the employer or the employees. This is not actual 'bargaining'.

Unions can also capture employers against their will and force them into multi-employer 'bargaining', in which employers know they have no reasonable prosect of ever escaping.

The effect of the amendments is to trash the concepts of actual bargaining and agreement-making that previously applied. When one party is 'bargaining' solely at the behest of the other, it is not genuine bargaining. When an agreement is forced upon one of the parties, it is no longer an actual 'agreement'.

The MCA strongly cautions the reviewers against accepting any assumptions that 'more collective bargaining' under this new regime is a worthwhile objective or constitutes a measure of 'success'. Under the amendments, there is no longer a balanced bargaining system that encourages cooperation. Instead, it is one that is predicated on confrontation and litigation, which is guaranteed to lead to less productive outcomes.

[9] *Fair Work Act 2009* (Cth) s.3.

[10] Hon Tony Burke MP, Minister for Employment and Workplace Relations, media release, Delivering secure jobs, better pay and a fairer system, 27 October 2022; Anthony Albanese, Prime Minister, Building for a better future, Speech to the National Press Club, 29 August 2022.

AUSTRALIA'S MINING WORKFORCE – SECURE JOBS AND BETTER PAY

- Over the past two decades the mining industry has made an enormous economic contribution to Australia, driving higher living standards for all Australians.
- Mining employment has more than tripled, showing that rather than being 'broken', Australia's workplace relations laws allowed the industry to deliver high paying, secure jobs to thousands of Australian workers.
- Mining investment is at a crossroad, where business conditions must improve to allow the industry to maintain its competitive advantage and continue to expand into the future.

Economic contribution

The mining industry's substantial investment this century has established it as a cornerstone of the Australian economy.

Over the last 20 years, mining has been the largest contributor to Australia's economic growth.[11] In that period, net capital investment has tripled, bringing the sector's real net capital stock to over 1 trillion dollars.[12] This capital investment continues to generate enormous export revenues for Australia. In 2023-24, the resources sector contributed $405 billion – over half of Australia's total export revenue.[13]

Mining export earnings in turn sustain government revenues, supporting spending on vital services such as health, education, childcare, aged care, and defence. In 2022-23, the total company tax paid by mining companies was $42.5 billion, with a further $31.5 billion paid in royalties.[14] The ATO Deputy Commissioner has stated that *'2022–23 is the second year in a row that the mining sector paid more tax than all other sectors combined'*, proving mining's economic resilience through the economic shock caused by the pandemic.[15]

Success was built on past economic reforms

Over the past 30 years, mining employment more than tripled from 83,600 workers in 1993-94 to 284,900 in 2023-24.[16]

The period of growth in the mining industry coincides with the impact of economic reforms originating during the Hawke and Keating Governments. A central plank of this reform process was the shift away from industry-wide fixing of employment pay and conditions, to modern workplace settings, commencing in the early 1990s.

The sustained increase in the number of highly paid, highly skilled and secure mining jobs over this period shows that the industrial relations system was neither broken, nor in need of radical overhaul at the time the amendments were introduced. No case was ever made by the Albanese Government for inflicting the amendments on the mining sector. Nor does any such case exist now.

[11] Australian Bureau of Statistics, Australian System of National Accounts, Table 5, released 25 October 2024.

[12] Australian Bureau of Statistics, Resources net capital stock, GFCF, and consumption of capital, Australian System of National Accounts, Table 58. Capital Stock, by Industry, cat. No.5204, Released 27 October 2023.

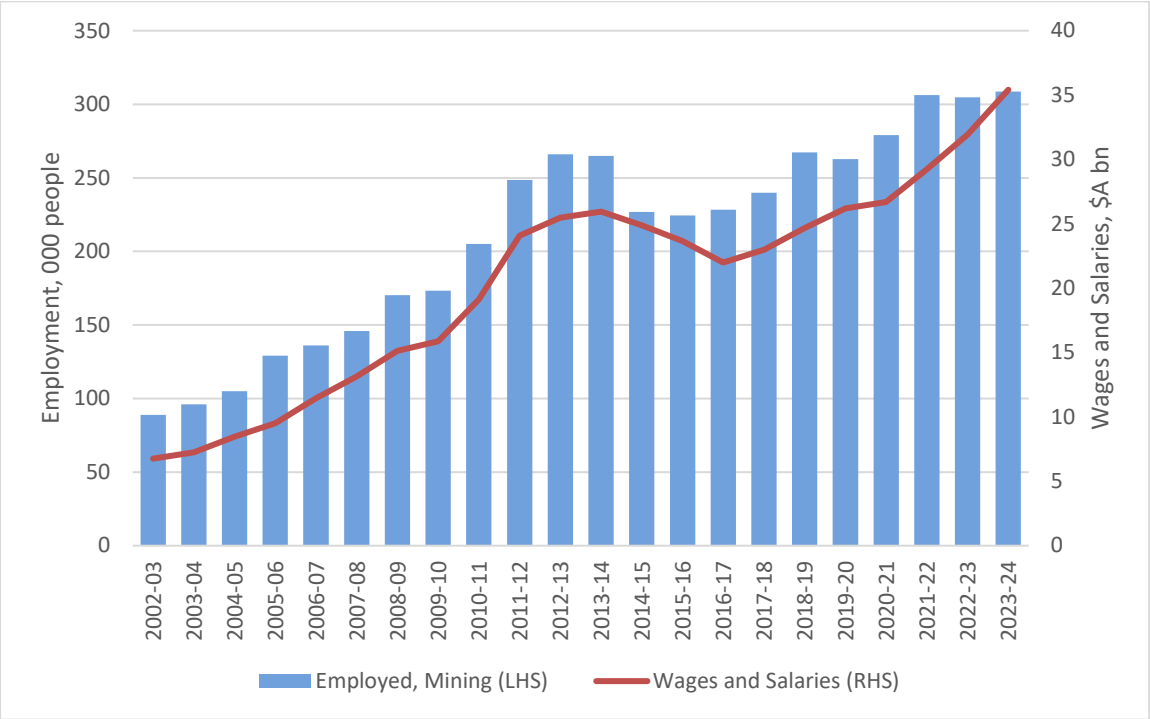
[13] Australian Bureau of Statistics, *International Trade in Goods and Services, Australia*, Table 3, cat. No. 5368, released 5 April 2024.

[14] EY, Royalty and Company Tax Payments, Table 3 Royalty and company tax payments, minerals sector, Published May-2024.

[15] Australian Taxation Office, media release, 'Report reveals record tax paid by large corporates', 9 November 2023.

[16] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Table 6, released 24 April 2024.

Figure 1: Employment and wages in Australian mining



High paying, secure jobs

Mining today continues to be Australia's highest paying industry. In 2023-24, the industry paid average remuneration of $158,800 a year – 55 per cent more than the average across all sectors ($102,800).[17]

Job security remains a clear feature of mining industry employment:

- 89 per cent of mining workers are permanently employed[18]
- 94 per cent are full-time.[19]

Labour hire and casual employment are small but essential parts of mining industry employment, providing for operational adaptability. According to the Department of Employment and Workplace Relations, just 5.4 per cent of workers in the mining industry are employed as labour hire.[20] A casual conversion entitlement has been enshrined in national employment standards since 2021.

