



Submission to the Senate Economics
Committee

Exposure Draft Australian Jobs Bill 2013

By the Australian Mines & Metals
Association (AMMA)

April 2013



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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1 This submission

1. This submission does not address the specific provisions of the exposure draft bill.
2. The focus of the submission is on providing the committee with information about:
 - a. The contribution made by the resource industry to Australia (see section 2 of the submission).
 - b. The appropriate role for Government in ensuring the resource industry is an attractive place for employment and investment (see section 3 of the submission).

2 The contribution of the resource industry to Australia

3. Between 2002 and 2012, the resource industry was responsible for the greatest creation and transfer of wealth in Australia's economic history.
4. In May 2011, the Government of Western Australia's *Local Content Report* stated:

The resource sector has been the most important driver of Western Australia's strong economic growth over the past ten years. Resource development contributes directly to economic activity through exports and investment in new capacity, and delivers benefits to the broader community through taxes, royalties, infrastructure, regional development and demand for goods and services during both the construction and operation of projects.

5. The contribution of the resource industry to the Australian economy is demonstrated by the facts.
 - a. Over 1,100,000 Australian people are employed in the resource sector, directly or indirectly.¹
 - b. The mining industry is the highest earning industry in the Australian economy, with an average per annum salary of over \$120,000.²
 - c. The resource industry has driven a 40% increase in real wages (ie, living standards) in Australia over the past 10 years.³

¹ Vanessa Rayner and James Bishop, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RDP2013-02), available at: <http://www.rba.gov.au/publications/rdp/2013/2013-02.html>.

² Vanessa Rayner and James Bishop, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RDP2013-02), available at: <http://www.rba.gov.au/publications/rdp/2013/2013-02.html>.

- d. The resource industry will contribute \$209 billion of export earnings to the Australian economy in 2012–13.⁴
 - e. When the flow-on effects of the resource industry are taken into account, it is estimated that the resource industry accounts for between 15 and 20% of the Australian economy.⁵
 - f. In 2009, the mining industry paid over \$5 billion in corporate tax. This was more than 20% of the total corporate tax raised by the Government in that year.⁶
 - g. More than 8 million Australians are in a superannuation fund. The strong performance of mining has driven the wealth of these funds.
6. However, the ability of the resource industry to contribute to the Australian economy is under ever-increasing pressure.
- a. Labour productivity is at its lowest level in a generation.
 - b. There is unprecedented competition for global capital.
 - c. New frontiers for competing resource investment continue to open.
7. These factors go to whether resources can be extracted, processed and transported, reliably and at a profit in this country. They affect decision-making about whether to commit to major projects. As commodity prices continue to adjust and the scarcity premium enjoyed by Australian resources diminishes, the efficiency of our export supply chain becomes ever-more critical. In *Rebooting the boom: Unfinished business on the supply side*, for the MCA, the need to maintain, if not increase, competitiveness was explained (at 6):

Unless we achieve and retain global cost competitiveness in each stage of that chain, we will benefit less than we should have during upswings and suffer more than we need to when times turn tough. And as unsustainably high prices return towards long run levels, it is our cost competitiveness that will determine how much of the current investment pipeline ultimately translates into completed projects.

³ See remarks made by Professor Quentin Grafton at the Australian National Conference on Resources and Energy (ANCRE) 2012, available at: http://www.bree.gov.au/media/media_releases/2012/20120918-mining-boom.html.

⁴ Bureau of Resources and Energy Economics, Resources and energy major projects, October 2012, available at: <http://www.bree.gov.au/publications/mimp.html>.

⁵ Vanessa Rayner and James Bishop, Industry Dimensions of the Resource Boom: An Input-Output Analysis, RDP2013-02), available at: <http://www.rba.gov.au/publications/rdp/2013/2013-02.html>.

⁶ Based on Australian Tax Office data.

8. Currently, these economic risk factors put in jeopardy \$383 billion of projected Australian resource industry investment. That is seven times the scale of the Gonski charges or ten times the scale of the NBN.
9. A significant proportion of projected Australian resource industry investment would be subject to the exposure draft bill. The enactment of the exposure draft bill would create an additional, and undue, risk to the resource industry.

3 The appropriate role for Government

10. Government policy, and financial and regulatory levers, can support and positively influence the resource industry. It can make the resource industry an attractive place to work and invest.
11. However, AMMA members identify:
 - a. An ever-increasing regulatory compliance burden with its associated administration and costs.
 - b. Significant uncertainty about application of increasingly complex legislation to the practicalities of the resource industry.
12. AMMA notes that our Federal arrangements foster the potential for cumbersome regulatory complexity and duplication. The combined result of Federal, State and Territory Acts of Parliament, delegated legislation and administrative guidelines, together with applicable local government rules, is not conducive to a minimal regulatory burden. In relation to the offshore resource industry, the additional element of maritime zones and competing State/Territory, Commonwealth and international jurisdictions creates further complexity and uncertainty.
13. The key concerns of the resource industry are that legislative and other regulatory frameworks should not constitute an undue burden. Regulation should be smart and effective. Regulation should form an appropriate governance framework and be clear in its application. It should not give rise to cost increases or unnecessary delays. Nor should it undermine productivity and competitiveness. Rigorous regulatory impact analysis should be undertaken therefore in respect of all new measures.
14. However, it is noted that the exposure draft bill would:
 - a. Operate in addition to State local content schemes.
 - b. Comprise a heavy-handed and undue intervention by Government into the resource industry. It would require resource industry companies undertaking major projects to employ an industry opportunity officer, even though those companies have in place significant measures to ensure that competitive local suppliers have diverse opportunities to supply to their projects.

- c. There are suggestions in the media that the thresholds in the exposure draft bill may be amended, requiring a further 25 to 30 projects to have Australian industry participation plans. This needs urgent clarification.
- d. AMMA notes with concern that the Department estimates the cost of each officer will be about \$232,000 a year. This is far greater than the \$50,000 to \$100,000 estimated cost to companies of the AIP legislation given in the Decision Regulation Impact Statement.
- e. The Decision Regulation Impact Statement, *Strengthening Australian Industry Participation*, does not contain rigorous cost benefit analysis. It does not provide adequate justification for the increase in costs. Nor did the Innovation Statement that accompanied the release of the exposure draft legislation. As observed in an *Australian Financial Review* opinion article, "Manufacturing plan misses the basic point" (*The Australian Financial Review*, 19 February 2013):

The innovation statement includes a graph that shows Australian business expenditure on research and development rising "faster than other nations" as a proportion of national output over the past two decades. Although starting from a low base, Australia is just below the developed economy average, and well above Canada, on the latest numbers.

A more substantial policy document would have explored the reasons why. In part it is because much of Australia's R&D now is being performed by mining companies, such as Rio Tinto's world-leading remote mining operations technology. Any serious policy document on the future of manufacturing would consider this and explore how manufacturing could exploit this, as Australia's mining services sector has done so well over the past decade.

- 15. Fundamentally, the key concerns of AMMA members are with reduced labour productivity and increased cost. The exposure draft bill will not address these concerns, and it may exacerbate them.
- 16. AMMA recommends that the main priorities of the Australian Government, and the key objectives to be addressed in legislation directed to major projects, should be increasing labour productivity and reducing cost.
- 17. In particular, resource employers report a number of key concerns about the *Fair Work Act 2009* (Cth) and related legislation:
 - a. Deteriorating labour productivity.
 - b. Unsustainable wage claims.
 - c. A militant labour environment.
 - d. Delays in investment, approvals and project starts and completion.
 - e. A lack of flexibility.
 - f. The increasing exclusion of productivity measures from enterprise bargaining.

18. Amendment of the Fair Work Act is one essential way in which Government should support and positively influence the resource industry. Recently, AMMA published a paper which identified ten key priorities for workplace reform in Australia. Attachment A is a copy of AMMA's *Workplace reform priorities for Australia's next Federal Government*.
19. The paper describes how Australia's next Federal Government must deliver a system of workplace relations regulation which better encourages long-term economic growth and development, investment and job creation.
20. Further, AMMA provides for the consideration of the committee a draft AMMA discussion paper regarding productivity in the resource industry, including the imperative to address the regulation of industrial relations issues and non-industrial relations measures. Attachment B is a copy of the current draft of *Resource Industry Productivity Analysis and Policy Options*. It sets out six important reforms that can reboot the mining boom through workplace relations reform.



Workplace reform priorities for Australia's next Federal Government

The Australian Mines & Metals
Association (AMMA)

March 2013



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INTRODUCTION

- Australia's next Federal Government, whether Coalition or Australian Labor Party (ALP), must deliver an industrial relations (IR) system that better encourages long-term economic growth and development, and that better encourages investment and job creation, whilst also allowing benefits to flow to both employees and employers and a protective safety net of minimum standards.
- The effectiveness of our IR system in delivering competitiveness, investment and productivity, concurrently with protecting appropriate minimum standards, must be one of the leading national policy priorities for any Australian government.
- Australia's IR system must assist enterprises in meeting the serious economic challenges faced in globally competitive capital and product markets, while at the same time maintaining and improving employment opportunities and working conditions.
- Workplace policy is not an area that can be treated as "set and forget", or as "fixed". It is the height of political and policy hubris to think any system or policy approach should not be revisited in light of substantial operational concerns.
- Unfortunately, the present IR system, combining a legacy of reforms under both political parties with the Fair Work policies of the current Labor government, is falling well short of what Australia requires.
- The present system has fallen out of balance. It is increasingly characterised by entrenched ineffectiveness, delay and complexity. This holds back Australia's productivity and competitiveness, and our attractiveness and reliability as an investment destination.
- The present system has systemic flaws which limit job creation and threaten job security. This is despite the comparatively strong performance of the Australian economy and labour market in a period of global malaise and crises.
- Change is needed urgently, and should be a high priority for whichever party forms our Federal Government after 14 September 2013.

Supporting the resource industry and its people in the national interest

- The resource industry is the heartbeat of the Australian economy in terms of investment, employment and export growth.
- Australia's resource industry is increasingly important to our economy, national interest and prosperity. The Reserve Bank of Australia (RBA) recently estimated that the resource industry now accounts for around 18 per cent of the entire economy, double its share in 2003/04.
- The Chief Economist of the Bureau of Resources and Energy Economics (BREE) has stated that the success of the resource industry weathered our economy through the global financial crisis and accounted for a 40 per cent increase in real incomes (living standards) over the same period.
- There is presently \$650 billion of capital investment in resource projects committed or awaiting approval and the industry will deliver \$184 billion of export earnings in 2012/13.
- In terms of workforce, the resource industry is the fastest growing workforce in Australia, with annual employment growth reaching 25 per cent.

- The RBA found that more than 1.1 million Australians are employed directly or indirectly by the resource industry: more than in manufacturing, as many people as in retail and construction, and twice as many as in tourism.
- The National Resources Sector Employment Taskforce (NRSET) has estimated that every job created in mining can create three jobs in allied industries such as transport, catering, construction and support services.
- Australia's resource industry has a long and proud history of driving reform. Our industry has initiated many the policy debates Australia needed to have about the world of work, even when those debates were uncomfortable or difficult.
- The perspectives and priorities of the resource industry matter to the trajectory of the Australian economy, labour market and community as a whole, and should help the competing parties engage with what must be a key national policy priority for Australia; how we regulate work and workplace relations.

Urgent reform priorities

- Australia's next Federal Government must get back into the IR reform business. Our government must again actively strive to ensure the regulation of work supports job creation, productivity, competitiveness and the advancement of our economic and social wellbeing.
- The next Federal Government should urgently address **6 key priorities for IR reform:**
 1. Protected industrial action
 2. Allowable matters in agreements and bargaining
 3. Greenfield agreement making
 4. Individual flexibility
 5. Trade union right of entry
 6. Adverse action/general protections
- A further four policy areas are also in particularly pressing need of reform:
 - Industrial regulation of the building and construction industry
 - Transfer of business
 - Unfair dismissal
 - The accountability of registered industrial organisations.

1. PROTECTED INDUSTRIAL ACTION

1. The very foundations of Australia's industrial relations system were in the prevention and orderly settlement of industrial disputes and avoiding the significant mutual harm to employers, employees and the community that comes from strikes, bans, pickets, lockouts etc.
2. This remains a relevant goal for our system, albeit in a 21st Century context.
3. Our system now faces the challenge of simultaneously delivering workplace bargaining and harmonious workplace relations. This requires our system to implement workplace by workplace agreement on wages and conditions, subject to a right to take protected industrial action in the bargaining process, but in practice a minimal incidence of actual action strikes, bans, pickets etc.
4. This is a completely valid challenge, and we have already seen under previous iterations of our legislation that this balance can be delivered. However, our current system has gone backwards and is failing to meet this challenge that is fundamental to the successful operation of our IR system.
5. Australia's next Federal Government must urgently address the institutionalised adversarial aspects of the current bargaining system. Our system should maximise the proportion of Australian enterprises able to successfully agree on terms and conditions of employment without being subject to damaging industrial action (or uncertainty and threat of industrial action).
6. Premature and damaging industrial action has become a hallmark of the current IR framework, frequently instigated by employees and unions at the very earliest stages of bargaining. Resort to protected industrial action at first instance is at odds with an obligation to bargain in good faith, and at odds with how all parties intend our system to operate.
7. A right to engage in protected industrial action during bargaining should remain part of the system. However, this should be a right of last resort for all parties and not one that is used prematurely or habitually. We need an IR system that delivers workplace driven outcomes in the vast majority of cases.
8. Existing very low thresholds to take protected industrial action should be tightened, and parties should be required to participate in conciliation before the Fair Work Commission prior to taking legally protected action.
9. Only when the Fair Work Commission is satisfied that all reasonable attempts to resolve the enterprise bargaining dispute have been, or are unlikely to be successful, should either party be able to take protected industrial action.
10. In cases where an employer has not yet agreed to bargain, or where there is doubt about majority support for bargaining among the workforce, a majority support determination (constituting the valid majority of the workforce to be covered by the agreement, not simply union members) should be required in all cases before protected industrial action can be sought by employees or unions.
11. Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action simply on an assertion they believe they are bargaining for permitted content. They must actually be bargaining for permitted content (see 2 below).

12. Where notices of protected industrial action are provided to an employer and less than 24 hours' notice is given of cancelling that protected action, the employer should have the right to refuse to accept employees making themselves available for work and no further protected action should be able to be taken by that group of employees for a subsequent period of 30 days.
13. The bar has been set far too high under the Fair Work Act to obtain orders that action stop, particularly for third parties economically and operationally harmed by industrial action in their supply chains, contractors or markets. This needs to be brought back into balance and reflect a better balance between public policy considerations in this area.
14. The bar should not be set so high for significant harm to third parties, given the overall value of their operations or projects, that relief is effectively denied to them. A finding that losses of \$3.5 million per day do not constitute significant harm to a business is extraordinary. It is illustrative of a system and statute in need of repair.
15. The requirement for an applicant union to be 'genuinely trying to reach an agreement' with an employer before seeking a protected action ballot order should include application of a designated criteria that ensures protected industrial action is not being taken over wage and condition claims that are speculative and inconsistent with the public interest.
 - a. The current ability to take protected industrial action over claims that are clearly contrary to the public interest should be removed.
 - b. As part of this consideration, unions could be required to demonstrate productivity measures that will offset labour cost increases sought.