High-paying individual agreements are another important feature of mining industry employment, particularly in Western Australia. These arrangements are delivering better pay outcomes than collective agreements. As of May 2023, 71 per cent of non-managerial mining employees across Australia had their pay determined by an individual agreement.[21] Those employees earned 11 per cent more in average hourly total cash earnings than employees paid under a collective agreement.[22]

[17] Australian Bureau of Statistics, *Average Weekly Earnings, Australia*, Table 10H (full time adult total earnings), released 15 August 2024.
[18] Australian Bureau of Statistics, *Characteristics of Employment, Australia*, Table 3, released 13 December 2023.
[19] Ibid.
[20] Australian Government, Department of Employment and Workplace Relations, Annexures to Certification Letter OBPR22-02409: Closing the labour hire loophole, August 2023, p. 48.
[21] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2023, data cube 5, released January 2024, table 4.
[22] Ibid.

A strategic industry

The mining industry's contribution is not purely economic. Mining is also a strategic industry because of the reliance of major economies, including Japan, China, the United States, India and others on Australia's commodity exports. This was well summed up by the former Japanese Ambassador to Australia, who stated in 2023:

> *'It's hard to imagine the neon lights of Tokyo ever going out, but with Australia now supplying 70 per cent of coal, 60 per cent of iron ore, and 40 per cent of Japan's gas imports, this is exactly what would happen if Australia stopped producing energy resources'.*[23]

Operations in the Pilbara are especially susceptible to disruption from industrial action, because:

- Production depends on all aspects of the operation working effectively – port operators, pilots, tugboats, loaders, train drivers and mine operators and the technologies they use operate interdependently
- Industrial action at any point in the supply chain, even if it only involves a small cohort of critical workers, can disrupt production
- Given the huge scale of capital investment, even small disruptions can generate hundreds of millions of dollars in lost revenue and damage Australia's reputation for reliability.

[23] His Excellency Yamagami Shingo, Ambassador of Japan to Australia, speech, INPEX Luncheon, 30 March 2023.

MULTI-EMPLOYER BARGAINING

- Multi-employer bargaining is a major change that the government continues to understate.
- The government never revealed this policy prior to the last election, nor has it ever made any credible case for it since.
- Workers have not received, and will not receive, higher wage increases under involuntary multi-employer bargaining agreements. Any suggestion to the contrary is mere assertion that does not survive any scrutiny.
- No mining business is more productive because this change was legislated, nor will they be.
- The legislation includes deliberate design features to expand multi-employer bargaining over time – to deliberately trap businesses in the system against their will and prevent them from ever escaping.
- The first test case of these laws in the coal industry shows that over time, these deliberate design features will destroy single enterprise bargaining – they will kill the concepts of 'enterprise', 'bargaining' and 'agreements' in enterprise bargaining agreements.

A major change – with no mandate and no rationale

Multi-employer bargaining is a major change to Australia's industrial relations system.

The Minister for Employment and Workplace Relations has suggested criticisms of the government's multi-employer bargaining laws are *'overblown'* since *'there has not yet been one multi-employer bargain reached in the mining industry'*.[24]

This position is misconceived. There has not been an 'agreement' reached but there has been an order made, which forced three NSW coal mines into multi-employer bargaining against their will. This order was made by the Fair Work Commission on 23 August. The three mining businesses are currently appealing the decision to the Federal Court.

A regressive change that reverses previous Labor Government reforms

Multi-employer bargaining is a regressive change because it reverses the previous bipartisan position that a system underpinned by workplace-level terms and conditions delivers superior productivity dividends.

This was the bipartisan position since the Keating Government's IR reforms in the early 1990s, and was reiterated by Labor leaders in debates that preceded the introduction of the *Fair Work Act 2009*.

These leaders recognised the dangers of industry-wide strikes and the productivity risks associated with centralised systems of wage-fixing, such as pattern bargaining and multi-employer bargaining.

In 2007, former Minister for Workplace Relations, Julia Gillard said:

> *'Labor's policy is perfectly clear on this question. Labor will not enable industry wide strikes to be taken, that will be unlawful under Labor's policy. We have always been crystal clear about that. You will have to, in Labor's system, if you are collectively bargaining, be bargaining at an enterprise level.'*
>
> *'Our policy is perfectly clear on this. A Rudd Labor Government will enact legislation which means, you must be bargaining at an enterprise level.'*[25]

[24] ABC radio, RN Breakfast with Patricia Karvelas, interview with Minister for Employment and Workplace Relations, 2 October 2024.
[25] Minister for Employment and Workplace Relations, Julia Gillard, Doorstop, Sydney, 1 June 2007.

Former Prime Minister Kevin Rudd said:

> *'The Labor Party's policy Forward with Fairness, says you have to be bargaining at your enterprise level. Pattern bargaining is a term used to describe bargaining across the whole industry, that is not what Labor's policy is about.'* [26]

No election mandate, no policy rationale and no legitimacy

The terms of reference for the Review required it to consider whether the operation of the amendments is 'appropriate and effective' and also consider any 'unintended consequences'.

To assess the 'appropriateness' and 'effectiveness' of the amendments, it is necessary to understand their rationale – what they have been designed to achieve. Unfortunately, the rationale for involuntary multi-employer bargaining lacks both clarity and legitimacy.

Before the 2022 federal election, the government gave confidence to businesses that it would not pursue multi-employer bargaining. When asked about industry-wide bargaining on 21 November 2021, the then Shadow Treasurer, Jim Chalmers, told the ABC Insiders program *'it's not part of our policy'*.[27]

The Treasurer was, of course, correct. Multi-employer bargaining was not part of the Labor Party's 2022 election policy.

The government's multi-employer bargaining agenda only became apparent at the time of its '*Jobs and Skills Summit'* held on 1-2 September 2022. The intent was captured in a Treasury 'outcomes' document after the summit, which set out the following 'immediate actions':

> *Ensures workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements* (emphasis added).[28]

Shortly after the summit, Minister Burke outlined the government's reasons for expanding multi-employer bargaining, stating there was *'enough of agreement on the concept of opening up to multi-employer bargaining that we're willing to go forward on it'*.[29]

There was, in fact, no 'agreement' of any kind. The pretence of 'agreement' relied on statements by one business association that had positively endorsed *'the opportunity to explore new flexible single or multi-employer options'* on an 'opt-in' basis, a position which it later retracted.[30]

By the time of its introduction to Parliament, both the rationale and the policy had dramatically shifted. No longer was multi-employer bargaining to be pursued to create 'flexible options' for both workers and businesses, preserving the voluntariness that had been the basis of the system for decades. The policy was to include draconian new powers to force diverse employers into multi-employer bargaining on the unilateral application of a union.

The Minister's second reading speech provided the following further rationales for the amendments:

> *Australia's bargaining system is not working effectively and hasn't worked effectively for a long time. Bargaining delivers simpler and more tailored workplace arrangements for businesses, and an average of $601 more to workers each week, compared with those on awards.*
>
> *Yet only 14.7 per cent of employees are covered by an agreement that is in date.*
>
> *…*

[26] Julia Gillard, Minister for Employment and Workplace Relations, Doorstop – Sydney, 1 June 2007.
[27] Shadow Treasurer Jim Chalmers, ABC Insiders, 21 November 2021.
[28] Australian Government The Treasury, Jobs and Skills Summit September 2022 – Outcomes, p. 7.
[29] Sydney Morning Herald, *Fears of industry-wide strikes risk jobs summit consensus on pay bargaining*, 1 September 2022.
[30] Australian Financial Review, *Small business backs calls to halt multi-employer bargaining*, 9 November 2022.

> *Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making. For employees and employers that have not been able to access the benefits of enterprise level bargaining, these reforms will provide flexible options for reaching agreements at the multi-employer level. This is intended to deliver more equitable and inclusive wage outcomes which benefit more Australians.*[31] (emphasis added)

This assurance is incorrect on two counts:

- Under the 2022 amendments, 'bargaining at the enterprise level' is no longer treated as the 'primary' or 'preferred type', as it has now been legally subordinated to multi-employer bargaining
- Nor is multi-employer bargaining limited to businesses that 'have not been able to access' single enterprise bargaining. It can be imposed on any business, regardless of whether or not it has accessed single-enterprise bargaining.

The Government's most recent rationalisations for multi-employer bargaining are also not credible. Minster Watt claimed in a media interview in October 2024 that multi-employer bargaining under the 2022 amendments was simply an extension of pre-existing concepts:

> *'Particularly their concern has focused on the risk that they see around multi-employee bargaining, a concept that did exist in the previous industrial relations legislation and we've revived.'* [32]

This claim is incorrect in several respects:

- The original *Fair Work Act*, passed by the Rudd Government in 2009, never included compulsory multi-employer bargaining, where employers could be forced in against their will.
- This was an entirely new concept introduced by the Albanese Government in 2022, for which it had no mandate and which was '*not part of our policy*' prior to the 2022 election.
- Multi-employer bargaining did exist under the 2009 legislation, but on a voluntary basis, where employers were part of the same common enterprise (e.g. McDonald's franchisees, or Catholic schools).

Multi-employer bargaining will not deliver higher wages

Assertions by government and unions that multi-employer bargaining will somehow deliver higher wages than the alternatives are not credible and do not withstand even the most cursory scrutiny. We strongly advise the reviewers to not accept any such assumptions.

The 2022 amendments are designed to progressively kill off single-enterprise bargaining by forcibly trapping businesses in a multi-employer system from which they can never escape. The imposition of sector-wide conditions in this way will not be via agreement – in the mining industry they will invariably be imposed outcomes, through either an arbitrated determination, or an involuntary 'roping in' without employer agreement.

These sector-wide outcomes will increasingly become an industry 'ceiling' on wages and conditions. Employers that would have been able to pay above the ceiling under enterprise-specific arrangements will no longer do so, as they will no longer be able to gain the enterprise-specific efficiencies that allow for it. Instead, they will be dragged down to 'low ball' conditions with lower wage growth and lower efficiency, to match their least efficient competitors. Conversely, where the 'ceiling'

[31] Hon Tony Burke MP, Minister for Employment and Workplace Relations, Second reading speech to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, 27 October 2022.
[32] Murray Watt interview with Patricia Karvelas, ABC Radio National, 2 October 2024.

may be higher than what smaller or less efficient competitors can afford, they will either downsize their workforce or close down completely.

Entrenching lower productivity

As the government recognises, labour productivity will be the main driver of growth in real gross national income per person in the future; however, labour productivity growth has slowed over recent years.[33] There is not a single element of the measures within the scope of this Review that will either enhance productivity or cooperation in the mining industry. They will all do the opposite.

Multi-employer bargaining has been recognised as a risk to innovation, competition – and productivity. The Productivity Commission has raised concerns about the productivity risks of the government's multi-employer bargaining laws, especially if associated with industrial action.[34] Further, research by E61 indicates that multi-employer bargaining would penalise young growing firms that have an outsized positive impact on productivity and have detrimental effects on labour market competition.[35]

Recent data showing that unit labour costs have declined is evidence that the bargaining system is no longer delivering productivity-based pay increases. Real unit labour costs increased by 2 per cent through the year to June 2024, despite GDP per hour worked only increasing by 0.5 per cent over the same period. This shows that labour costs are rising faster than what productivity growth can support in the current workplace relations system.[36]

In the government's explanatory material to the 2022 amendments, there was no attempt to address these and other predictable impacts of imposing generic agreements across multiple businesses. No credible case was made for how multi-employer bargaining would address flagging labour productivity in the economy. Nor does one exist.

The MCA submits that, in assessing the 'appropriateness' of the operation of the amendments, the reviewers must consider the jarring mismatch between the government's stated aim of improving labour productivity, and the complete absence of any evidence to even suggest improved productivity outcomes under multi-employer bargaining.

Unintended consequences? Multi-employer bargaining test case in NSW coal mining businesses

The very first test case involving compulsory multi-employer bargaining delivered exactly the outcome that the government promised it would not, when three competing coal mining businesses in NSW were forced to bargain together, notwithstanding their very different operations.

The former Minister of Employment and Workplace Relations downplayed the likelihood of multi-employer bargaining occurring in the mining industry on 2 November 2022, stating:

> *'…legally, is it possible that you could have a mine somewhere where this was pursued it wouldn't be unlawful, but it's not really realistic.'* [37]

Former Minister Burke also gave a specific undertaking that separate coal mining businesses would not be captured, prior to the legislation being passed:

> *'if you're on the east coast and you're on enterprise agreements, then you're excluded from the multi-employer bargaining agreements.'* [38]

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[33] The Australian Government, The Treasury, *Working Future: The Australian Government's White Paper on Jobs and Opportunities*, Chapter 3, October 2023, pp 47, 53.

[34] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, Interim report 6, pp. 61-63.

[35] E61 Institute, Multi-employer bargaining: a barrier to firm growth, Research Note 2, 10 March 2023.

[36] Australian Bureau of Statistics, Australian National Accounts: National Income, Expenditure and Product, released 9 September 2024.

[37] Tony Burke interview, ABC 730, 2 November 2022.

[38] Tony Burke, speech to National Press Club, 22 November 2022.

Contrary to these assurances, the first use of coercive multi-employer bargaining occurred in the coal mining industry. On 23 August 2024, following lengthy and costly litigation, the FWC ordered three competing employers to commence bargaining together.[39]

As the first 'test case' of the laws, the door is now open for many more multi-employer bargaining claims, relying on the legislative architecture the government has put in place under its amendments.

The FWC accepted arguments put by the union parties that because the competing employers mine the same commodity in the same state, this was sufficient to demonstrate a 'common interest' forcing them into multi-employer bargaining, regardless of the very distinctive elements of their operations.

This decision confirms that the government's multi-employer bargaining laws are set to have a wide reach. This precedent can now be extended to (amongst other things) any businesses that mine iron ore in Western Australia.

Where does the Albanese Government now stand on multi-employer bargaining?

The government opted not to intervene in this test case, which would have required it to express a view on whether or not this was what it had intended. As such, its position is unclear.

Does the government consider the outcome an 'unintended consequence', given Minister Burke's previous comments that coal mining would be unlikely to be captured?

This was the most significant test case on any IR legislation in decades. The outcome of this case is the single greatest policy shift in industrial relations in over 30 years. The FWC ruled that the Act should be applied such that there is now no difference between single-enterprise bargaining and multi-employer bargaining.[40] This was the argument put by the ACTU. The government has not indicated whether this is also its view.

The outcome is also contrary to Minister Burke's assurance in the Parliamentary debate that:

> *'Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making.'* [41] (emphasis added)

The Government's attempts to downplay the multi-employer bargaining test case decision

The current Minister for Workplace Relations, Minister Murray Watt, has sought to defend this outcome by asserting that there are 'hurdles' in the legislation that protect employers:

> *'But you need to understand that there are several hurdles that have got to be cleared before the Fair Work Commission allows multi-employer bargaining to occur, and that's why it's not breaking out right across the economy.'* [42]

This analysis is also incorrect, on several grounds:

- There are no 'hurdles' that have to be cleared. There are instead several reverse onuses[43] which employers must overcome in order to not be captured. All the 'hurdles' are put up to prevent employers escaping

[39] *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 106 (***APESMA decision***).

[40] 'The FW Act and its objects should be understood as changing the emphasis from agreement making at the level of a single business or part of a single business to bargaining at an enterprise level. In that light, the inclusion and 'promotion' of multi-enterprise bargaining is consistent with the existing objects as understood in that way.' (para [45] of the FWC decision)

[41] Tony Burke, second reading speech, 'Secure Jobs, Better Pay' Bill, 27 October 2022, at Hansard page 2181

[42] Murray Watt, Interview on *Insiders*, ABC TV, 20 October 2024.