Cooling off and getting back on track

16. The FWC should be in the business of promoting industrial harmony, minimising industrial action, minimising economic harm to both bargaining participants and third parties, and ensuring workplaces are covered by genuine agreements that contribute to productivity and competitiveness.
17. The powers of the FWC should be adjusted to empower the tribunal to more readily impose a cooling off period or other innovative means of getting parties back into genuine negotiations, and to step back from taking industrial action.
18. The requirement that protected industrial action be occurring at the time a cooling off application is made should also be changed to allow an application to proceed where protected industrial action is threatened or likely to occur.

Pattern bargaining

19. The Fair Work Act purports to prohibit the taking of protected industrial action where pattern bargaining that pays no regard to the needs of the enterprise is occurring.
20. However, pattern bargaining continues to be the *modus operandi* of many unions who then encourage employees to take protected industrial action to secure a pattern agreement.
21. The current system is yet to actually prohibit the taking of protected industrial action while pattern bargaining is occurring. To date, the tribunal has interpreted pattern bargaining extremely narrowly so that only if identical wages, not identical pay rises, are being sought would a claim qualify by pattern bargaining.
22. The existing legislative constraints on protected industrial action being taken where a union is engaging in pattern bargaining are completely ineffective in their current form. This is especially the case in the building and construction industry, which is plagued with pattern agreements.
23. The definition of pattern bargaining should be tightened to provide more effective protection and better deliver on the stated aims of the system's practice. The exemption in the Fair Work Act that allows pattern bargaining and protected industrial action to go hand in hand must also be removed.

2. ALLOWABLE MATTERS IN AGREEMENTS AND BARGAINING

24. Australia's shift to enterprise determination of wages and conditions, and enterprise-driven improvements in productivity, competitiveness, flexibility and employee satisfaction is becoming increasingly superficial and illusory under the current Fair Work system.
25. In too many instances, agreement making in Australia has become little more than a bureaucratic process of translating standardised union claims into agreements, with no scope or challenge to address productivity or progress organisational change.
 - a. In too many negotiations under the Fair Work Act, productivity improvements or changes to the organisation of work are off the bargaining table; not for negotiation.
 - b. Merely processing inflated unions claims into wage outcomes closer to inflation does nothing to innovate or make enterprises more productive.
26. Government must make agreement-making simpler, more flexible and better empower employers and employees to improve productivity.

27. The Fair Work Act must be amended to start to turn this around. This must be complemented by wider dialogue and initiatives to ensure Australia gets back into the business of productivity improvement and world-leading performance, a significant part of this must relate to labour productivity and our IR system.

Allowable Matters in Agreements

28. Under the present IR system almost anything can be included in enterprise agreements, and in union claims that give rise to legally protected industrial action.
29. Union claims regularly include a wide array of matters as a vehicle to entrench, support and extend their role at the workplace and deflect the focus away from improving working arrangements for employees and employers.
30. This includes claims relating to payroll deductions of union dues, trade union training leave, provision of on-site facilities for union delegates, restrictions on the use of contractors and other union rights clauses that do not pertain to the employment relationship between the employer and its employees.
31. The virtually unrestricted nature of matters that can be subject to enterprise agreement claims has frustrated Australian enterprises in maintaining and advancing innovative, flexible work practices, including the loss of flexibilities introduced in past generations of agreement. The lack of boundaries further forces productivity off the bargaining table in too many Australian workplaces.
32. The next Federal Government should limit agreement content to matters pertaining solely to the employment relationship between the employer and its employees.
 - a. This should be based on the High Court's determination of 'matters pertaining' in the *Electrolux* decision.
 - b. Protected strike action and bargaining should not extend to matters that are not employment matters or that unacceptably restrict individuals' freedom of choice and companies' capacity to manage.
 - c. In addition, some matters may need to be expressly identified as able to be included in agreements and others as not being able to be included in agreements (and also subject to protected industrial action).

Bargaining

33. 87 per cent of Australians in the private sector choose not to join a trade union. We need a system that not only better respects these choices, but actually reflects current rather than historic realities in Australian workplaces.
34. The current default bargaining representative status for employee organisations should be removed, in favour of transparency in representation via employees appointing in writing their bargaining representatives. Again, the system should better respect the choices of Australian employees.
35. The existing system of default representation is not transparent and leads to misrepresentations and undue complexity. Transparency in representation will also be restored through employees appointing their bargaining representatives in writing.

36. Employers should know which bargaining representatives are seeking to represent employees in negotiations and how many employees each bargaining representative actually represents.
37. Existing laws provide ample protection for employees to be represented by bargaining representatives without fear of discrimination.
38. There should be no access to protected industrial action by either employees or employers without a rigorous attempt to resolve differences, including via conciliation.
39. Employers and employees should also have greater scope to determine the coverage of agreements, and the FWC should no longer override these choices by somehow trying to determine whether agreement coverage has been fairly chosen.
40. Consideration should be given to how the Fair Work Commission could better encourage parties to address workplace flexibility and productivity in agreements brought before it for approval.

3. GREENFIELD AGREEMENT MAKING

41. Greenfield agreements are imperative for the Australian resource industry, with the development of nationally significant resource projects requiring effective, accessible, practical and timely first-time regulation of work for a new workforce.
42. Under the current Fair Work Act, the only way an employer can make a greenfield agreement is with a trade union. As a result, many greenfield agreements are being stalled or completely withheld. Where agreements are made, unions are demanding and achieving excessive outcomes that have led to spiralling labour costs for new projects.
43. The choices for employers under the current system are unenviable:
 - a. To start up a project without a greenfield agreement in place, leaving the project vulnerable to protected industrial action as soon as employees start work. This has the effect of increasing the project's financial exposure and placing it in an extremely uncertain position, potentially being subject to delays from the outset. The failure to have an agreement in place will also raise alarm bells with investors who demand industrial certainty before signing on the dotted line.
 - b. Agree to unions' often exorbitant wage and conditions demands, as well as the extensive union rights agendas being pursued across the board, simply to get a greenfield agreement up and running.
44. Employers should be able to make greenfield agreements for new projects without a union having a veto over whether an agreement can be made and/or what terms it should include.
45. Where unions demand that fanciful and inflationary claims be agreed before sanctioning a greenfield agreement, there must be a safety valve for employers. In such circumstances, employers must have the option of registering a greenfield agreement that would be tested against the relevant modern award, the National Employment Standards and the better off overall test, without obtaining consent from a union or unions.

46. On application by the employer, the Fair Work Commission should have the ability to deem that a union's demands are not in the public interest and to issue a greenfield "determination" where agreement with unions cannot be reached in a reasonable timeframe.
47. Any tribunal intervention or consideration in relation to a Greenfields agreement must be at the instigation of the employer only, and not be able to be commenced by trade unions or the tribunal.
48. Compulsory arbitration is not the answer. A significant number of major employers in resource industry have expressed concerns regarding the capacities of industrial tribunal members, many of whom have limited experience in business operations, to properly engage with the scale and complexity of considerations involved in bringing massive resource projects to investor approval and project commencement.

4. INDIVIDUAL FLEXIBILITY

49. At the rhetorical level at least, all parties recognise the increasing role of individual determination and choice in the operation of our workplace relations system.
50. Our workplaces and markets are no longer the homogenous monocultures upon which our historic award system was predicted, and our system needs to continue to evolve in step with changing communities and markets.
51. One of the current government's key justifications for removing the ability to make new AWAs was that essential individual flexibility could be delivered under its Fair Work framework, via:
 - a. Flexibility provisions included in awards and collective agreements; and
 - b. Individual flexibility arrangements (IFAs) based on the above flexibility provisions in modern awards and collective agreements.
52. As with so much of the Fair Work system, this has not worked in practice.
53. Scope for individual flexibility has been rendered essentially inoperative in many cases through trade union approaches to collective bargaining.
54. The foundation for IFAs and individual flexibility has been eaten away from within by what the system allows trade unions to do at the collective level.
55. This needs to be revised, and, as the current government intended, genuine scope for individual flexibility provided under awards, collective agreements and IFAs. The system needs to operate as originally communicated to the Australian community, and to deliver genuine individual flexibility within the existing framework of the Fair Work legislation.
56. Enterprise agreements should at very least contain the Fair Work Act's model flexibility term currently included in all modern awards. Agreement making with trade unions should not be able to be used to restrict the capacity of individual employees to access genuine individual flexibility where able to be agreed with the employer.
57. While the model flexibility clause should be the minimum standard required, the optimal situation would be to ensure:

- a. Restrictions not be able to be placed on what terms of a collective agreement can be subject to an IFA.
 - b. IFAs are able to run for the nominal term of an enterprise agreement, that is, four years.
 - c. It is possible to make IFAs a condition of employment.
 - d. IFAs are not subject to unilateral termination during their life. The current 28-day notice period for cancellation of an IFA by either party fails to provide essential certainty.
 - e. Employers and employees can agree that no protected industrial action can be taken during the life of IFA, as is the case for other forms of agreement.
58. At all times agreement must be genuine and there should be appropriate protections for employees in both the making and operation of IFAs.

5. TRADE UNION RIGHT OF ENTRY

59. Australia's workplace relations system has long provided a legislated capacity for unions to enter employer workplaces for prescribed purposes, subject to legislated or arbitrated capacities and controls. What these controls are, and the balance between competing interests in this area, has been subject to considerable political debate dating back to prior to the 2007 election.
60. In November 2007, then-Deputy Opposition Leader Julia Gillard said:
- "I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it [that the Fair Work Act will retain identical right of entry rules to those under the Workplace Relations Act]."*
61. That promise was not kept.
62. In reality, union access to worksites has widened enormously under the Fair Work Act, creating significant additional disputation, uncertainty and imposts upon employers.
63. It has also encouraged a completely unacceptable level of harassment of potential union members/bargaining clients in enterprises that trade unions are targeting for coverage.
64. The current right of entry provisions have encouraged a greater number of union visits by an increased number of unions competing for coverage. Right of entry provisions have become a recruitment vehicle for unions at the expense of both employers and employees, the latter more often than not choosing not to join a union.
65. Unions undertaking hundreds of visits to any site is contrary to both community expectations for fairness and balance and the reasonable exercise of management.
66. The current situation reflects a fundamental lack of respect for the choices being made by those working people to exercise their right not to join a union.
67. Proportion and reasonableness needs to be reinserted into Australia's right of entry rules.

Unique challenges in the resources sector

68. Right of entry rules designed to help union officials stroll in through the open roller doors of metropolitan factories are quite unsuited to remote operations, particularly offshore operations, in the resource industry.
69. Resource sector operations are unique in the sheer scale, area and complexity of activities, the numbers of people employed, and the remoteness and difficulty of access. Massive safety considerations are paramount and severely control how these sites operate and the access and movements of all persons on site.
70. Transport to and from offshore and remote locations in our industry is difficult and costly. In practice, businesses running sites cannot always bring all persons out to their remote operations that they wish to. Unique legal concerns also limit who can and cannot be flown in and out, and in what numbers.
71. Any suggestion that employers must somehow fund or facilitate union officials seeking to sell union membership getting access to remote resource industry workplaces, particularly offshore, is completely unrealistic and impractical.

Reform Priorities

72. The Prime Minister was quite right back in 2007 when as Deputy Opposition Leader she said the long-standing right of entry rules in place at that time did not need to be changed.
73. Australia's next Federal Government should realign right of entry rules for trade unions in a form consistent with those that existed prior to the 1 July 2009 changes.
74. Union rights to enter workplaces should no longer be solely based on unions' constitutional rules. All of the following conditions should be met before a union official can legally enter a worksite:
 - a. The union should be a party to an enterprise agreement that covers the site or be attempting to reach one;
 - b. The union should be required to demonstrate that it has members on that site; and
 - c. Those members should have requested the union's presence.
75. This would restrict entry under both s.481(1)(a) for the purposes of investigating breaches and s.484(b) for the purposes of holding discussions with members, to cases where unions have actual members on-site rather than just workers that are covered by the union's eligibility rules (i.e. potential members).
76. Right of entry clauses in enterprise agreements: There should be no capacity for unions to include additional right of entry provisions in enterprise agreements that bestow entry rights which are in addition or inconsistent with the legislated system. Statutory checks and balances should not be able to be undone through bargaining
77. Reasonable limits on site visits: There should be a limit on the number of entry visits that unions can make to worksites that are not for the purposes of investigating suspected breaches. The number of visits for discussion purposes should be capped.
78. Employer supervision and direction: Given the size, location and type of machinery on resource projects, as well as employers' enormous safety obligations, employers must have the capacity to reasonably direct union permit holders in relation to where to go onsite during visits.

79. Costs of entry: Unions are a commercial service provider seeking to attract clients to their service. As such, unions must meet the travel, logistical and other expenses of their entry onto worksites to meet current and potential members. Under no circumstances should employers be required to in any way subsidise or fund union right of entry.
80. Disputes over right of entry: The above changes should significantly decrease current levels of disputation and dissatisfaction created by aggressive trade union right of entry campaigns.
81. However, there may be value, in addition to the initiatives above, in creating a fast-track capacity to take disputes or concerns to the Fair Work Commission for resolution.
82. One of the tools that could be considered is limiting otherwise lawful entry where there has already been a volume of entries onto a site that would be considered reasonable.
83. However, the Commission's discretion in this area would be limited and explicitly spelled out so as not to allow further broadening of the already too broad provisions in practice.

6. ADVERSE ACTION / GENERAL PROTECTIONS

84. In 2009, the current Federal Government grafted an entirely new platform for litigation onto Australia's workplace relations system, taking existing long-standing and effective legal protections against discrimination and unlawful treatment and expanding them significantly to create an unnecessary and counterproductive new avenue to sue employers.
85. The very broad-ranging "adverse action" provisions were introduced without any genuine examination of their necessity, especially in light of other remedies long available under our law (e.g. discrimination and OHS laws).
86. Every employer action relating to an employee activity now needs to be assessed against the potential for an adverse action claim to be brought at some future time.
87. As was entirely foreseeable, this has become a lawyers' picnic and has served to create another tool in strategic litigation and avenue for forum shopping. It has also significantly increased the costs of employment through the extensive new documentation and record-keeping requirements it forces on employees.
88. This adventure in speculative litigation should be removed from our system entirely, in favour of restoring the long-standing, well understood, and balanced protections which preceded the current legislation.
89. Failing the removal of the adverse action provisions in their entirety, the following changes should be made to the system as a matter of urgency:
 - a. The reverse onus of proof on employers should be removed as it encourages non-meritorious claims to be brought and allows claims to proceed further than they otherwise would if the burden of proof rested with the applicant.
 - b. Applicants should be required to comprehensively document the grounds on which they are bringing their claim to enable employers to prepare their defences and so the FWC can assess the merits of the application before it moves to conciliation.
 - c. An entitlement to a workplace right should have to be the dominant reason for the adverse action alleged to have been taken, rather than one of several factors, for a claim

to proceed. Claims should not be able to proceed where other valid, more significant reasons exist for the adverse action such as poor performance or misconduct.