[43] See, for example, *Fair Work Act 2009* (Cth), ss 216DC(1AAA); 216DC (3AB); 249(1AA); 251(4A).

- The legislation clearly states that *'it is presumed that the business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved*' [44]
- Employers are automatically captured unless they can litigate their way out, via the reverse onuses
- In the very first case before the FWC, the competing employers were unable to do so. The FWC delivered exactly the outcome the government promised would not happen, by forcing several coal mining businesses into multi-employer bargaining
- It is not yet 'breaking out across the economy' because the first case is currently under appeal. If the appeal fails, then the precedent will be set in stone – unions in every industry will take advantage of it and employers will have no legal grounds to resist.

The Minister has also made further comments that misrepresent the nature of the legal tests imposed on the FWC, including the 'not contrary to the public interest' test:

> *'there is one case that the Fair Work Commission has authorised that to begin, but that's because in that case it cleared the hurdles.*
>
> *'The Fair Work Commission determined that it was in the public interest to allow it. The majority of their workforce wanted that to happen.*
>
> *'There were reasonably comparable interests between the companies involved, and there is no underpinning single enterprise agreement.'* [45]

This comment is similarly incorrect:

- First, due to the reverse onuses in the legislation[46], the FWC must compel multi-employer bargaining simply because the various businesses mined the same commodity in the same state on a commercial basis. This was enough for the FWC to rule that the businesses were 'reasonably comparable'. This is not a 'hurdle' to clear. Any business that does the same thing in the same state can now be roped in together, for example, all of the 'Big Four' banks, Coles and Woolworths, or every iron ore miner in Western Australia.
- Second, the FWC did not determine that it was 'in the public interest'. This is because it does not have to. The legislation has a 'reverse onus'. It assumes that multi-employer bargaining is '*not contrary to the public interest*' unless the employer can demonstrate that it is.[47] The reverse onus requires employers to prove it is 'contrary to the public interest', which is an extremely high 'hurdle' that they must jump in order to escape.

The MCA is equally concerned by more recent comments by Minister Watt that attempt to downplay the impact of this decision. On 18 November, Minister Watt was reported as saying:

> *'Not one multi-employer bargaining process has been authorised to even begin in the Pilbara, or that covers mining production workers anywhere in Australia.'* [48]

Such statements provide no comfort and ignore the future effect of the NSW coal mines decision. The precedent that the decision set ('same state, same commodity') can now be applied to all iron ore operations in the Pilbara. The fact that no production workers have (yet) been captured simply reflects the fact that the union representing 'non-production' workers just happened to get in first with the first application in the industry.

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[44] *Fair Work Act 2009 (*Cth), s.249(1AA)(b).

[45] Murray Watt, Interview on *Insiders*, ABC TV, 20 October 2024.

[46] Fair Work Act 2009 (Cth) ss 249(1AA); 249(3AB).

[47] APESMA decision, above n 37, para [495].

[48] The Nightly, *Business Council of Australia accused Murray Watt of misrepresenting its position in latest IR spa*t, 18 November 2024.

The inevitable growth of multi-employer bargaining

Deliberate design features of the 2022 amendments make the expansion of multi-employer bargaining inevitable. The time frame over which multi-employer agreements will be established is not certain – it depends on the ambition, resources and strategic choices of unions in pursuing applications and the expiry dates of existing agreements. This is why the adverse impact of the new system will be a 'slow burn' process.

However, three factors make the expansion in the number and size of multi-employer agreements inevitable. The legislation includes a number of deliberate design features intended to force businesses into the multi-employer system and prevent them ever escaping.

1. Roping in

First, the amendments allow a union party to a multi-employer agreement to unilaterally apply to the FWC to vary the agreement to capture other employers.[49] Those employers may then be 'roped in' if the FWC is satisfied that most of their employees *'want to bargain for the agreement'*.

Contrary to all principles of agreement-making, this does not require the employer to agree. The Explanatory Memorandum for the amendments revealed this very deliberate design feature:

> *'It is not intended that an employer can refuse to sign the variation because they did not consent to the FWC making the variation and thereby defeat the making of the variation.'*[50]

In practice, this will mean that the concepts of 'enterprise', actual 'bargaining and actual 'agreement' will all be removed from enterprise bargaining agreements, over time.

2. Prohibiting enterprise-level bargaining

Once a business is forced into a multi-employer authorisation, the legislation prohibits them from even attempting to bargain for a single enterprise agreement.[51] The legislation prohibits employers from bargaining for a single enterprise agreement once they are covered by a multi-employer authorisation or an agreement – even one they have been forcibly roped into.[52]

3. Permanent entrapment

Once a business is trapped in multi-employer bargaining, the system is designed to prevent it from escaping in future.

The legislation provides that if an employer wishes to do so, it must litigate the matter in the FWC. Once it does, it faces a reverse onus in which it has to prove a 'change in circumstances':[53]

> *'The FWC must… remove the employer's name if the FWC is satisfied that… (b) because of a change in the employer's circumstances it is no longer appropriate.'*

Every employer forced in will be stuck forever unless they can litigate their way out. However, the reverse onus and high 'hurdle' to prove a 'change in circumstances' mean there is no realistic prospect of this happening. Even if the employer, its employees and even the relevant union wish to escape the multi-employer system, this is not sufficient – the employer must still demonstrate a 'change in circumstances'.

These three elements are very deliberate design features of the amendments and destroy any notion that single-enterprise agreements will continue to have primacy in the system. They are contrary to the assurances by former Minister Burke that:

> *'Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making.'*

[49] *Fair Work Act 2009* (Cth), s 216DB

[50] Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022, para. 1034.

[51] *Fair Work Act 2009* (Cth), s 172(5)

[52] *Fair Work Act 2009* (Cth), s 249(4)(b).

[53] *Fair Work Act 2009* (Cth), s 251(2A)(b)

‘INTRACTABLE’ BARGAINING’ LAWS – REMOVING INCENTIVES TO AGREE

- The ‘intractable’ bargaining regime is a fundamental shift away from voluntary bargaining to arbitrated outcomes (especially combined with unilateral forced bargaining, and multi-employer bargaining).
- The ultimate effect will be to progressively destroy the concept of agreed outcomes at an enterprise level and instead impose a system of arbitrated industry-wide outcomes. This is a deliberate design feature that is intended to reverse over three decades of reform.
- The 2023 amendments to ‘intractable bargaining’ by the government and the Greens political party will destroy any incentive for unions to reach an agreed outcome and will instead encourage the system to be ‘gamed’ to impose arbitrated outcomes.
- It is extremely unlikely that any agreed outcome will ever be reached by employers who are forced into multi-employer bargaining. Instead, such ’bargaining’ will be resolved through arbitration, due to the unworkability of having competitors agree on employment terms and conditions.
- The system rewards uncooperative and intractable union behaviour. It encourages them to ‘game’ the process by ‘running the clock down’ to trigger arbitration after nine months.

The new ‘intractable bargaining’ regime

The 2022 amendments implemented an ‘intractable bargaining’ regime. This provides for the FWC to make an intractable bargaining declaration if after the later of nine months of bargaining, or nine months from the expiry of an agreement, there is *‘no reasonable prospect’* of agreement being reached.[54] If no agreement is reached during a subsequent negotiating period, the FWC must use its arbitration powers *‘as quickly as possible’* to decide the terms and conditions of employment in dispute.[55] This process applies to bargaining for single-enterprise agreements as well as multi-enterprise agreements.

Subsequent amendments to the intractable bargaining provisions were made under a Government-Greens deal in the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (the Government-Greens amendments). The effect of the subsequent amendments is that arbitrated outcomes always favour unions over employers. They apply to intractable bargaining declarations from 27 February 2024. While strictly outside the scope of the Review, any consideration of the impact of the 2022 bargaining amendments would be a futile exercise if it did not consider the intractable bargaining regime as it currently operates.

The Government-Greens 2023 amendments to the 2022 ‘intractable bargaining’ regime

The Government-Greens amendments were:

1. Arbitrated outcomes must be ‘not less favourable’ to unions and employees
    - In arbitration of a bargaining dispute, the FWC must ensure <u>any</u> term it makes is ‘not less favourable’ to any employee or union covered by the existing enterprise agreement. This applies to any disputed terms except those that provide a wage increase. This is a ‘line-by-line’ test with no requirement to make an ‘overall’ comparison.[56]

[54] *Fair Work Act 2009* (Cth), s. 235(5); s. 235(2)(b).
[55] *Fair Work Act 2009* (Cth), s. 266(1).
[56] *Fair Work Act 2009* (Cth), s. 270A(3).

2. ‘Agreed’ terms must be included in the arbitrated outcome

    - The FWC must examine the bargaining history to form a view about whether any terms have been agreed to, from the time the union applies for an ‘intractable bargaining declaration’.

Clearly, with barely nine months in operation in their current form, the consequences of this change have yet to fully play out. However, there are indications of negative changes in bargaining behaviour even at this early stage.

Victorian Government’s criticisms

The Government-Greens amendments were implemented despite criticism from the Victorian government, which rightly pointed out that the *‘not less favourable’* test in the amendments *‘removes the incentive for unions to reach an agreement as they know that they will be no worse off on a clause by clause basis as against a current enterprise agreement’*.[57]

The Victorian Government’s appeals to the Albanese Government were ultimately ignored.

‘Agreements’ only in name

For over 30 years, the Australian workplace relations system has been founded on the concept of the freedom of businesses and workers to engage, or not engage, in collective bargaining at the workplace level.

It is only when enterprise bargaining is premised on the ability of either party to agree or not agree that it can deliver superior productivity benefits and wage outcomes. This is because businesses and employees are best placed to understand their needs and find ‘win-win’ outcomes.

By making forced arbitration the endpoint of the bargaining process – rather than a negotiated and agreed endpoint – the amendments have undermined the core concept of agreement-making. It is not an exaggeration to say that these changes risk destroying any concept of cooperative bargaining with mutually agreed ‘win-win’ outcomes.

If the practice of arbitrating wages and conditions becomes more prevalent, we will inevitably see a negative impact on productivity, as sub-optimal outcomes are imposed on businesses.

Multi-employer ‘bargaining’ will likely be resolved through arbitration

Multi-employer ‘bargaining’ will inevitably be complex and unproductive because it forces competitors to bargain together. These competitors are bound by strict requirements of confidentiality under Australia’s competition laws, which are likely to lead to unworkable situations where confidential information relevant to a bargaining position cannot be disclosed.

These dynamics make it highly unlikely that any agreement will be able to be reached between large competing businesses within the nine-month negotiating period before an intractable bargaining declaration can be applied for.

The MCA expects that no multi-employer agreements will ever be reached in the mining industry. Instead, outcomes will be determined under the intractable bargaining provisions, with inevitable sub-optimal outcomes.

Encouraging ‘ambit’ claims and uncooperative bargaining

The amendments strongly incentivise unions to make ‘ambit’ claims during bargaining. As soon as a term is ‘proposed’ by a party during the course of bargaining, it can potentially form part of an arbitrated outcome.[58] The FWC has confirmed that this could include drafts terms, claims, counter

[57] Letter from Tim Pallas MP, Minister for Industrial Relations, Victoria to the Hon Tony Burke MP, Minister for Employment and Workplace Relations, Australia, 16 January 2024 (BMIN-24010095).
[58] FWA, s. 240(1).

claims, or even issues or topics raised for discussion and not documented.[59] Under the new settings a union has nothing to lose and everything to gain by raising as many 'proposed' claims as possible through the bargaining process and refusing to concede to non-contentious employer claims. Each claim made, however unreasonable, would become a risk for the employer in the event of an intractable bargaining determination.

MCA members have observed that, with intractable bargaining now freely available, unions have been disengaged during bargaining processes and less willing to make concessions.

MCA members advise that unions now have no incentive to genuinely bargain. They are not even turning up to meetings. As this flows through the system through future bargaining rounds, there will be more recourse to arbitration, as the system positively encourages unions to use it as the 'first-resort' option.

The system is now designed to reward 'intractable' behaviour and trigger arbitration, given that the 2023 amendments mean that a union will never have anything to lose, and will never, therefore, have to make any concessions.

Destroying the Better Off Overall Test

The 'no less favourable' test in the 2023 Government-Greens amendments requires that each clause in a proposed enterprise agreement be assessed against the corresponding clause in the existing enterprise agreement. This is a radical change that revives the 'line-by-line' approach the government has previously accepted was inappropriate in the context of the Better Off Overall Test.

It is incredibly poor public policy to have two separate statutory tests to assess industrial instruments, yet that is what the legislation now provides:

- For agreed outcomes, the test is the Better Off Overall Test, which is compared to the applicable award
- For arbitrated outcomes, the test is now the 'Better Off In Every Respect Test', which is compared to the previous agreement.

The practical impact of this perverse outcome is easy to predict. Unions will inevitably 'game' the system and push for arbitrated outcomes, knowing that the new test will guarantee a better outcome than that which would apply under the previous agreement.

Encouraging employers to take a risk-averse approach to bargaining

Perversely, the amendments discourage employers from making concessions during bargaining, out of concern they will be held to those concessions under the 'no less favourable' test. The issue arises because of the nebulous nature of the concept of an 'agreed term'.[60]

The FWC has made it clear that 'agreement' under the new regime *'does not require formal agreement necessary for contract law'*. Even concessions that are made in principle and subject to an 'entire agreement' being reached do not necessarily protect an employer from later being deemed to have agreed.[61] Every case turns on its own facts, and the commission's assessment of whether there was a 'meeting of the minds' in relation to a particular term. In other words, employers can never be certain about what they have agreed to and might be held to under an arbitrated outcome.

Encouraging restrictive workplace practices: entrenching low productivity

The Government-Greens amendments mean that no disputed term in a proposed enterprise agreement can ever be less favourable (to a union) than the existing enterprise agreement. These

[59] *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd T/A Qube Ports* [2024] FWC 1646 (24 June 2024).
[60] FWA, s 274(3).
[61] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FWCFB 43, paras [108]-[157]; *Transport Workers' Union of Australia (179V) v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 287, para. [8].

settings have already encouraged unions to adopt aggressive bargaining strategies, which are likely to lead to more industrial action in aid of 'ambit' claims. The predictable result will be the gradual inclusion of more and more restrictive work practices in enterprise agreements, which can never be reversed without union agreement.

The more industrial action is engaged in, the better a union's chances of persuading the Fair Work Commission that bargaining is 'intractable'.