- d. Removing actions on the basis of alleged discrimination that is able to be pursued using other, long standing Commonwealth and State legislation.
- e. Employees undertaking union activity should not be exempt from an employer's right to take disciplinary action if the same activity would result in disciplinary action if undertaken by an employee not engaged in union activities.
- f. The six-year time limit for bringing adverse action claims under s.372 where dismissal is not involved should be reduced to 21 days, the same time limit applying to adverse action claims made under s.365 where dismissal is involved (following amendments to the Fair Work Act that took effect on 1 January 2013).
 - i. The current six year allowable period to bring claims doesn't stand up to any form of scrutiny.
 - ii. During a period of more than 2000 days, managers change, staff change, whole cultures and processes change. It is impossible to be able to reconstruct events reliably in many cases so far in the past.
 - iii. The current system is predicated on an operational impossibility. This operates to the significant prejudice of employers required to defend claims subject to a reversed onus of proof.
- g. Damages should be limited to economic loss only, excluding claims for pain and suffering and other alleged non-economic harm.
- h. The application of the general protections to prospective employees and independent contractors is unwarranted and should be removed.

FURTHER PRESSING AREAS FOR REFORM

90. In addition to the six lead workplace reform priorities set out above, a number of other areas of the system need to be brought back into balance to address significant concerns for the resource industry and for all enterprises, employees and the wider community. Four particularly pressing areas for reform are as follows:

Industrial regulation of the building and construction industry

91. The laws that successfully curtailed unlawful and thuggish behaviour in the Australian building and construction industry must be restored.
92. The building and construction industry must again be given the proper legislative support to eliminate unlawful and unacceptable behaviours that have become an impediment to conducting business in the resource industry, and which artificially inflate the cost and timeliness of Australia's built infrastructure.
93. The present policy approach is unsound and ineffectual. The abolition of the Australian Building and Construction Commission (ABCC) and its replacement with Fair Work Building and Construction (FWBC) in 2012 has seen a return to a widespread culture of unlawfulness.

94. Significantly reducing penalties, along with the powers and functions of the enforcement body, has given the green light for building and construction unions to act like they are above the law. Relaxing the law and neutering an effective regulator has been an invitation to heightened union militancy.
95. In the resource industry, a return to union excesses makes essential infrastructure more costly and industrial relations far less reliable on time-critical projects. International investors choosing between Australia and other markets are acutely aware of the problems caused by the abolition of the ABCC and many of the other policy approaches under the current Fair Work system.
96. The next Federal Government must reintroduce the laws that successfully curtailed unlawful and thuggish behaviour in the building and construction industry. Maximum penalties for unlawful behaviour must be set at levels that provide a genuine deterrence against such behaviour in the building and construction industry.

Transfer of business

97. The transfer of business laws under the Fair Work system have proved counter-productive and are discouraging the employment of existing workers by new business owners.
98. Under our next Federal Government, there should be no mandatory requirement for employers to take on a previous employer's industrial arrangements where a business transfer occurs, particularly if the majority of employees of the new entity are already covered by another industrial instrument.
99. In the absence of the complete removal of the transfer of business provisions, transferring instruments should only apply for a period of six months rather than having open-ended operation until new arrangements are negotiated.

Unfair dismissal

100. The Fair Work Act's unfair dismissal rules, in the same way as the adverse action provisions (above), have had the effect of encouraging speculative claims by employees and have seen the federal industrial tribunal encroach on various aspects of what should be managerial decision making.
101. The costs of defending unfair dismissal claims remain significant, as does the incidence of employers being compelled to pay to make claims go away (even where the employer has acted properly and the claim is without merit).
102. Processes for unfair dismissal litigation need to be re-calibrated to properly balance the rights and interests of employers and claimants, and the expectations of the wider community. A range of changes should be considered:
 - a. Determination of whether a dismissal is harsh, unjust or unreasonable should exclude consideration of the consequences of termination of employment for workers and their families.
 - b. Given the unique and fluctuating circumstances of the building and construction industry, daily hire employees in that industry should be prevented from bringing unfair dismissal claims unless they are dismissed for prohibited reasons.
 - c. Employers should only be required to canvas redeployment options for workers they make redundant within their own enterprises or within their subsidiaries' enterprises. The broad definition of 'associated entity' applying to redeployment obligations on employers where they are considering dismissing employees should be removed.
 - d. Where employees are dismissed following serious safety breaches, there should be no ability for the commission to reinstate those workers or else it risks undermining the safety culture of the enterprise and the industry.

Accountability of registered organisations

103. The legislation and rules governing registered organisations have considerable deficiencies. Increased operational transparency and accounting controls are required.
104. The rules of registered organisations should be required to deal with disclosure of remuneration, pecuniary and financial interests to ensure greater accountability and transparency.
105. Union officials should not be able to receive monies or other benefits from their positions on superannuation boards, insurance companies, industry training bodies and the like without declaring to members that they hold such positions and stating the income or benefit received.
106. Receipt of monies or benefits from employers must also be declared. Employers should be required to state where they have made pecuniary or other contributions to unions or union-associated bodies such as training organisations. Union rules and legislation should also specifically require this transparency.
107. Registered industrial organisations should be held accountable to the same standards expected of incorporated companies. This means that:

- a. Misuse of members' funds and the exercise of undue pressure on third parties for financial and like contributions is not acceptable conduct.
- b. Officials of registered organisations should not be permitted to behave in a manner inimical to the interests of the organisation's members.



Resource Industry Productivity
Analysis and Policy Options
Discussion Paper

Australian Mines & Metals
Association (AMMA)

April 2013



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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Executive Summary

Unless you are highly productive in Australia, projects will go offshore and construction jobs will go offshore. Every major project under evaluation, including Browse, has to confront this issue. – **Michael Chaney AO, Chairman of NAB and Woodside Energy**

2013 sees the Australian resource industry at a crossroads. Labour productivity is at its lowest level in a generation, competition for global capital is more intense than ever and new frontiers for resource investment continue to open.

Productivity in the resource industry has been in decline since 2000-01 and is now 45 per cent off its peak. The surge in commodity prices, an investment boom and resource depletion have all been cited for initiating a steady but inevitable decline in overall productivity, particularly capital productivity. Increasing the level of labour productivity, through both legislative and non-legislative measures, is therefore essential to lift overall productivity in the resource industry.

A double threat is on foot as Australia's international competitiveness continues to decline. Recently, an independent report cited labour relations as a key reason for the drop in our competitiveness.

Resource employers face competition from emerging resource nations and, combined with escalating costs, there is serious concern for the \$383 billion of investment currently under consideration in the Australian resource industry. The industry is now a 'high-cost, low-productivity' place to invest and do business. Globally significant projects worth billions of dollars and thousands of jobs will continue to go offshore under these conditions.

Resource employers continue to report deteriorating labour productivity under the Fair Work Act and face unsustainable wage claims, a combative labour environment, project delays and undermined flexibility. Both the first and second tranche of amendments to the Fair Work Act have failed to address these key concerns. Productivity gains have all but been pushed 'off the table' under the Act. This paper sets out six priorities for workplace relations reform to reboot the mining boom.

While change to the Fair Work Act is essential, a variety of non-legislative measures are needed to complement this reform. This paper sets out six proposals in the areas of investment, work practices, leadership, technology, productive bargaining and skills development to boost productivity and collaboration in the resource industry.

Ultimately, a multi-faceted approach is required to ensure our resource industry delivers on its great promise. The purpose of this paper is to facilitate a genuine discussion around both the workplace relations (WR) and non-WR measures required to restore resource industry productivity.

1 Australia's Waning Productivity

1.1 What is productivity?

1. Productivity is a measurement of the ratio of output to one or more inputs.
2. Productivity growth is the most important determinant of long-running improvements in economic prosperity. Over the past 30 years, it is estimated that around 80 per cent of the increases in Australia's living standards have been due to increases in productivity levels.¹
3. The Australian Bureau of Statistics (ABS) provides industry-level indexes for three measurements of productivity: multifactor, capital and labour productivity.

1.2 Multifactor productivity

4. The productivity measure preferred by economists is multifactor productivity. It takes into account the effects of both labour and capital inputs on output.
5. In 2008 the Productivity Commission published a report² on productivity in the mining industry which used the ABS data series entitled *Experimental Estimates of Industry Multifactor Productivity*. This data index has also been used by eminent economist Saul Eslake in his 2011 paper 'Productivity: the Lost Decade'³ and also by the Bureau of Resource & Energy Economics (BREE)⁴.
6. The graphs in this chapter have been created using that same data series. They compare the 'mining' industry data to the ABS 'selected industries' data. The latter category is a cross-section of the economy that includes: Agriculture, Forestry and Fishing; Manufacturing; Electricity, Gas Water and Waste Services; Construction; Wholesale Trade; Retail Trade; Accommodation and Food services, Transport, Postal and Warehousing; Information, Media and Telecommunications; Financial and Insurance Services; and Arts and Recreation Services. These are henceforth referred to as 'other industries'.
7. An examination of multifactor productivity over the past 20 years shows a steady growth trend for these 'other industries'. At the same time, the statistics show a resource industry characterised by greater volatility, and productivity falling sharply from 2000-01 onwards.
8. Since peaking in 2000-01, multifactor productivity in the resource industry has fallen at an average annual rate of 4.5 per cent, or by 34 per cent in total, as displayed in the following graph.

¹ Commonwealth Treasury, Recent Productivity Outcomes and Australia's Potential Growth

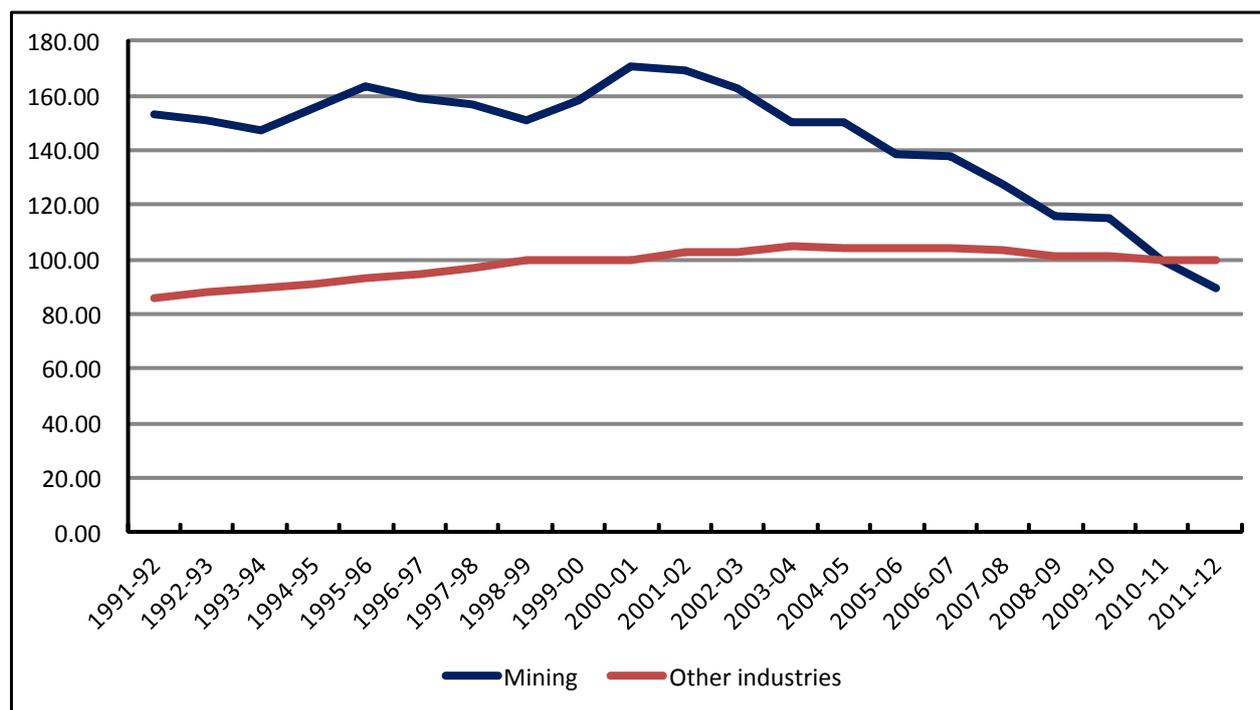
² Productivity Commission, Productivity in the Australian Mining Industry: Measurement and Interpretation

³ See: <http://www.rba.gov.au/publications/confs/2011/eslake.pdf>

⁴ See: <http://www.aares.org.au/aares/documents/2012ACPapers/MSSyed.pdf>; and

<https://crawford.anu.edu.au/pdf/events/2013/8801/Grafton-Australian-Mining-Productivity-18-March-2013-Finalversion.pdf>

Figure 1: Multifactor productivity indexes



Data source: ABS 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia: Detailed Productivity Estimates (Reference year for indexes is 2010-11 = 100.0).

9. One key reason economists cite for the decline in multifactor productivity in the resource industry is the impact of a surge in commodity prices. This has produced large increases in the *value* of output that has not been matched by a commensurate increase in the *volume* of mining output.
10. The Productivity Commission explains:

...a commodity price boom can lead to lower productivity (albeit occurring at the same time as high profitability) because higher prices render less efficient mines and mining practices economically viable. In boom times the primary focus of mining operations is usually on increasing output, albeit at a higher unit cost of production⁵.
11. While significant, the impact of commodity prices on resource industry productivity is only one part of the current productivity challenge. The Productivity Commission has recently detailed other factors including: the transition to lower yielding resources (resource depletion), inefficiencies of vintage capital, output-input lags and the lumpy nature of mining investment.⁶
12. To unpack these complexities we need to look at the two key components of multifactor productivity: capital productivity and labour productivity.