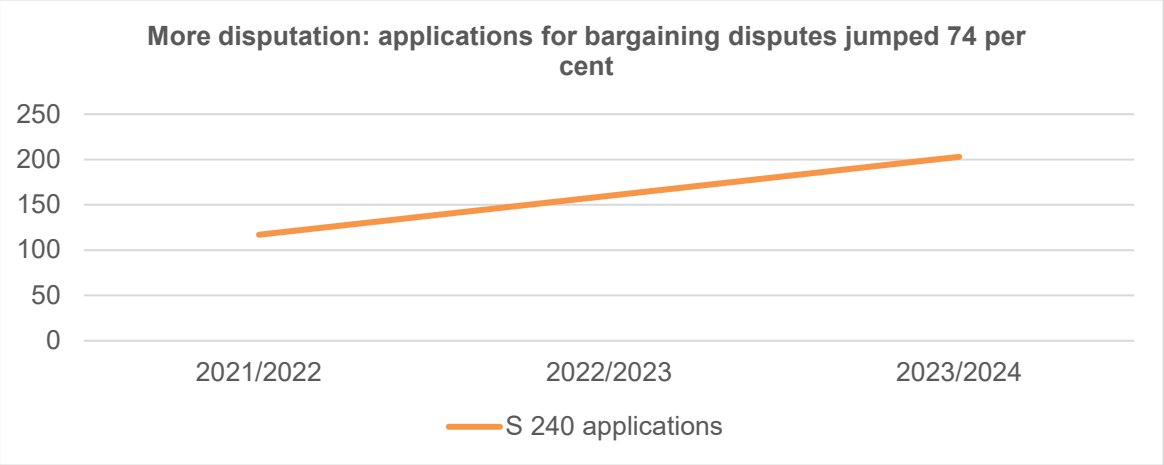
The legislation has encouraged more confrontational and aggressive bargaining tactics

Available evidence so far suggests the intractable bargaining scheme is encouraging and rewarding disputation, industrial action, and uncooperative bargaining. This is for two key reasons:

- Industrial action and hostile and obstructive behaviour are encouraged under this scheme, as this can be cited by union as evidence that bargaining is, in fact, 'intractable'
- Unions who adopt uncooperative tacts are rewarded, as they are guaranteed to receive better outcomes in the intractable bargaining workplace determination.

Unions are making full use of this tactic. Since the amendments have been introduced, there has been a 74 per cent increase in applications for section 240 bargaining disputes (a prerequisite for obtaining an 'intractable bargaining declaration').[62]

In the same period, there has been a 13 per cent increase in applications for protected action ballot order. [63]



[62] See Fair Work Commission Annual Report FY2021-22 and FY2023-24.
[63] See Fair Work Commission Annual Report FY2021-22; FY2022-23; FY2023-24.

FORCED BARGAINING – A NEW UNION LOOPHOLE TO REMOVE WORKPLACE DEMOCRACY

- Enabling unions to unilaterally initiate bargaining in the absence of majority support by employees is a significant shift in power away from workers and businesses.
- Any employee 'bargaining representative' can unilaterally commence bargaining for a new agreement without employer consent within five years of the nominal expiry date of the previous enterprise agreement.
- This can also be used in pursuit of multi-employer agreements.
- The exposure for businesses in mining industry is enormous. There are over 100 enterprise agreements that currently operating in the Western Australia mining sector.[64] All of these could be exposed to unilateral forced bargaining once they expire, which many already have. [65]
- Where bargaining is forced on an employer without worker support, it is not 'bargaining' at all. Where an agreement is forced upon an employer, it is not an 'agreement' at all.

Amendments in Part 15 of the 2022 amendments removed requirements for unions to demonstrate majority employee support before commencing bargaining. This applies where the proposed agreement would replace an existing enterprise agreement that is less than 5 years past its expiry date. The change came into effect on 6 December 2022.

Workers no longer have a say

The requirement for unions to demonstrate employee support before commencing bargaining has been a key feature of the Act since its commencement. When implemented, its purpose was to break deadlocks in bargaining where most employees at an enterprise wanted to bargain, but the employer refused to do so.

However, the amendments deliberately subordinate worker choice to union interests by removing the right of workers to decide for themselves what course of action is best. It substitutes a reasonable requirement to bargain when the workforce wants to bargain, with a requirement to bargain when the union wants to bargain.

The government has provided no explanation or justification for this removal of workers' democratic rights. The Revised Explanatory Memorandum does not acknowledge the issue, simply stating that the purpose of the amendment was to *'simplify the process for initiating bargaining'* by '*removing unnecessary limitations on access to enterprise agreements'*.[66]

The amendment also stands in stark contrast to other government changes including those relating to casual employment, which, according to the government, were *'driven by employee choice'*.[67]

Bargaining where it is not wanted or needed

In parts of the mining industry, particularly in the WA iron ore industry, some mining businesses have enterprise agreements that have expired and play little role in setting actual employee pay and conditions. Such agreements are sometimes referred to as 'baseline' agreements.

[64] https://minerals.org.au/wp-content/uploads/2023/11/MCA-analysis-Impact-of-Same-Job-Same-Pay-legislation-on-WA-mining-industry_November-2023.pdf
[65] The full list is published on the MCA website: https://minerals.org.au/wp-content/uploads/2023/11/MCA-Enterprise-Agreement-Tracker-WA-Mining-Industry.xlsx
[66] Revised Explanatory Memorandum, paras 30, 751-752.
[67] Hon Tony Burke MP, Minister for Employment and Workplace Relations, *Speech – The Sydney Institute*, 24 July 2023.

The purpose of such agreements is usually historical. Specifically, the agreement may have been put in place for the purpose of securing project finance – to demonstrate certainty over industrial relations arrangements before an investment decision could be made.[68]

In practice, the pay, conditions and incentives employees actually receive far exceed those in the expired agreement – they are determined on a direct basis with each employee and according to company policies, which are designed to fairly reward good performance, and allow businesses to attract and retain the best talent.

Such workplace arrangements have worked exceedingly well in Western Australia since the early 1990s, when the iron ore industry offered all workers the choice to convert to 'staff' arrangements. This change, overwhelmingly welcomed by workers, was built on establishing and maintaining trust and respect with employees and has been the foundation of employee relations in the Pilbara ever since. Mining workers in WA today receive around 20 per cent more in wages than the average of their counterparts in the rest of Australia.[69]

Many of these successful workplace arrangements could now be undone, by allowing unions to unilaterally force enterprise bargaining in their own interests rather than in the interests of employees. Indeed, unions have already begun to use the amendments to – in the words of one union – *'circumvent the Majority Support Determination Process'* in the Pilbara, after years of failed attempts to use democratic processes that were previously required.[70]

There has been a 26 per cent decrease in applications for majority support determination since the commencement of this provision,[71] which indicates that unions in various industries are taking advantage of this new tool to 'circumvent' workplace democracy.[72]

The exposure for businesses in the Pilbara is significant. There are more than 100 collective agreements in Pilbara iron ore operations, around 40 of which are within the 5-year timeframe.

Examples of claims under the amendments, which would undermine productivity and performance, include:

- $10,000+ per annum bonuses for 'retention' – not linked to employee performance or productivity measures, which would replace performance bonuses that would typically be higher for well-performing employees
- Unsustainable fixed above-CPI pay rises not linked to productivity improvements
- Inflexible roster arrangements, which workers have not asked for themselves.

These early examples confirm that the government's changes have nothing to do with improving wages through higher productivity. Rather, they represent an attack on modern workplace arrangements that have delivered Australia's highest paid workforce and its most productive industry.

[68] Competition law and confidentiality obligations prevent MCA members from providing examples to this public process about how international investment decisions are made. However, evidence supporting the point was provided by the MCA and its members as part of a confidential government process related proposals to implement 'project-life' agreements in July 2020. Accordingly the sensitivity of mining investment to industrial relations certainty should be well understood by the federal government.

[69] Australian Bureau of Statistics, Employee Earnings, August 2023, table 3, released 13 December 2023.