1.3 Capital productivity

13. Capital productivity is the measure of the amount produced per unit of capital services utilized. The composition of capital used in the resource industry differs to that of other industries

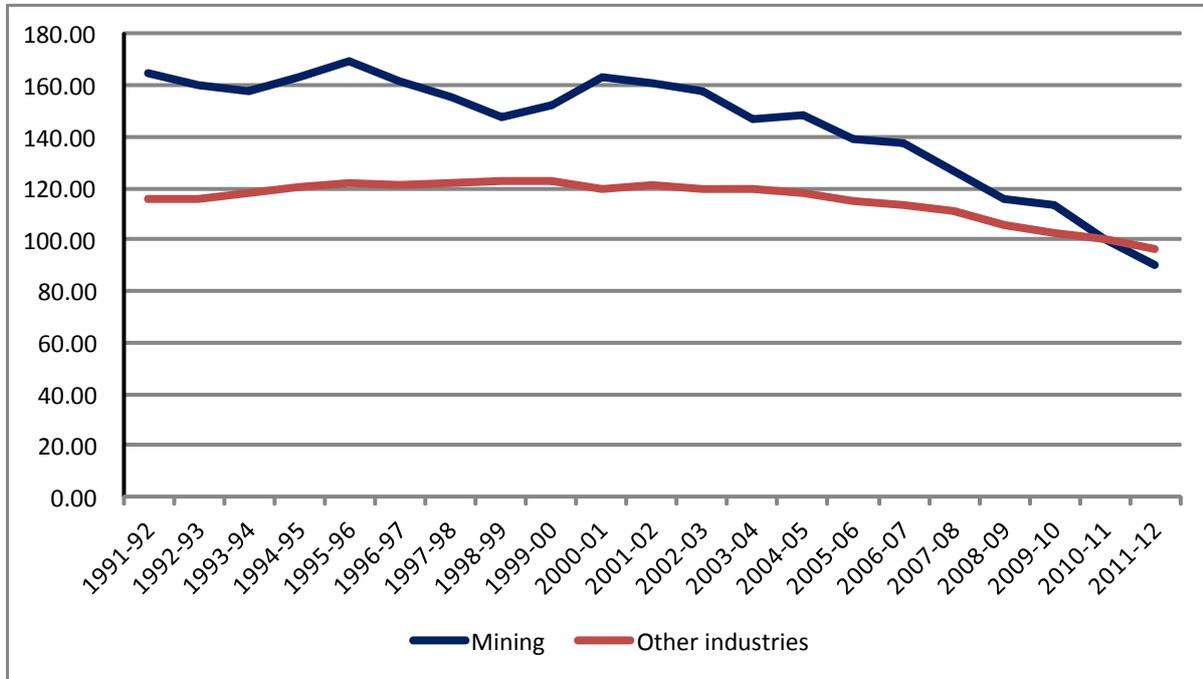
⁵ Productivity Commission, Productivity in the Australian Mining Industry: Measurement and Interpretation

⁶ Bureau of Resources and Energy Economics, Productivity in the Australian Mining Sector, BREE Discussion Paper Series 13.01, March 2013

because it includes exploration expenditure as a capital input on the basis that, regardless of whether it is successful or not, exploration is required in order to acquire new reserves.

14. Given the capital-intensive nature of Australia's resource industry, it is useful to consider how capital productivity has trended over the past two decades.

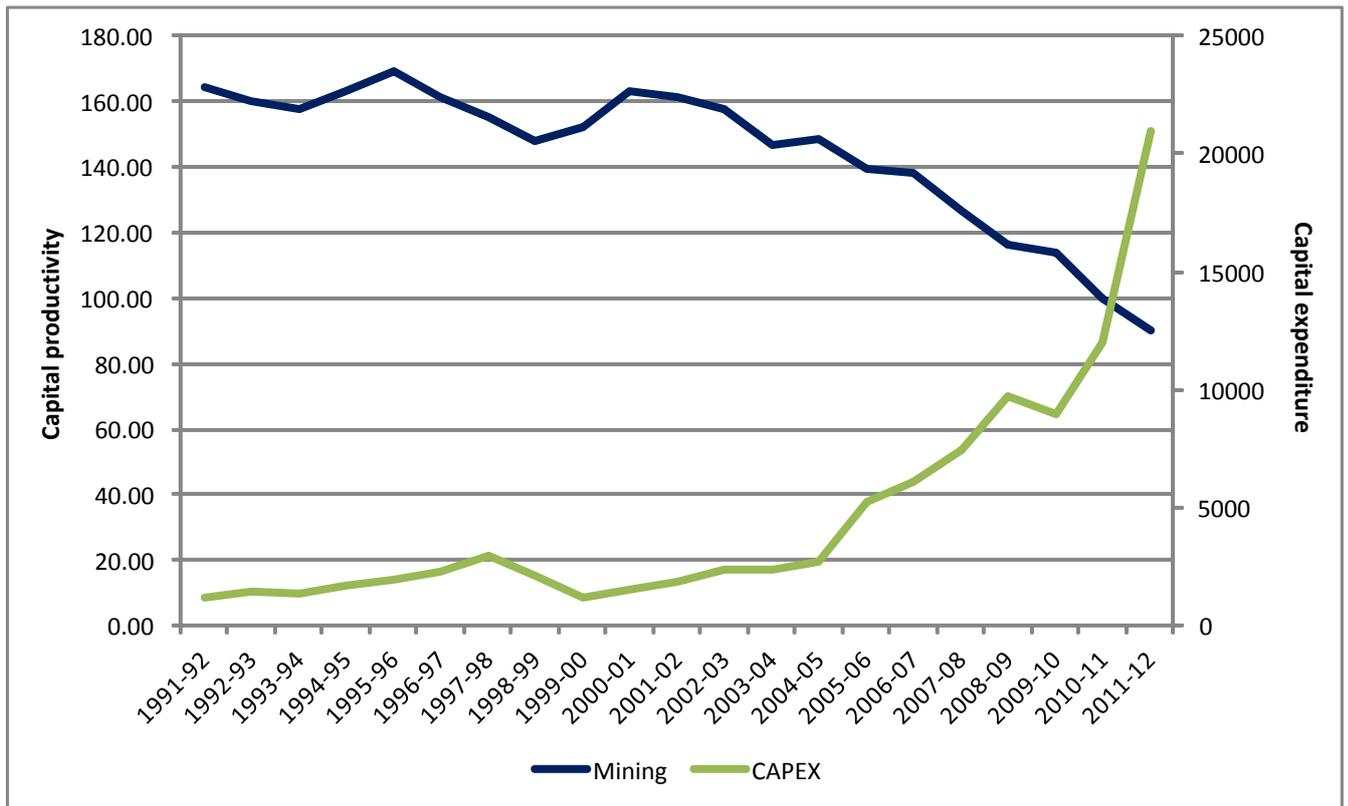
Figure 2: Capital productivity indexes



Data source: ABS 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia: Detailed Productivity Estimates (Reference year for indexes is 2010-11 = 100.0).

15. As the graph above shows, while capital productivity for selected industries has remained fairly stable over the 20-year period, there has been a sustained general downward trend since 2004.
16. Adding mining industry capital expenditure to the scene in the graph below provides a more complete picture.

Figure 3: Capital productivity vs. capital expenditure



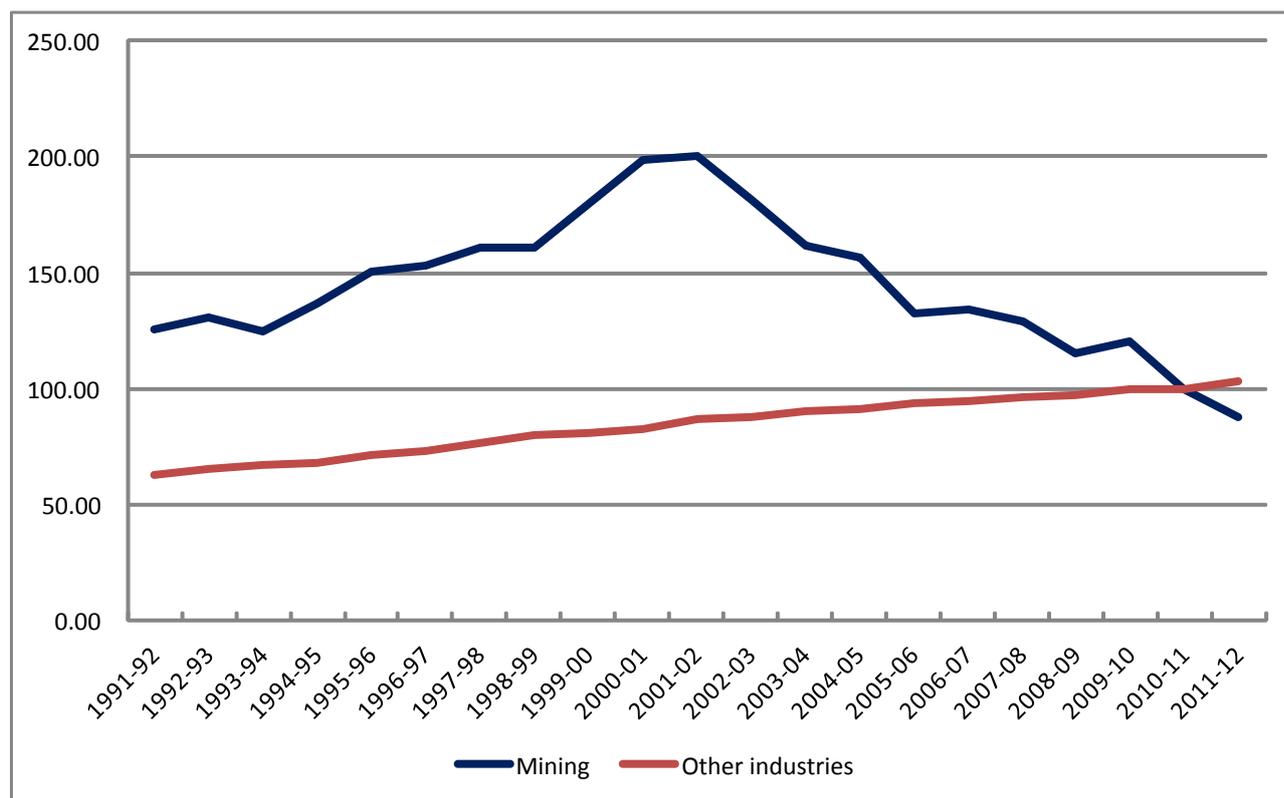
Data source: ABS 5625.0 - Private New Capital Expenditure and Expected Expenditure, Australia

17. What becomes apparent from the graph above is that capital expenditure in the industry shows an inverse correlation to capital productivity. As expenditure increases, productivity falls, as shown above, particularly since 2000-01.
18. A factor at play here is the lag effect that occurs when measuring capital productivity. The Productivity Commission has stated that the average production lag in mining is around three years, meaning output does not come online until three years after the capital is invested.
19. With over \$590 billion of capital investment either under way or in the pipeline of resource projects, the capital investment outlook in the sector is strong. But these large investments underway are subject to an inevitable production lag. We must find ways to increase productivity in the meantime to ensure benefits of expansion are fully realized and to ensure future investments are made.

1.4 Labour productivity

20. As mentioned, multifactor productivity accounts for the impacts of both capital and labour on output. As shown above, capital productivity is unlikely to pick up in the short-term given the sheer volume of capital investment already in the pipeline. This means the key to enhancing productivity in the mining sector lies largely in raising labour productivity.
21. The labour productivity index is often considered of most obvious relevance from a workplace relations perspective. It measures the output produced by one typical employee over a period of time.

Figure 4: Labour productivity indexes



Data source: ABS 5260.0.55.002 Estimates of Industry Multifactor Productivity, Australia: Detailed Productivity Estimates (Reference year for indexes is 2010-11 = 100.0).

22. Immediately apparent from the graph above is the significant discrepancy between the trend lines, for mining compared to other industries. Other industries' labour productivity has shown a steady but moderate growth over a 20 year period, rising 20 per cent over the past decade.
23. Resource industry labour productivity, on the other hand, showed much stronger growth up until 2000-01 but then went into sharp decline and is now 60 per cent lower than its peak. As Saul Eslake commented:

There's no denying that both labour and multifactor productivity have fallen sharply in the mining and utilities sectors over the past decade⁷.
24. There is also an accelerated decline coinciding with the commencement of the Fair Work Act. Labour productivity levels in the industry are currently at their weakest level since 1987.
25. A recent report from BIS Shrapnel⁸ describes mining industry labour productivity as a 'disaster' and argues that governments have failed to deliver the structural reform required to increase output. While acknowledging the impact of the surge in commodity prices, the report argues that the resource sector is at a crossroads and that changing the relevant policy levers is more urgent than ever before, including but not limited to industrial relations, tax and regulation.
26. These findings are consistent with feedback from AMMA's members. Resource industry employers continue to stress that greater productivity can be generated through flexible workplace relations arrangements, particularly more direct employer-employee arrangements at the workplace level. Access to skilled labour, including via skilled migration in a small number of cases, is also of vital importance in delivering productivity growth.

⁷ Saul Eslake (2011), Productivity: The Lost Decade, p229

⁸ BIS Shrapnel (2012), Mining in Australia 2012 – 2027

27. BIS Shrapnel also found that, faced with rising wage costs, construction cost blowouts, increasing regulation and additional taxes, resource industry employers need flexibility in dealing with contractors in order to drive productivity improvements. Similarly, AMMA's policy is that where there is third-party involvement in workplaces it must be both reasonable and constructive, including respecting management's rights to make management decisions.
28. Unfortunately, some commentators and interest groups continue to neglect to properly acknowledge the impact of the industrial relations framework on productivity. While labour relations policy is by no means the only factor affecting productivity, it is certainly an issue for policymakers to get right in order to drive much needed improvements.
29. Eminent economist and outgoing Chairman of the independent Productivity Commission Gary Banks recently and forcefully made the point that:

...industrial relations regulation is arguably the most crucial [area of regulation] to get right. Whether productivity growth comes from working harder or working 'smarter', people in workplaces are central to it⁹".

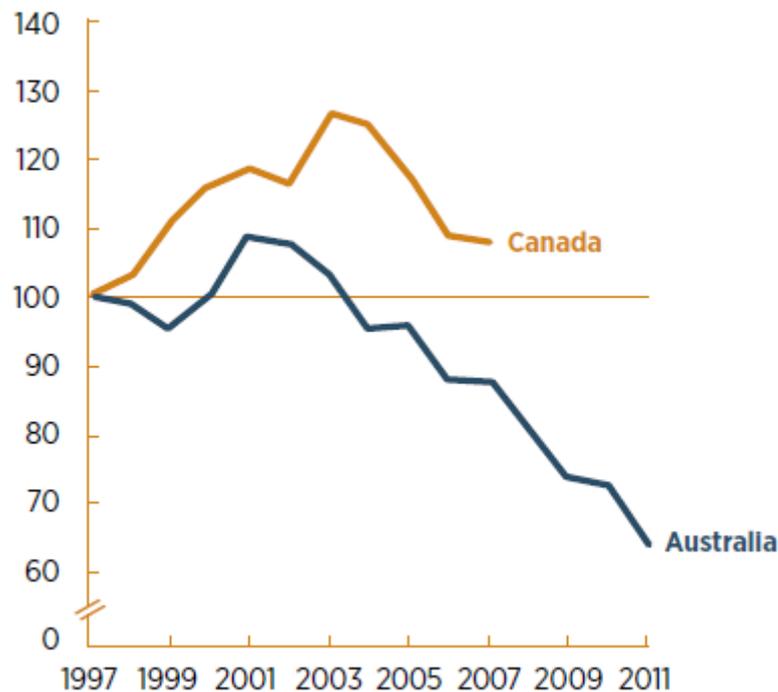
1.5 Putting our productivity in a global context

30. It should be acknowledged that declining productivity in the mining industry is not unique to Australia. The boom in commodity prices has led to less 'productive' mines coming online around the world.
31. However, the following graph shows that while Canada has also experienced declining mining productivity, Australia has performed significantly worse¹⁰. While Australia's mining productivity peaked in 2001, Canada experienced growth until 2003 and has been able to retain some of the gains made since 1997, unlike Australia.

⁹ Gary Banks, 'Successful Reform: Past Lessons, Future Challenges', Keynote address to the Annual Forecasting Conference of the Australian Business Economists, Sydney, 8 December 2010

¹⁰ Minerals Council of Australia, Opportunity at Risk: Regaining Our Competitive Edge

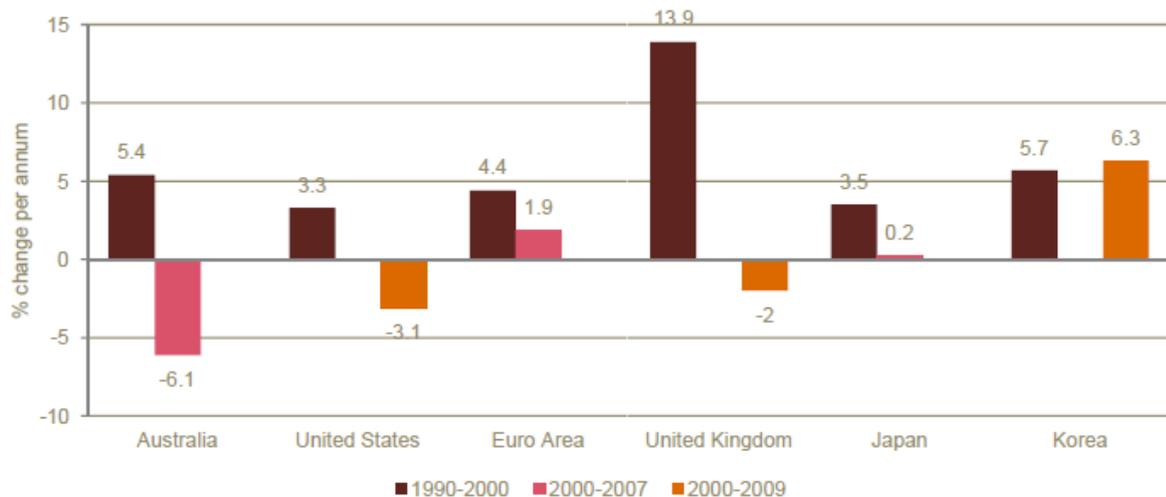
Figure 5: Multifactor productivity: Australia vs. Canada



Source: 'Opportunity at Risk: Regaining our competitive advantage in minerals resources', Port Jackson Partners for the Minerals Council of Australia, September 2012

32. Australia’s mining productivity performance has been poor not only compared to Canada but other advanced economies. Pricewaterhousecoopers (PwC) have stated “there is no doubt that while the past decade has also seen mining industries’ labour productivity decline in advanced economies around the world, the decline in Australia is notable.”¹¹

Figure 6: Labour productivity: international comparisons (mining and quarrying)



Source: PwC Productivity Scorecard, March 2012

¹¹ PriceWaterhouseCoopers, Productivity Scorecard: Mining edition, May 2012

33. Saul Eslake¹² has published data showing that Australia's mining and quarrying labour productivity decreased 6.1% from 2000 to 2007, while the Euro Area grew 1.9% and Japan managed to avoid any loss in labour productivity. These comparisons are displayed in the above graph first published by PwC.
34. While the United States and the United Kingdom both registered productivity losses, Korea's mining and quarrying sector recorded 6.3% labour productivity growth between 2000 and 2009. Of the nations listed above, Australia has been the poorest labour productivity performer since 2000 in the mining and quarrying sector.

Key chapter takeaways:

- The resource sector is at a crossroads – labour productivity in the industry is now 60% off 2001 peak and at its lowest level since 1987. Capital, labour and multifactor productivity have all been in decline since 2000-01.
- Multiple factors influence productivity in the mining industry including commodity prices, resource depletion, the lumpy nature of mining investment, production lags, work practices, innovation, technology and labour efficiency.
- A boom in capital investment and the has created an inevitable steady decline in capital productivity, placing further importance on improving levels of labour productivity to drive resource sector productivity growth.
- Australia's mining industry has performed poorly compared to our international competitors on productivity. The United States, the Euro Area, the UK, Japan and Korea all outperformed Australia with regard to labour productivity in the mining and quarrying sectors.
- Declining productivity in the mining sector drags down overall productivity levels in resource-rich states such as Queensland and Western Australia. Productivity is a key determinant of resource sector investment and vital to the improvement of long-term living standards.

2 Declining Competitiveness – Resource Investment at Risk

35. At the same time as productivity problems are being faced by resource industry employers, Australia's international competitiveness has declined significantly. Recent reports have attributed the steep decline in Australia's competitiveness to our labour relations system.

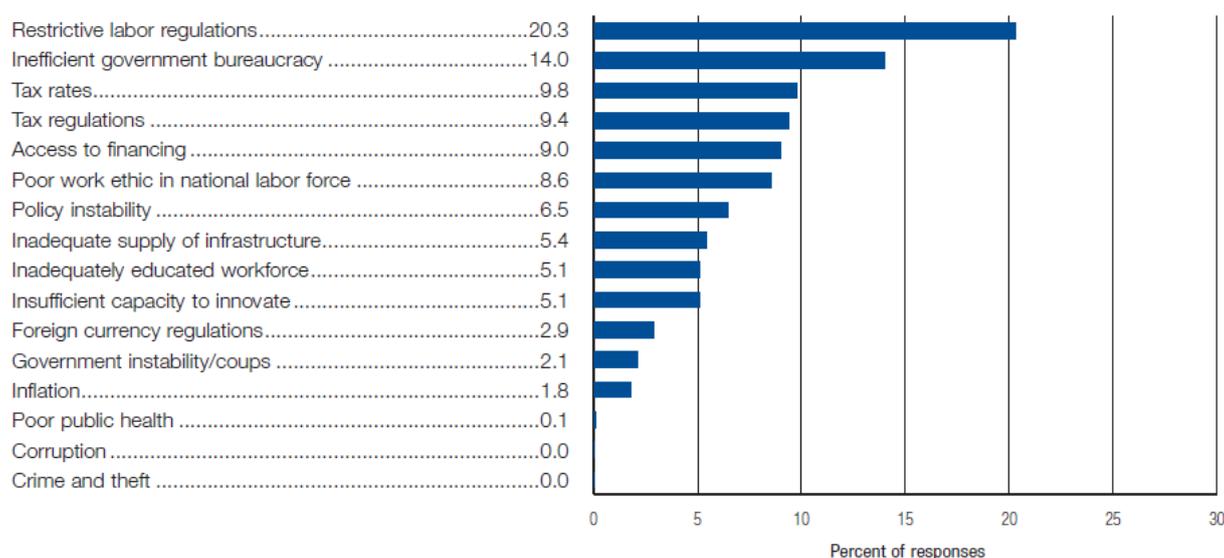
¹² Saul Eslake 2011, "Productivity" presented to the *Annual Policy Conference of the Reserve Bank of Australia*, HC Coombs Conference Centre, Kirribili, Sydney, 15-16 August

36. Combined with intensified global competition and escalating costs, significant amounts of Australian resource investment are at risk.

2.1 Labour relations dragging down our competitiveness

37. In the Global Competitiveness Report¹³ major sectors of the Australian economy are asked by the World Economic Forum (WEF) to select and rank the five most problematic factors facing their business. The report is based on economic data and a survey of 15,000 individuals.
38. As pictured below, in 2012-13 restrictive labour regulation was singled out as the most problematic from a total of 16 competitiveness factors including infrastructure, tax, and government bureaucracy.

Figure 7: The most problematic factors to doing business in Australia



Note: From the list of factors above, respondents were asked to select the five most problematic for doing business in their country and to rank them between 1 (most problematic) and 5. The bars in the figure show the responses weighted according to their rankings.

Source: World Economic Forum Global Competitiveness Report, 2012-13

39. Back in 2010-11, soon after the commencement of the Fair Work Act, only 13.1 percent nominated labour regulation as the most problematic factor to doing business in Australia. That rose to 16.6 per cent in 2011-12 and 20.3 per cent in the most recent 2012-13 report.
40. The fact that twice as many respondents recently cited restrictive labour regulation as a greater impediment to doing business than tax rates is concerning, particularly in light of Australia being one of the world's highest-taxed countries.
41. Despite ranking 4th in the efficiency of corporate boards (a proxy for management acumen), 5th for the stability of our banking system and 7th for the quality of scientific research institutions, Australia ranked a dismal 42nd in overall labour market efficiency in the WEF report as pictured below.

Figure 8: Australia's 'hit-and-miss' rankings in international competitiveness

| 'Top 10' rankings | | 'Situation critical' | |
|--------------------------------|-----------------|-----------------------------------|-------------------|
| Efficiency of corporate boards | 4 th | Flexibility of wage determination | 123 rd |

¹³ WEF Global Competitiveness Report 2012-13, accessed 1 February 2012

| | | | |
|---|-----------------|---|-------------------|
| Stability of banking system | 5 th | Hiring and firing practices | 120 th |
| Intensity of local competition | 6 th | Pay and productivity | 80 th |
| Quality of scientific research institutions | 7 th | Co-operation in labour relations | 67 th |
| Financial market development | 8 th | <u>Overall</u> labour market efficiency | 42 nd |

Source: World Economic Forum's Global Competitiveness Report, 2012-13

42. Canada – a commonly used comparator against Australia – ranked 4th in labour market efficiency while our New Zealand rivals across the Tasman also earned a top 10 place. As the WEF report noted, “the main area of concern for Australia is the rigidity of its labour market”. A full comparison with OECD countries is featured at the back of this paper.

2.2 Intensified global competition

43. An examination of trends in the international resource sector further illustrates why this decline in international competitiveness threatens the billions of dollars of uncommitted investment in our resource industry pipeline.
44. Over the past decade, Australia’s resource industry has been responsible for the greatest creation and transfer of wealth and skills in our country’s history. However, with capital more global and mobile than ever before, \$383 billion worth of uncommitted resource projects and hundreds of thousands of jobs could be at risk unless investors are reassured of Australia’s status as a reliable prime destination for investment. Improving productivity is a crucial part of this.
45. While substantial attention about demand for our natural resources from China is warranted, it must not be overlooked that China is both an energy customer and energy competitor to Australia. A sole focus on China’s demand appetite would be misguided.
46. China remains the world’s largest producer of coal, steel, cement, aluminium, lead, zinc, tin and magnesium. China’s mining industry as a whole has approximately 80,000 state-owned mining companies and 200,000 collectively-owned mines. According to the Australian Trade Commission, the Chinese mining industry has been experiencing strong growth driven by increasing demand from the power, manufacturing and construction industries¹⁴.
47. Australia’s strategic location in Asia is often cited as a key driver of the resource industry’s competitiveness. However, there are other emerging competitors in this region. These are often low-cost economies with a significant headstart against Australia in the hunt for global capital. Mongolia was the world’s fastest growing economy in 2011, driven by foreign investment and rapid developments in its rich coal, copper and gold mining sectors.
48. The Guardian recently reported a prominent hedge fund manager saying:

If you were going to develop a commodity supply source anywhere – even today, when global commodity prices have taken a dip – it would be in Mongolia, this former Soviet satellite right next to China, the most resource-hungry market in the world¹⁵.

¹⁴ Australian Trade Commission, ‘Mining to China’, accessed 1 February
<http://www.austrade.gov.au/Mining-to-China/default.aspx> (Last updated: 31 Jul 2012)

¹⁵ The Guardian online, Foreign firms dig deep for Mongolia's commodity riches, 20 August 2012

49. The recent discovery of vast mineral deposits in the Mongolian hinterlands is helping drive the country's progress and diverting the attention of investors from conventional markets like Australia.

2.3 Increasing cost pressures

50. According to a recently published Australian Financial Review article, up to \$100 billion of mining projects are currently under threat due to rising costs and falling commodity prices, with the analysis predicting that more than a dozen developments will be further delayed¹⁶.
51. Xstrata reportedly told a Hunter Valley business in August 2012 that the cost of building a new thermal coal mine in Australia was 66 per cent more expensive than anywhere else in the world, at \$US176 a tonne versus \$US106 a tonne¹⁷.
52. In 2012 the Business Council of Australia commissioned an analysis of the cost of building large-scale resource projects in Australia, and found productivity and wage inflation levels far worse than those of our global competitors.

Figure 9: Summary of Australian project cost performance

| Project type | Average cost compared to US Gulf Coast |
|-----------------------------------|--|
| Sustaining capital projects | 40 per cent higher |
| Iron ore and coal developments | 38 per cent higher |
| Large complex processing projects | 50 per cent higher |

Source: Internal report prepared for Business Council of Australia by Independent Project Analysis, 2012

53. While Australia will never be able to compete against many of our Asian neighbours on wage costs, it is concerning to see our industry at a distinct cost disadvantage compared to an economy of comparable living standards such as the US. It is little wonder companies like Chevron and Woodside, which are potentially developing the largest LNG projects in the world in Western Australia, cite such cost escalations from an already high base as a major concern.
54. Numerous resource industry leaders have warned that Australia cannot afford to have its cost curve further jeopardised by escalating wage claims, and have flagged that labour productivity improvements as essential when the cost of labour in Australia is double that of many of our competitors.
55. As the Managing Director of Rio Tinto stated at the Australian Resources Conference and Trade Show in November 2012:

*Australian projects are now at a distinct capital cost disadvantage relative to peers. Reform of the Fair Work Act needs to go much further than has so far been flagged by the government.*¹⁸

2.4 The cost of inaction

56. While the mining boom is by no means over, its dynamics have changed and the policy challenges have become greater and more urgent. In the past, higher prices underwrote strong

¹⁶ \$100bn mining projects threatened, Australian Financial Review, 4 September 2012

¹⁷ More big mine projects at risk, published by the Australian Financial Review, 25 August 2012

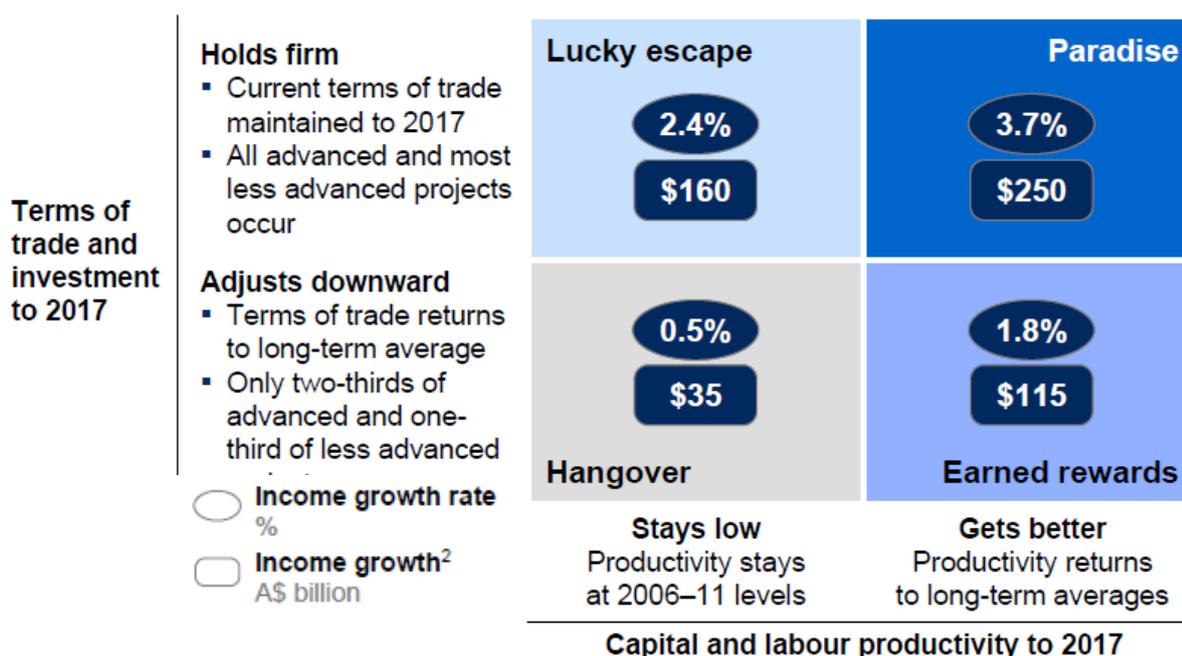
¹⁸ Rio Tinto, Presentation to the Australian Resources Conference and Trade Show, Nov 13, 2012

revenues but we can no longer rely on sustained high commodity prices to sustain growth. While our terms of trade remain at historically high levels, Australia needs to do the hard yards of increasing productivity to ensure our value growth for the long term.