[70] Mining and Energy Union, webpage, *Taming the Wild West*, 29 August 2024.

[71] See Fair Work Commission Annual Report FY2021-22 and FY2023-24.

[72] Ibid.

High paying arrangements in the WA iron ore industry – deliberately attacked by the Government's legislation

The Western Australian iron ore industry, centred in the Pilbara, is a critical driver of Australia's economic prosperity, generating $133.2 billion in export revenue in 2022-23.[73] It also contributes significantly to state finances, with iron ore royalties accounting for $9.1 billion, while all other royalty sources combined contributed $1.9 billion.[74]

This industry offers some of the best pay and conditions in Australia. WA mining workers earned a premium of approximately 20 per cent on the mining wages averaged over all other Australian jurisdictions.[75]

Moreover, workplace relations in the Pilbara have been notably peaceful and productive, with no industrial action disrupting production this century. This represents a dramatic contrast to the labour disputes of the 1970s, 80s, and early 90s.

The foundation of the WA iron ore industry's high-paying harmonious workplace arrangements is the trust that employers have been able to develop with their employees. This trust, based on concerted efforts from employers during the 1990s to demonstrate fair and transparent workplace practices, led mining workers to overwhelmingly choose high-paying 'staff' agreements over union-negotiated collective agreements – a choice that they continue to make to this day.

The change to 'staff' agreements in the Pilbara immediately led to higher productivity, higher wages, upskilling of employees and greater job satisfaction.[76]

There is no sense in which workers have ever been 'locked out' of collective bargaining – they can unionise and bargain collectively at any time but overwhelmingly choose not to do so.

The mining industry's example shows that direct engagement has delivered harmonious, productive workplaces with better outcomes for workers.

As at May 2023, 71 per cent of non-managerial mining employees across Australia had their pay determined by an individual agreement. Those employees earned 11 per cent more in average hourly total cash earnings than employees paid under a collective agreement.[77]

The amendments, including involuntary multi-employer bargaining, threaten to dismantle successful, harmonious workplace arrangements in one of Australia's most strategic industries. These arrangements are based on the free choices of both workers and employers but could be undone under the coercive powers the government has granted unions.

The 2022 amendments and subsequent amendments in the 'Closing Loopholes' legislation introduced six new levers that will all be used by unions to attack cooperation and productivity in the Pilbara:

1. Multi-employer bargaining – imposed on employers against their will
2. Unilateral commencement of bargaining – forced by unions without employee support
3. 'Intractable' bargaining rules that will be abused to trigger arbitrated outcomes that are not agreed
4. Greater powers for union delegates in all workplaces – even those with no union members
5. Union right of entry powers – More powers with new loopholes that are designed to be abused
6. 'Same job, same pay' laws that will be used to attack service contractors and will extend far beyond labour hire.

[73] Department of Industry, Science and Resources, Resources Energy Quarterly, released 30 September 2024.
[74] Government of Western Australia, Annual Report on State Finances, released: 27 September 2024.

ABOLISHING THE ABCC – REWARDING UNION CORRUPTION AND ABUSE

- A construction industry that operates with integrity, harmony and efficiency is essential for the mining industry.
- The government's failure to maintain a strong construction industry regulator has coincided with lawlessness and criminal infiltration in the construction union.
- The government must acknowledge the construction industry's unique need for a strong, standalone regulator and reinstate one in the interests of all Australians.
- The construction industry shows what happens when workplace laws are not observed and workplace relations are uncooperative because powers are abused. There is a real risk that the amendments will encourage and reward such behaviour in other industries and the construction disease will spread to other industries, most notably mining.

Australian mining businesses rely on the civil construction industry to build large-scale mining, processing and transport infrastructure. As such the mining industry has an interest in ensuring the construction industry operates efficiently, harmoniously and with integrity.

The 2022 amendments abolished the office of the Australian Building and Construction Commission and transferred its functions to the Fair Work Ombudsman.

The effect of this change was to:

- Reduce the higher maximum penalties that previously applied under the ABCC legislation
- Disrupt investigations currently on foot through the wholesale immediate termination of all ABCC staff by legislation
- Destroy institutional knowledge at the regulator about the operation of the building industry
- Fail to fully transfer previously budgeted ABCC funding to the FWO, in effect cutting the resources available for regulation of the construction sector.
- Reduce the evidence-gathering powers of the regulator, given that the FWO does not have the witness-protection powers that the ABCC had.

Given these factors, it is clear that the ABCC's replacement was always set up to fail.

Former Minister Tony Burke outlined the purpose of the change as removing '*ineffective and discredited institutions, more concerned about prosecuting workers and their representatives*…' [78]

The problem with the government's approach is that it failed to recognise the unique need for strong institutional arrangements to address a longstanding and well documented history of deliberate and systematic law-breaking and corruption in the construction union and other elements of the industry. In abolishing what it asserted 'ineffective' and 'discredited' institutions, the government failed to provide for an adequate replacement.

[75] Australian Bureau of Statistics, Employee Earnings, August 2023, released 13 December 2024, table 3.
[76] See for example: Hamersley Iron report, 'Business Sunday', 26 November 1995.
[77] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2023, data cube 5, released January 2024, table 4.
[78] Hon Tony Burke MP, second reading speech, House of Representatives, Official Hansard, 27 October 2022, p. 2176.

The Albanese Government's approach stands in stark contrast to previous Labor Governments, who recognised the need to *'always keep a strong cop on the beat for the building and construction industry'*.[79]

The government's abolition of the dedicated industry regulator was evidently at the behest of the union it was, in part, intended to regulate – the most corrupt union in Australia, with a longstanding history of lawlessness, which remains the ALP's largest political donor.

The result of the Albanese Government's approach has been predictable. It represents a clear policy failure on the part of the government, which has set the scene for the most recent revelations that the construction union has been infiltrated by criminal elements at the highest levels and is *'caught up in a cycle of lawlessness'*.[80]

These revelations should have prompted a reassessment of the policy to abolish the building regulator – but incredibly, the government doubled down on its previous position.

The Albanese Government must recognise its policy failure

The current cycle of lawlessness did not happen straight away following the abolition of the ABCC. It had been well documented feature of the industry for decades. The government must adopt a clear position against lawlessness and corruption – backed not just with words but with actions – and reinstate a standalone regulator with sufficient powers.

There is a long history of apologism and denial among members of parliament who have been supported financially and politically by the CFMEU that must be addressed. For example, the Australian Labor Party's rationale for opposing the initial establishment of the ABCC in 2004 was as follows:[81]

> *'But there is not a piece of credible evidence to suggest that the CFMEU has even the remotest ambition to dominate, regulate and control the industry… The CFMEU is cast as the bogy man in this drama…, it is unlikely that industry players have been deceived by this malign campaign.'* [82]
>
> *What is clear to the committee majority is that there is no evidence provided of systemic criminal activity in the industry.'* [83]

Such sentiments were also expressed in the ALP's opposition to the legislation to re-establish the ABCC in 2016:

> *'Trade unions have no tolerance for corruption and, where corrupt practices occur, they are dealt with swiftly and transparently.'* [84]

Clearly, such sentiments are no longer appropriate or reasonable. The need for a strong and effective regulator of the construction industry remains. The issue will not be addressed solely by putting the CFMEU into temporary administration. A corrupt construction union has real impacts on mining and on the entire economy, pushing up costs across the board. It is now incumbent on the government to recognise its policy failure and re-implement an effective standalone regulator with powers at the very least akin to those of the former ABCC, plus new powers to deal with the obvious and systemic breaches of various laws in the industry, of which the CFMEU is the most notorious recidivist.