57. In their 'Beyond the boom' report¹⁹, McKinsey and Co depict four scenarios for the resource industry, dependent upon potential outcomes in our productivity and terms of trade (commodity prices):

¹⁹ McKinsey & Co, 'Beyond the boom: Australia's productivity imperative' August 2012

Figure 10: McKinsey's 'Four Scenarios' for the Resource Industry



Source: McKinsey & Co, 'Beyond the Boom: Australia's productivity imperative'

58. Looking ahead to 2017, national income could vary up to \$A135 billion depending on the direction of our terms of trade.
59. While the commodity price cycle is out of our control, Australia can take meaningful steps to increase our productivity and shore up the certainty of advanced and less advanced project investment.
60. Returning our productivity to long-term averages and the levels experienced in the 1990s is required to 'earn ongoing rewards' in the resource sector and guarantee at least \$90 billion of income growth over the next five years.

Key chapter takeaways:

- Independent studies cite labour relations as highly problematic for conducting business in Australia and partly responsible for a decline in our competitiveness.
- The efficiency and competitiveness of our labour market has fallen from 9th in the world in 2009-10 to 42nd in the world in 2012-13.
- The search for capital has intensified with emerging resource-rich countries now genuine competitors with a distinct cost advantage over Australia.
- Projects in Australia operate at a cost disadvantage to developed economies and are 38 to 50 per cent more expensive than on the US Gulf Coast.
- Recent project scale-backs indicate that cost escalations are impacting jobs and investment. We can no longer rely on high commodity prices to underwrite our revenues, jobs and national income.
- The resource sector is at a crossroads and responsible workplace reform can assist in addressing cost blowouts and increasing productivity.

3 Productivity Initiatives – Non WR Legislation

61. This section focuses on ideas and initiatives to increase productivity in the resource industry separate to any consideration of amending the Fair Work legislation, or pursuing workplace relations reform. AMMA members report that driving productivity gains within their respective organisations is very much on their agenda as a corporate priority.
62. The Telstra Productivity Indicator 2012²⁰, a survey of organizational attitudes towards productivity, found that over the next 12 months, productivity improvement is rated as the highest priority by organisations in the agriculture, mining, resources and utilities sectors (93%).
63. Six non-legislative productivity initiatives are now advanced for consideration.

| | Productivity driver | Initiative |
|----------|----------------------------|--|
| 1 | Investment | Develop a productivity index to provide baseline data to support the business case for employer investment in employee engagement, process improvements and ICT. |
| 2 | Work practices | Research paper on innovative work practices that investigates how rostering schedules can increase productivity at FIFO worksites. |
| 3 | Leadership | Rolling out of recent landmark findings to resource employers on the management and leadership drivers of High Performing Workplaces. |
| 4 | Technology | Creation of an inter-industry technology forum that brings together experts and practitioners in logistics, operations and technology from both resource and manufacturing industries to share and cross-fertilize ideas. |
| 5 | Bargaining | Placing productivity back on the bargaining agenda through a global study drawing together the '20 most innovative practices' around the globe to reignite the creativity and commitment of employers and employees to address productivity gains in bargaining efforts. |
| 6 | Human Capital | The integration of 'enhancing productivity and efficiency' modules into various levels of vocational education and training, in order to instill a productive culture, mindset and relevant skills at a workplace level. The first step would be a scoping study and consideration by national skills authorities. |

3.1 Development of a productivity investment index

64. Employers recognise the role of investment in driving productivity. Respondents to the Telstra Productivity Indicator survey, including resource employers, rated investment in information and communications technology (ICT), process improvements, employee engagement and customer communications as all equally important in driving productivity improvements.
65. However, research suggests that one of the most significant challenges to investment in productivity is to secure buy-in from management. Uncertain or inefficient data to support a

²⁰ See: <http://www.telstra.com.au/business-enterprise/resources-insights/telstra-productivity-indicator/>

genuine ‘business case’ in favour of productivity investment appears to be a substantial barrier to its implementation.

66. AMMA therefore proposes the establishment of a ‘productivity investment index. The index would establish baseline data for productivity investment in the resource industry, developed from of a survey of resource industry enterprises. The index would collate industry best practices in the key areas of employee engagement, process improvement and technological adaption. Case studies would be utilised to illustrate the qualitative and quantitative benefits of productivity-driven investment.
67. The index would serve the dual purposes of showcasing productivity initiatives by resource employers as well as providing a road map for future investment. AMMA understand that many of its members are developing their own internal productivity measurement processes, and an industry wide measure would neatly complement current industry decision making frameworks.

3.2 Innovative work practices: FIFO rostering research

68. Given the capital intensive nature of the resource industry, work arrangements can have a crucial influence on capacity utilisation²¹. For example, the introduction of 12-hour shifts was a key factor in labour and capital utilisation in the resource industry, and by the end of the 1990s it was estimated that around one half of all production and maintenance employees were working 12-hour shifts.
69. Fly-in fly-out (FIFO) work arrangements are an essential mechanism for accessing key skills in remote areas. A question that arises out of this labour supply mechanism is how it affects productivity. A study by the Centre for Social Responsibility in Mining identified labour turnover as a significant threat to the productivity of FIFO operations²².
70. A critical factor in managing turnover at FIFO sites is the particular roster schedule used. Early research indicates that providing a longer time-off ratio appears to reduce turnover. However, shortened rosters such as ‘4 days on, 4 days off’ have been associated with employees taking less task ownership. There is a need for further research in this area, as flagged by both academics and practitioners.
71. AMMA therefore proposes a research project aimed at identifying innovative work practices to increase productivity at FIFO work sites. A mixed-method study would draw upon direct interviews with mine site managers, FIFO employees and be supplemented by production data from selected sites. This grass-roots approach to productivity is likely to discover innovative and practical ways to increase productivity ‘at the coal face’.

3.3 Leadership and productivity

72. On 14 October 2012, the Minister for Employment and Workplace Relations announced the Australian Government, in collaboration with industry, would provide \$12 million over four years to establish a new Centre for Workplace Leadership²³. Focusing on leadership ‘as it happens at the enterprise level every day’, the Centre’s activities would lead the public debate on the importance of leadership and drive a broader movement to ‘do things differently at work’.
73. The Minister’s media release stated ‘that ensuring that Australian jobs and workplaces of the future continue to lift productivity is a key priority for the Gillard Government.’ It further stated

²¹ Productivity Commission (2008), Productivity in the Mining Industry

²² Workforce Turnover in FIFO Mining Operations in Australia: An Exploratory Study. Summary Report. University of Queensland, 2003

²³ ‘Centre for Workplace Leadership’, 14 October 2012, Media Release, The Hon Bill Shorten MP

that, for too long, the workplace relations debate in Australia has focused on conflict between unions and employers and the transactions involved in setting pay and conditions. As a result, relationships at work have been given insufficient attention.

74. Meanwhile, landmark research is being undertaken in a DEEWR-funded cross-disciplinary study into High Performing Workplaces (HPWs) in the services sector. That study has found that, compared with Low Performing Workplaces, HPWs:
 - a. Are more productive – having a 12% higher total factor productivity when ranked in terms of their intangible asset performance.
 - b. Perform significantly better financially – with profit margins nearly three times higher.
 - c. Have significantly higher levels of innovation performance, for example – HPWs dedicate more resources to fund new strategic initiatives (46.9% higher).
75. The report found that improving productivity is largely a function of commitment to develop leadership and management capabilities.²⁴ The HPW study is now working with a small number of study participants to design and trial tailored intervention strategies to lift workplace performance and improve management of intangible assets, productivity and profitability.
76. This could be replicated for the resource industry. Resource industry employers could be informed of the significant benefits from increased productivity by way of enhanced leadership and management capabilities, as reported in the DEEWR study. Working in partnership with members, AMMA could develop strategies, tailored to each organisation, to enhance workplace performance, improve the management of intangible assets and increase productivity and profitability.

3.4 Fostering technological innovation

77. New ore reserves are becoming more technically challenging than at any time in history, and are located in more remote regions²⁵. Business imperatives to improve performance and contain costs, combined with a chronic shortage of skilled labour, compound the difficulty of operating profitably in these inhospitable locations. Mining companies thus need to find new ways to achieve increases in productivity to meet demand.
78. Recent advances through driverless trucks, remote operations and control systems, enable resource employers to produce many times the ore with fewer workers and better safety than ever before. However, the challenge is that the last step-change of technology has now been exhausted: infrastructure is being pushed to its limits.
79. Other industries, such as manufacturing, have been able to make quantum leaps in productivity and responsiveness through new technology paradigms such as assembly lines, automation and just-in-time methodologies²⁶. As mining enterprises aspire to achieve similar gains, elements of these concepts are now being investigated for their application in mining through emerging technology that includes ‘intelligent production’ and ‘demand-driven planning’.
80. AMMA proposes the formation of an ‘inter-industry technology forum’ that brings together experts and practitioners in logistics, operations and technology from both the manufacturing and mining sectors, to capitalize on this trend. We live in an era of ‘open-source innovation’ where the best ideas are those that are spread and shared. A technology forum would enable

²⁴ Leadership, Culture and Management Practices of High Performing Workplaces in Australia: The High Performing Workplaces Index.

See: <http://www.deewr.gov.au/Skills/Programs/WorkDevelop/Documents/SKEHPW.pdf>

²⁵ ‘Four Must Have Productivity Increasing Technologies’, Mining Australia, 29 October 2012

²⁶ Ibid

industry and thought leaders to discuss how innovation can cross-fertilize between industries to drive ongoing productivity growth. This would create industry flow-on effects between sectors, boosting productivity and competitiveness by fostering an innovation mindset.

3.5 Putting productivity back on the bargaining table

81. Productivity improvement is simply off the bargaining agenda in too many, if not nearly all negotiations. We have ended up in a situation in which bargaining fatigue has given way to no practical scope to bargain for increased productivity. Employers and trade unions have lost capacity and creativity in this area and they need both reinvigoration and reequipping to pursue productivity increases.
82. There are three ways in which AMMA proposes to get bargaining back on the bargaining agenda.
83. Firstly, AMMA proposes that a study be undertaken into the barriers to productivity bargaining at the workplace level. In 2008, the Productivity Commission released a report on productivity in the mining industry²⁷. As we approach the five-year anniversary of that report in 2013, the time is right to ask the Productivity Commission to produce, in liaison with a committee comprised of employer groups and unions, a report identifying barriers to productivity bargaining and recommending solutions.
84. Secondly, funding needs to be used to support employer organisations and unions in delivering innovative enterprise bargaining. In the 2010-11 budget the Federal Government announced \$20 million over two years for a Productivity Education and Training Fund to assist trade unions and employer organisations to achieve better productivity outcomes through enterprise bargaining under the Fair Work Act²⁸. This funding should be continued, expanded and targeted towards 'productivity-at-risk' industries such as the resource sector. This funding should be linked with productivity outcomes and employer associations should play a primary role in progressing initiatives.
85. Thirdly, AMMA proposes that a rapid research project be undertaken by DEEWR on the 20 most innovative business practices and initiatives from around the globe as a catalyst to place productivity back on the bargaining agenda. For example, 'new works agreement' are now commonplace in the German automobile industry and rely on cooperation between management and the union to secure investment projects. In one instance, Ford management signed to promised new investments at the five German Ford plants at Cologne, Düren, Berlin, Wülfrath and Saarlouis. In return the union agreed to a tapering of 'payments above contract wages' and a flexibilisation of working time²⁹. Ford announced that the new works agreement will bring savings amounting to \$US120 million per year and will secure jobs at Ford Germany for the next 10 to 15 years.

3.6 Skills development and productivity

86. Skills shortages are a well-documented threat to productivity in the resource industry. PricewaterhouseCoopers has reported that, with an underemployment rate of only 1 per cent, compared to the national average of 11.1 per cent, the resource industry is operating at close to full labour capacity³⁰. This can undermine productivity through increased labour turnover and difficulties experienced by employers in attracting and retaining skilled labour. This is exacerbated by the remote nature of many resource industry projects.

²⁷ Productivity Commission, Productivity in the Australian Mining Industry: Measurement and Interpretation

²⁸ Commonwealth Government, 2011-2012 Budget: Building Australia's future Workforce

²⁹ Eurofund- European Foundation for the Improvement of Living and Working Standards: New practices in industrial relations, 2002

³⁰ PriceWaterhouseCoopers (2012), Productivity Scorecard: Mining edition, May 2012

87. In response, AMMA has developed industry initiatives aimed at domestic skills and training, as well as attraction and retention:
- a. Mingoilandgasjobs.com is an electronic platform that matches the correct skill set with employer requirements.
 - b. AMMA Skills Connect brings together specific training and development, apprenticeship and cadetship programs, verification of competency to international skills assessments at one point of service delivery to employers.
 - c. AWRA is a jointly funded initiative led and managed by AMMA with the goal of increasing women's participation in the mining sector.
88. To further drive productivity through skills development, AMMA proposes that the teaching of productive work practices be integrated into vocational training programs. This will encourage future generations of trained employees to develop and implement and productivity improvement, and has already been flagged as a valuable initiative by employers. The Telstra Productivity Indicator reported that over the past year there has been a significant increase in the perceived impact of investment in staff training on driving productivity improvement, from 35% in 2011 to 46% in 2012 by employers³¹.
89. A curriculum on “managing for efficiency and productivity” for managers in particular, as well as across various levels of trades, sciences and engineering roles on site should be developed. The Minister's 14 October 2012 media release on Centre for Workplace Leadership stated that ‘productivity happens at work’. To facilitate this, vocational training needs to incorporate the productivity agenda and illustrate to future employees the methods and benefits of improved productivity.

Key chapter takeaways:

- While reform to the Fair Work Act is essential, a range of non-legislatives are also required to restore mining productivity.
- Securing productivity improvements was rated as the highest priority by organisations in the agriculture, mining, resources and utilities sectors over the next 12 months, as indicated by 93% respondents to a recent survey.
- This paper has advanced six particular initiatives which the resource industry believes can drive productive improvement through innovative investment, work practices, leadership, technology, productive bargaining and skills development.

³¹ <http://www.telstra.com.au/business-enterprise/resources-insights/telstra-productivity-indicator/>

4 Labour Productivity – The Case for WR Reform

90. Resource industry employers continue to report deteriorating labour productivity under the Fair Work laws.
91. AMMA’s ongoing Workplace Relations Research Project, conducted in conjunction with RMIT University, is a survey-based analysis that has revealed a story of reduced flexibility, increased union power, productivity being forced ‘off the table’ in bargaining, project delays and a climate of industrial uncertainty, all combining to threaten projects of national significance.
92. The respondents to these surveys, which have been conducted twice a year since 2010, are resource companies operating in every part of the industry across Australia. Respondents are asked every six months to rate their perception of current levels of labour productivity at their worksites. This is then converted into an index score out of 100. The higher the index, the more positive the perception of labour productivity. Results are provided below.

Figure 11: What is your perception of the current level of labour productivity at your worksite(s)?

| Survey date | Extremely low (%) | Quite low (%) | Low (%) | Acceptable (%) | High (%) | Quite high (%) | Extremely high (%) | Index score out of 100 |
|-------------|-------------------|---------------|---------|----------------|----------|----------------|--------------------|------------------------|
| April 2010 | 0.0 | 4.6 | 7.7 | 16.9 | 30.8 | 33.8 | 6.2 | 66.7 |
| Oct 2010 | 0.0 | 0.0 | 8.8 | 38.2 | 30.9 | 20.6 | 1.5 | 61.3 |
| April 2011 | 0.0 | 2.9 | 20.0 | 28.6 | 32.9 | 14.3 | 1.4 | 56.7 |
| Oct 2011 | 1.2 | 3.5 | 11.6 | 31.4 | 31.4 | 15.1 | 5.8 | 59.5 |
| April 2012 | 1.0 | 5.0 | 14.0 | 27.0 | 27.0 | 22.0 | 3.0 | 58.8 |

Source: AMMA Workplace Relations Research Project – Fifth Report: for the period from 1 November 2011 to 30 April 2012, prepared by Dr Steven Kates, RMIT University

93. As the table above shows, the benchmark level is that reported in the first survey conducted in April 2010, shortly after the Fair Work Act commenced. Employers’ perceptions of labour productivity then dropped in the second and third surveys in October 2010 and April 2011 respectively, with the index falling a full ten points from 66.7 in April 2010 to 56.7 one year later.
94. A telling statistic is that between April 2010 and April 2012, the number of resource industry employers who perceived their workplace productivity as ‘high’ or better dropped from 70.8% to just 52%.
95. The level of satisfaction with workplace productivity in April 2010 could arguably be attributed to actions taken by resource workplaces to lock in pre-Fair Work agreements before July 2009. But going forward, as hundreds of these agreements expire and more employers are exposed to bargaining under the Fair Work Act, we expect to see reported labour productivity levels drop further.

4.1 Bargaining for productivity ‘off the table’

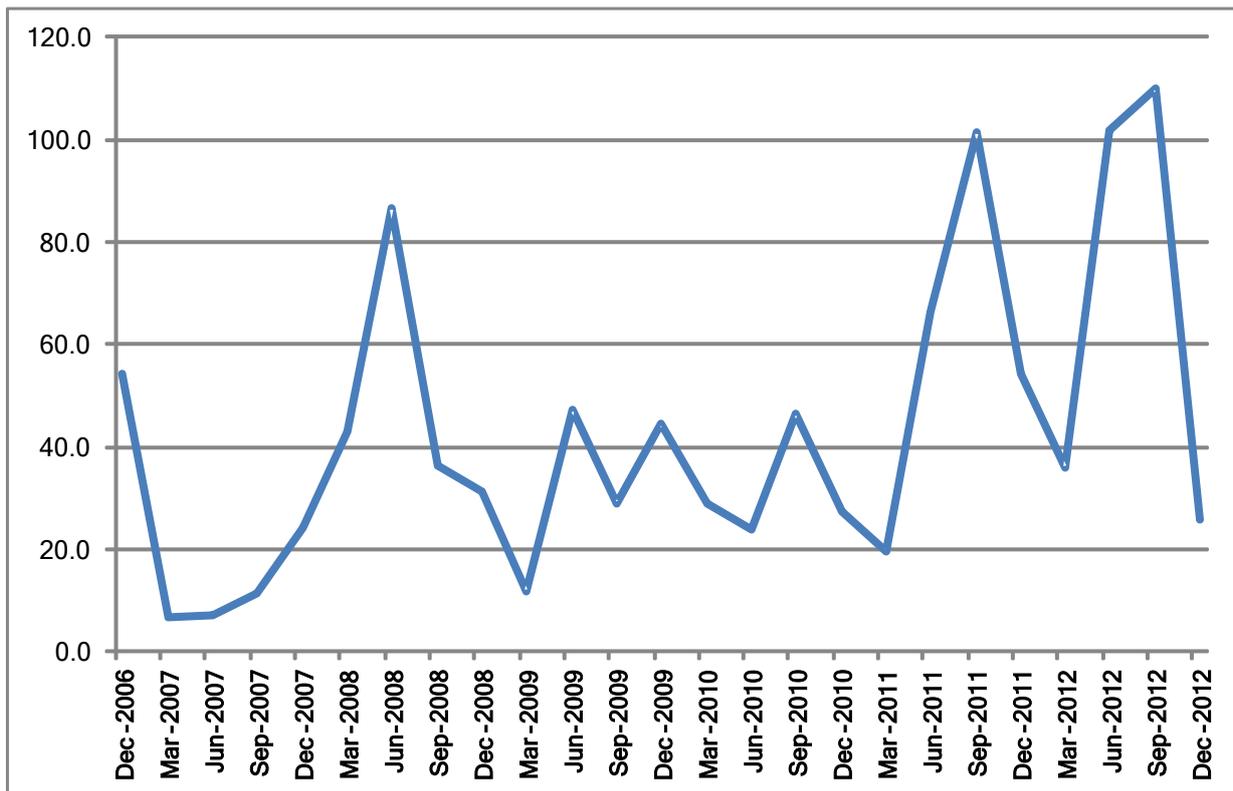
96. The above survey has also found that four in five companies that have tried to negotiate productivity improvements in exchange for wage increases under the Fair Work Act have been unable to do so³².
97. AMMA’s members are reporting that productivity has been forced off the bargaining table by unions who have been empowered under the Fair Work Act, resulting in a return to workplace restrictions that have not been seen for decades. AMMA members have reported roster schedules being union driven rather than employee driven, which is not in the interests of fatigue management or productivity.

4.2 A combative labour environment

98. The Fair Work Act has also led to resource industry employers reporting a rising incidence of conflict in the workplace. In the AMMA surveys, the numbers of resource employers who rated their industrial environment as unacceptable due to conflict have increased five-fold between April 2010 and April 2012.
99. The current industrial relations system broadens the capacity for unions to take protected industrial action. For example, union claims now commonly include clauses restricting the use of contractors and labour hire workers, which were prohibited content under the previous IR system.
100. It is therefore no surprise that at the same time, Australia's global ranking for ‘labour co-operation’ fell from 43rd in 2009-10 to 67th in 2012-13, as reported by the WEF their Global Competitiveness Reports.
101. ABS data on recent levels of industrial action indicate a more combative labour environment. Since the commencement of the Fair Work Act, working days lost have exceeded 100,000 in the Sept quarter 2011, the June qtr 2012 and Sept qtr 2012. Prior to the Act’s commencement, the last time more than 100,000 days of work were lost for any given quarter was back in 2004.
102. The graph below shows the trajectory in working days lost to industrial action over the past five years and clearly shows an increasing trend under the Fair Work Act.

Figure 12: Working days lost to industrial action

³² The AMMA Workplace Relations Research Project – Fifth Report



Data source: 6321.0.55.001 - Industrial Disputes, Australia, Dec 2012

103. While some of these recent spikes can be attributed to large public sector bargaining rounds, industrial action in the construction and coalmining sectors has also contributed to the increase in days lost, with coal mining recording the highest number of working days lost per 1000 employees for the September quarter 2012.
104. The financial cost of industrial action is a function of the resource project, its size, the stage of development it is at, and the duration of any stoppage or work bans. But not only does industrial action directly affect the hip pocket of employers, industrial uncertainty and the threatened industrial action causes investors and other stakeholders to question the viability of future resource projects in Australia.
105. The Grocon dispute in September 2012 was indicative of an increasing culture of militant unionism. Unionists started picketing in the Melbourne CBD in August 2012 in an effort to halt work on Grocon's Emporium site. The picket continued in spite of a Supreme Court injunction to end the blockade. Fair Work Australia also recommended a cooling off period, recommending the union stop its blockade of the site.
106. Grocon has said the dispute cost the company about \$500,000 a day³³. Consequently, its only option was to sue the union for damages given the costs of the industrial action and blockades were not factored into its service contracts. Work disruptions arising from strikes also erode productivity levels.

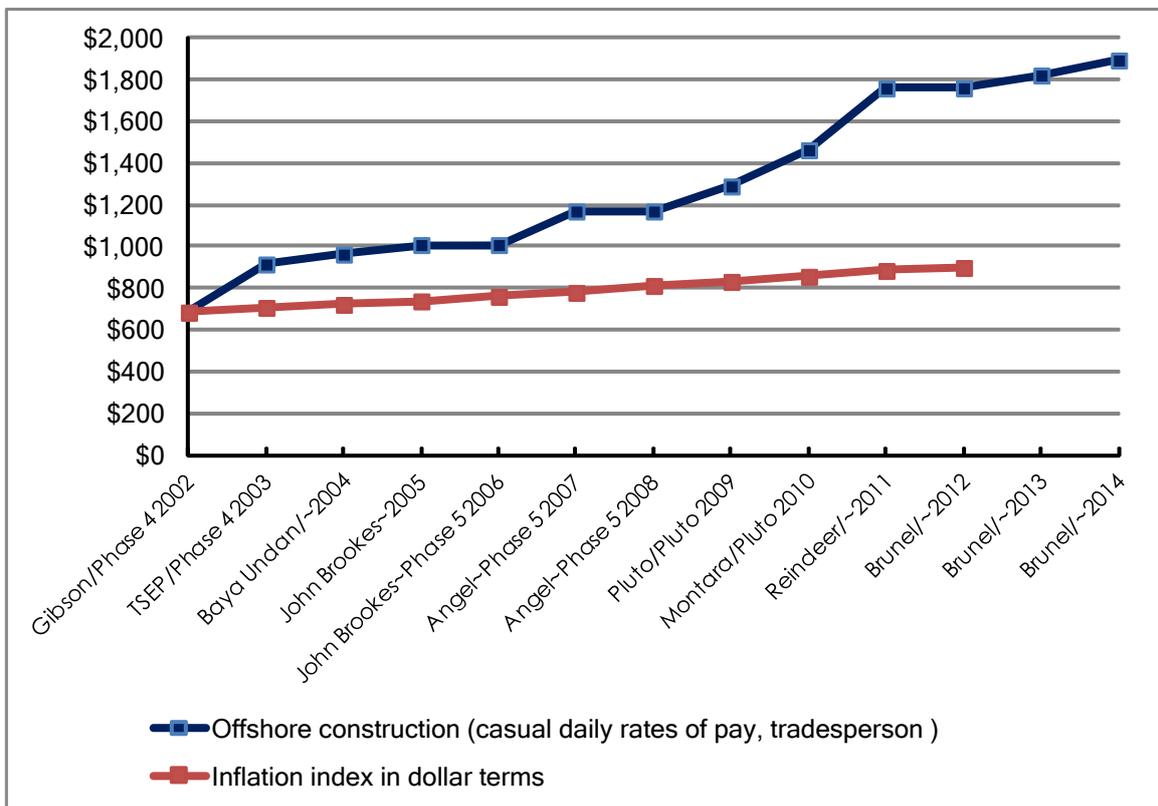
4.3 Unsustainable wage claims

107. The reduced number of agreement options available to employers under the current system as well as reduced measures discouraging militancy has also allowed unions to pursue and obtain unsustainable wage increases in bargaining rounds, and to do so with no productivity dividend.

³³ 'Grocon to sue CFMEU as police smuggle workers through CBD blockade', news.com.au, 2012

108. In the 2010/11 vessel operators' dispute in the offshore oil and gas industry, maritime unions were able to secure, on the back of ongoing strike action, 37 per cent pay rises plus a \$200 a day construction allowance in return for no productivity improvements. MUA national secretary Paddy Crumlin actually criticized employers seeking productivity offsets in the last enterprise bargaining negotiations as being 'dinosaurs'³⁴.
109. Another employer was forced to accept the following indicative pay rates for three week on, three week off rostered employees in the offshore construction sector:³⁵
- \$317,734 per annum for a laundry hand.
 - \$334,408 per annum for a cook.
 - \$337,484 per annum for a tradesperson.
 - \$373,701 per annum for a barge welder.
110. Across the board, casual daily pay rates for offshore construction trades have seen phenomenal growth in the past 10 years, as shown in the graph produced using data obtained from AMMA members below.

Figure 13: Casual daily rates of pay in offshore construction (tradesperson)



111. As the graph shows, in 2002, the casual daily rate of pay for an offshore construction tradesperson was \$685. By 2011, this had nearly tripled to \$1,760 a day excluding superannuation and accommodation expenses.
112. These types of wage rates are clearly not sustainable or justifiable on productivity grounds. Even the former President of the ACTU Martin Ferguson has stated that:

³⁴ 'Union leader claims 'dinosaur' employers out of touch', 3 February 2010, The Australian online

³⁵ Based on typical Enterprise Agreement established in offshore oil and gas vessel operators negotiations, 2010

113. Even the former President of the ACTU Martin Ferguson has made the observation that:

"...in some projects we are getting improvements in wages and conditions that I think are unsustainable over time. I think there's a message to all of us, including some elements of the union movement, if they're not very careful some members will do exceptionally well, but future members in 10 and 20 years time will miss out."

114. It is worth noting that it is not just in offshore construction that wage rises in the resource industry, even phenomenal ones like those above, are achieved with no productivity improvements for the employer. These types of non-productive outcomes are commonplace and encouraged by our current system due in part to the ease with which unions can take protected industrial action.
115. Productivity improvement is simply off the bargaining agenda in too many, if not nearly all negotiations. We have ended up in a situation in which bargaining fatigue has given way to no practical scope to bargain for increased productivity. Employers and trade unions have lost capacity and creativity in this area.