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[79] Hon Julia Gillard, House of Representatives Hansard, 13 August 2009.

[80] Mark Irving KC, *Investigation into allegations against the CFMEU*, Interim report, 12 September 2024.

[81] Senate Employment, Workplace Relations and Education References Committee inquiry, Beyond Cole – The future of the construction industry: confrontation or co-operation?, Labor Senators Majority Report.

[82] Ibid. p. 82.

[83] Ibid. p. 88.

[84] Senate Education and Employment Legislation Committee inquiry – Building and Construction Industry Improvement Bill 2013, Labor Senators dissenting report, 2016

UNION RIGHT OF ENTRY LOOPHOLES MUST BE REPEALED

A last-minute change to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* created a new loophole that allows union officials entry to worksites to purportedly 'assist' a health and safety representative (HSR) even if they have no right of entry permit.[85]

The measure was added on 7 December 2023, the day the legislation was passed, and became operative on 15 December 2023. The government, with the support of Senator David Pocock and the Greens political party deliberately introduced the measure in a way that avoided any scrutiny through Parliamentary debate, or provided any opportunity to consider the inevitable adverse consequences.

The measure amended the Act to:

- 'Disapply' the requirement that union officials must have an entry permit when invited onto a site to assist a HSR[86]
- Remove safeguards that required union officials assisting a HSR to give employers 24 hours of notice of entry, and only to exercise the right of entry during working hours (amongst other requirements).[87]

The government's justifications are incorrect

The justification the government provided for this change was to *'implement Recommendation 8 of the Review of the Model Work Health and Safety Laws - Final Report (2018)'* (the Boland Review).

The Boland Review recommendation was to:

> *'consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law'.*

However, the change the government implemented went significantly further than the Boland Review recommendation. The recommendation assumed that union officials who do not hold an entry permit under an industrial law will nonetheless have some qualification to enter a site for a safety purpose. The government's loophole deliberately ignores this. It creates a pathway for union officials who have been disqualified from entering a site to do so under the guise of *'assisting'* a health and safety representative. It would be a major overreach if the amendment could be relied on to allow convicted criminals onto worksites. Yet, amazingly, this is a deliberate design feature of this amendment.

The MCA has previously warned against such an outcome due to the potential for union officials who have failed character tests to cause disruption, create safety issues, and otherwise impact operations.[88]

Another concern is that permit holders must undertake training to ensure they understand their legal obligations.[89] These training requirements will not apply to those accessing sites under the government's changes, which could lead to disruption, misunderstandings, safety concerns and other problems at worksites.

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[85] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, Schedule1, Part 16A.
[86] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), Part 16A of Schedule 1; *Replacement Supplementary Explanatory Memorandum*, Amendments to be Moved on Behalf of the Government, 7 December 2023.
[87] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth). ss. 495 to 498.
[88] Minerals Council of Australia, *Submission to the Safe Work Australia Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health Safety Laws*, 5 August 2019.
[89] https://www.fwc.gov.au/registered-organisations/entry-permits/training-permit-holders-must-complete

A loophole that benefits the worst offenders

The MCA is deeply concerned that this last-minute change appears to deliver an outcome that some of the worst offenders in the construction union appear to have pushed for: access to sites they cannot access because they have failed 'fit and proper person' character requirements. Any union official can now enter a workplace, regardless of whether they hold a permit to do so.

For example, one senior CFMEU official spoke at the ALP National Conference in August 2023, argued in favour of 'removing barriers' to union officials accessing workplaces. The official told the ALP Conference:

> *'I've been deemed not fit and proper [person for a permit] a long, long time ago because of the laws that were brought in by the Liberal Party, laws brought in to hinder work of unions'.*[90]

Leaving aside the falsity of the 'Liberal Party' reference – the pre-existing right of entry rules were those legislated by the Rudd and Gillard Governments – this claim is not credible. Yet, concerningly, it appears to be the rationale behind the Albanese Government's amendments. The CFMEU official who made this statement, Joe Myles, has a record of repeated breaches of workplace laws, including '*coercion, obstruction, illegal stoppages and not complying with safety laws*.' He was described by the Federal Court in 2017 as having a 'deplorable personal history of offending'.[91]

These amendments will see union officials who have lost their permits for abusive conduct – such as Mr Myles - be given access workplaces without notice, on the pretext that they were there to 'assist' a HSR. There would not even be a requirement that there be a safety issue that requires their 'assistance'. As a further aside, one of Mr Myles' breaches arose from unsafe conduct, described by the Federal Court as:

> '*while espousing an interest in ensuring safety on the site … deliberately placed themselves in dangerous positions in order to obstruct the movement of trucks carrying concrete to the site*.'[92]

It is bad enough that these amendments appear to have no rationale other than create loopholes to assist union officials (and ALP guest speakers) such as Joe Myles to overcome the legal sanctions that have been imposed upon them. The situation is made worse by the fact that, under the amendments, the FWC cannot deal with disputes about the frequency of entry by those purportedly 'assisting' HSRs.[93] Consequently, businesses are now exposed to high-frequency entries from individuals who have a history of abuse, intimidation, and harassment.

Clearly, the 2023 amendments are not only open to abuse. The powerlessness of the FWC to deal with abuses can only mean that their abuse is a deliberate design feature on the part of the government.

The Victorian Government has called out this loophole

The Victorian Government's interim report of its '*Formal Review into Victorian Government Bodies' Engagement with Construction Companies and Construction Unions'* highlighted this anomaly that has been inserted into the Act:

> *'The Fair Work Act 2009 (Cth) was recently amended to remove the requirement for union officials to hold a Fair Work entry permit when entering a workplace to assist an HSR pursuant to a state OHS legislation.*
>
> *'…Under the Fair Work Act, to exercise a right under state OHS law, union officials must hold an entry permit, which is issued by the Fair Work Commission if it is satisfied they are a fit and proper person.'* [94]

[90] David Marin-Guzman, Australian Financial Review, *CFMEU commits Labor to get 'foot off our necks'*, 18 August 2023.
[91] '*Union boss with 'deplorable' history is behind Labor motion'*, Financial Review, 21 August 2023.
[92] Ibid.
[93] *Fair Work Act 2009* (Cth) s. 555A.
[94] Greg Wilson, *Formal Review into Victorian Government Bodies' Engagement with Construction Companies and Construction Unions*, Interim Report, p. 25.

This spells out the fact that ‘fit and proper’ requirements will not apply to union officials entering a workplace to ‘assist’ a HSR. The MCA hopes that the Albanese Government will not also ignore this particular concern raised by the Victorian Government, in the same way it ignored its concerns in relation to ‘intractable bargaining’.

Abuse of the loophole by unions

Under the Act, unions have long had powers to enter workplaces of workers they are entitled to represent under their coverage rules. These powers allow union officials with entry permits to investigate suspected breaches of workplace laws, awards, or agreements, and to hold discussions with employees. These powers apply to workplaces when unions are entitled to represent workers at the workplace under their coverage rules.

Recent developments in the WA resources sector have seen the expansion of the use of union right of entry through union ‘alliances’. Partnerships between unions, such as the Western Mine Workers’ Alliance’ and the ‘Offshore Alliance’, have resulted in permit holders from one union using the coverage rules of another union gain entry. This has included instances of some union officials attending sites and claiming to hold ‘dual permits’, a concept which does not exist legally and something which is not allowed under current union rules.

A lack of enforcement of union coverage rules and insufficient safeguards has meant union right of entry can be open to abuse. For example, The Western Mine Workers Alliance has held itself out as a bargaining representative for WA Iron Ore employees when it is not a registered organisation capable of being a default bargaining representative. The AWU has coverage of relevant workers; the MEU does not.