4.4 Project delays

116. The Fair Work Act reduces the number of agreement making options available to resource employers for new projects. This has enhanced the capacity for unions to delay major projects, with AMMA surveys revealing that one in five major projects is at serious risk of not being delivered on time and on budget due to ongoing union stalling tactics.
117. Further, AMMA members have reported that the time and costs associated with negotiating agreements have significantly increased under the current framework. Again, these difficulties have created bargaining fatigue and made addressing productivity all but impossible.

4.5 Undermined flexibility

118. More than 60% of resource industry employers report Individual Flexibility Arrangements (IFAs) are of little or no value and that there is no real option for individual flexibility under the Fair Work Act³⁶. This is in contrast to the up to 80% of resource industry workplaces in hard rock mining being covered by Australian Workplace Agreements at their peak or employee collective agreements in order to give all parties more flexibility and provide protection against industrial action.

4.6 Six essential WR reforms

119. Australia's Fair Work legislation was intended to increase the productivity, flexibility and fairness of workplaces. In reality, it appears to be one of the single largest barriers to labour market productivity, to rebooting the mining boom, and to increasing Australia's competitiveness.
120. The answer to Australia's productivity challenge is to address the range of productivity determinants, with a realistic acceptance that labour market reform must be at the heart of our efforts. Unless there is an acceptance of the need for workplace relations reform in conjunction with other productivity initiatives, resource industry productivity will continue to decline.
121. The following six priority areas have been identified by major resource employers as required to restore industry competitiveness and productivity.

³⁶ Based on research findings from the AMMA Workplace Relations Research Survey

4.6.1 Protected industrial action

122. **Ensuring protected industrial action during bargaining can only be taken as a last resort and that there is greater access to ‘cooling off’ periods.** Industrial action can cost employers up to \$3.5 million per day through lost working time, jeopardised contracts and commercial agreements, project delays and undermined productivity.
123. Bargaining should be the central focus of any industrial relations system. The parties’ interests being furthered should be those of the employer and their employees, not third parties. It is not conducive to employer-employee relations to have a union as the default bargaining representative: instead, employees should elect in writing if they wish to choose a non-employee representative. Industrial action should be a last resort and the bar should be raised so that bargaining needs to have been exhausted before protected action can be taken.
124. When industrial action is taken, there should be greater access to suspension orders and ‘cooling off’ periods to bring the parties back to the negotiating table without the federal industrial tribunal arbitrating outcomes. These changes are needed given that unions regularly fail to show any restraint in their wage and condition demands and commonly resort to threats of industrial action at the earliest stages of bargaining.

4.6.2 Greenfield (new project) agreement making

125. **Ensuring the capacity to make Greenfield (new project) agreements without exorbitant wage and condition outcomes or unnecessary project delays.** Securing Greenfield agreements in a timely manner with sensible wages and conditions is essential in delivering projects productively on time and on budget because work cannot commence until employment terms are secured. As previously stated, even the former head of the ACTU has warned that future resource sector productivity will disappear if unsustainable wage claims are sought at the expense of long-term wealth creation.
126. The only way an employer can make a Greenfield agreement under the Fair Work Act is with a trade union. The resource industry has a strong desire to make Greenfield agreements with the unions that represent workers but, if employers are not able to strike a reasonable agreement with a union, there must be an alternative.
127. Industry needs a workable set of rules that do not provide unions with unfettered power over the content of new project agreements and which provide employers with some ability to temper extortionate union demands.

4.6.3 Allowable matters

128. **Ensuring allowable matters in enterprise agreements pertain to the direct relationship between employers and employees and not to third parties.** Clauses in enterprise agreements such as those restricting the use of contractors and labour hire workers undermine managerial decision-making and the running of productive workplaces.
129. While such clauses purport to be about increasing job security, they are really about unions controlling who gets to work on projects and under what terms and conditions. This level of unwarranted control by unions over project costs must not be allowed to continue.
130. Industry requires an agreement making system that does not encourage the taking of protected industrial action in support of matters that have nothing to do with the efficient and productive operation of the enterprise, but which serve only to interfere with legitimate managerial prerogative and shore up union power. Agreement matters must pertain to the employment relationship.

4.6.4 Union right of entry

131. **Ensuring the location and frequency of union right of entry visits is reasonable and for the most part left to employers to determine based on operational needs.** The high frequency of union visits to some sites clearly threatens to undermine productive workplaces as time and attention are absorbed in accommodating union officials and diverted away from management and operational concerns.
132. Given the size, location and type of machinery on various resource projects as well as employers' enormous safety obligations, employers must retain the capacity to reasonably direct permit holders in relation to locations and times of workplace visits. A sense of proportion and reasonableness needs to be inserted back into the Fair Work Act's right of entry rules.

4.6.5 Genuine individual agreement making

133. **Ensuring agreement-making options are broadened through the re-introduction of a workable form of individual agreement.** The failure of the Fair Work Act to provide a statutory individual agreement option or to support other individual agreement making options such as fixed-term IFAs or opt-out clauses must be reformed. Productivity is being undermined as employers have less scope to directly engage their employees in pursuit of 'high-performance, high-reward' arrangements.
134. With the removal of the ability to make new AWAs in March 2008, the recent prohibition of opt-out clauses in enterprise agreements, the prohibition on making an enterprise agreement with one employee, plus existing requirements that a group of workers be 'fairly chosen', means the only form of individual agreements other than common law contracts under the current system are Individual Flexibility Arrangements (IFAs).

4.6.6 Adverse action

135. **Ensuring there is rigor introduced to the threshold for accessing the adverse action / general protections jurisdiction in order to moderate employers' potentially unlimited liability for damages and minimise the incidence of unmeritorious claims.** The prospect of unlimited liability creates great uncertainty for employers and negatively impacts their decision making. The reverse onus of proof in the provisions means that employers must go through a rigorous process of defending claims even if they are unmeritorious. This detracts from the running of productive workplaces by diverting attention away from management and operational concerns.
136. The adverse action provisions should be removed. If the provisions continue to exist there should be an upper limit on compensation such as a limit of six months' pay under the unfair dismissal jurisdiction. This would discourage employees from 'forum shopping' to get the best financial outcome or have the best chance of 'go away' money.

Key chapter takeaways:

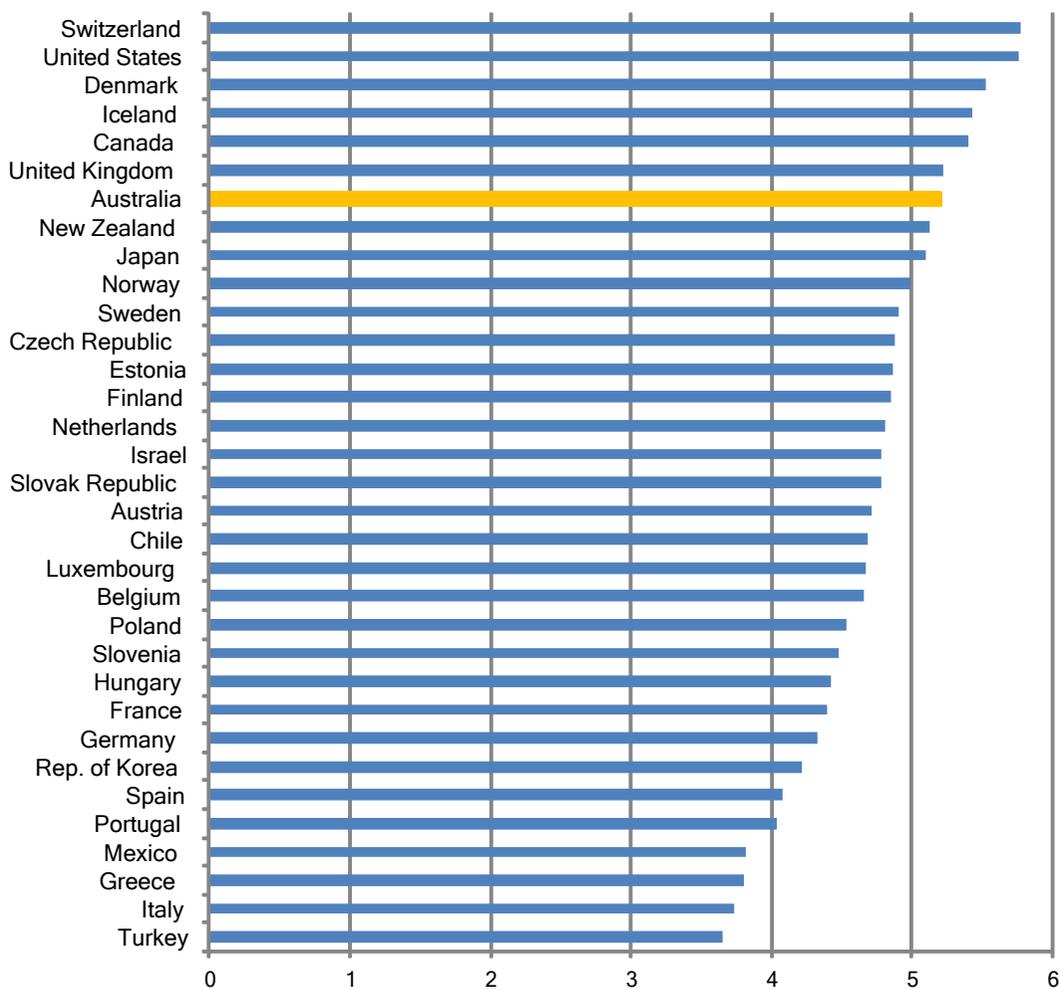
- The Fair Work Act has failed to deliver productive workplace outcomes, with resource employers continuing to report deteriorating labour productivity at their worksites under the laws. 4 out of 5 resource employers have been unable to negotiate productivity improvements for wage increases under the Act.
- A culture of union militancy has emerged as the current regime widens the capacity for unions to take protected industrial action in search of unsustainable wage claims. Even a former

President of the ACTU has acknowledged that unsustainable claims have the capacity to threaten future projects coming online.

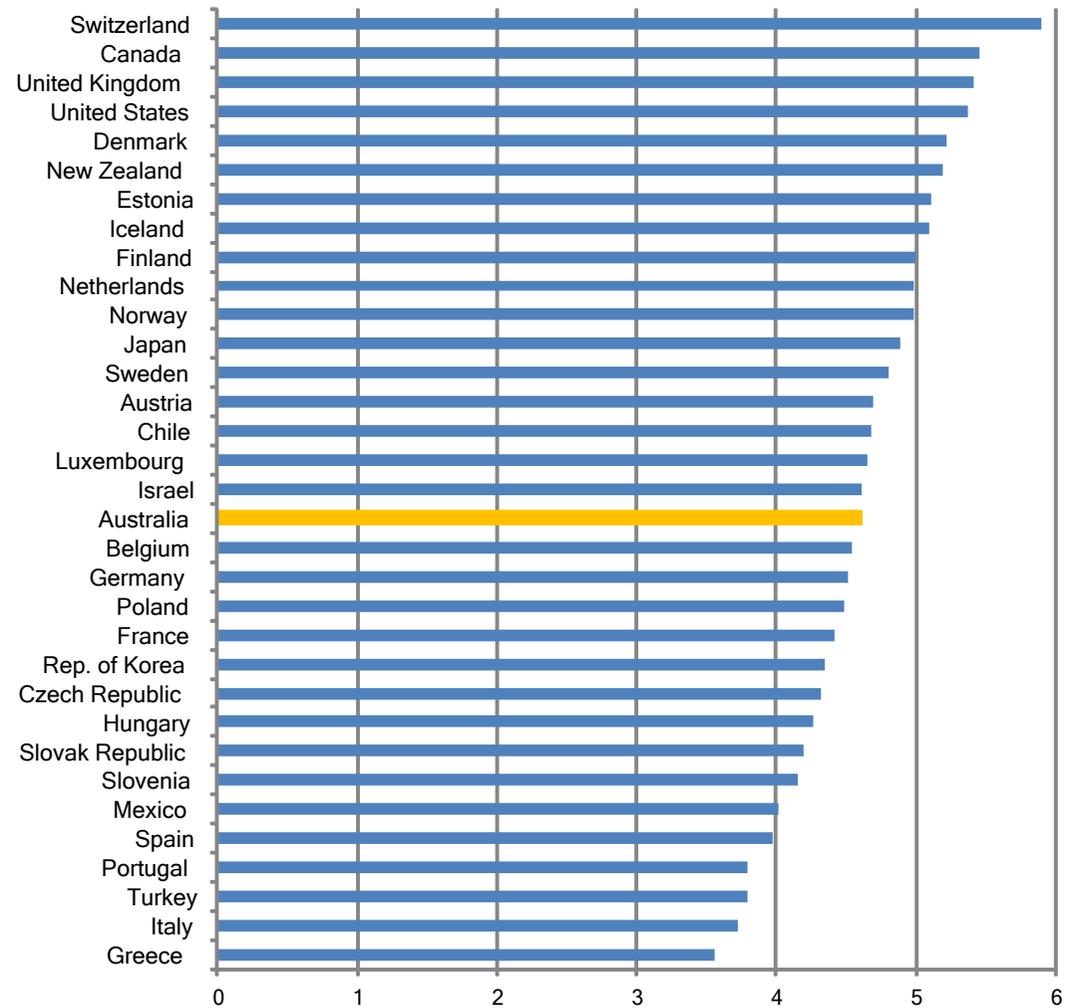
- Restricted agreement options available to employers for new projects have enhanced the power for unions to delay major projects – one in five projects are now at risk due to union stalling tactics. Under the Fair Work Act, the only way for an employer to negotiate a new project agreement is with a union.
- Much needed flexibility has been disregarded under the Fair Work Act, with more than 60 per cent of resource employers reporting that Individual Flexibility Agreements are of little or no value and that there is no real option for flexibility.
- An internationally competitive, productive and sustainable resource industry requires a workplace relations system that:
 - Ensures **protected industrial action** during bargaining can only be taken as a last resort and that there is greater access to ‘cooling off’ periods.
 - Ensures the capacity to make **Greenfield (new project) agreements** without exorbitant wage and condition outcomes or unnecessary project delays.
 - Ensures **allowable matters** in enterprise agreements pertain to the direct relationship between employers and employees and not to third parties
 - Ensures the location and frequency of **union right of entry** visits is reasonable and for the most part left to employers to determine based on operational needs
 - Ensures **agreement-making options** are broadened through the re-introduction of a workable form of individual agreement
 - Ensuring there is rigor introduced to the threshold for accessing the **adverse action/general protections** jurisdiction to minimise the incidence of unmeritorious claims

The decline of Australia's labour market efficiency under the Fair Work Act: comparison with OECD countries between 2009-10 and 2012-13

2009-10: Global Ranking (9), OECD Ranking (7)



2012-13: Global Ranking (42), OECD Ranking (18)



Rankings from The World Economic Forum's Global Competitiveness Reports 2009-10 and 2012-13.
The WEF is an independent organisation and the report is based on economic data and a survey of 15,000 individuals