Business Council of Australia

Business Council of Australia
Submission to the Review of the Fair Work Act

Contents

About this publication

This is the Business Council of Australia Submission to the Review of the Fair Work Act 2009. Part A of the submission sets out the context for the review – the economic challenges and opportunities Australia faces, and trends in the labour market. Part B reports on how the Fair Work Act is affecting the operations of Business Council of Australia member companies and their capacity to remain competitive.

Recommended amendments are based on member experiences and seek to strengthen the role of the Act in supporting an Australian economy in transition, our workplaces and our workforce. The appendixes provide a snapshot analysis of the comparative performance of Australia's labour market; a guide to where the submission responds to specific questions from the review panel; key findings from a recent survey by the Australian Human Resources Institute; and a factsheet about the construction sector.

About the Business Council of Australia

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies. For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole. Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

OVERVIEW

The Business Council of Australia welcomes the government's review of the Fair Work Act (FW Act) as an important process to consider whether the system is operating effectively to meet the needs of Australian employers, their workers and the nation as a whole.

The main challenge for this review is coming to terms with the changing nature of the Australian economy, our workforce and our workplaces, and the performance of the Fair Work Act in providing for this change. It needs to do more than examine the provisions of the Act by recognising the impact of the legislation on workplace culture and behaviour.

This submission reports the experiences of our member companies but is founded on four Business Council of Australia principles for the effective operation of the Australian workplace relations system:

- it must be fit for purpose and support the changing requirements of the economy
- it should support collaborative relations at the enterprise level that engender safe, harmonious and productive workplaces characterised by direct engagement between employer and employee
- it should provide support for vulnerable people and give employees flexibility about who represents them
- it must meet the needs of all individuals, those already in the workforce and those who would like to be, those who belong to unions and those who don't.

Australia's prosperity and economic strength have, in large part, been predicated on a shared understanding between business, governments and workers that we must grow the economy in order to raise the living standards of all Australians.

That understanding recognises that economic growth will largely be delivered by our companies remaining competitive.

In a changing world, Australian business can only stay competitive if different parties work together to create productive, collaborative, safe and innovative workplaces. We need a workplace relations system that will support this.

The review of the Fair Work Act provides an opportunity to create a renewed partnership between government, business and employees to strengthen the Australian economy for the benefit of all Australians.

Context of the review

Changing nature of the economy

The Australian economy is blessed with many sound fundamentals, envied by other developed countries. The opportunities available to us, particularly from our relationship and proximity to the thriving economies of Asia, provide a foundation for us to lock in future living standards.

Our future will be determined by our capacity to compete successfully in the world, particularly in Asia, and to compete with Asian competitors, but on our own terms with wages growing in line with increased productivity.

We need to get the policy settings right to ensure that Australia is competitive to take advantage of these considerable opportunities, and meet some short-term economic and longer-term demographic challenges. These policies include the workplace relations system but extend beyond it to other labour market institutions and to policies related to infrastructure, tax, regulation and access to capital.

Notwithstanding sound growth prospects, the review of the Fair Work Act is being conducted at a time of significant global economic uncertainty and complex domestic conditions.

On the international front, modest growth is being forecast for the global economy in 2012 on the assumption that policymakers, primarily in the Euro area and to a lesser extent the United States, continue to keep fiscal and economic challenges at bay.

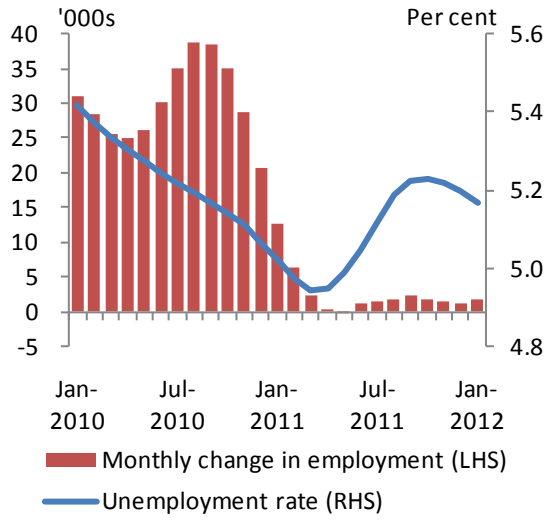
This is by no means certain, and the impact of a further deterioration of economic conditions in the Euro area would have far-reaching consequences.

Domestically, specific sectors of our economy are experiencing great pressure from the current high terms of trade, and the entire economy is dealing with increasing competitive challenge from around the world. The high dollar, together with strong competition for skilled labour, is currently putting considerable pressure on employers in the non-resources sectors. Unless they are able to reduce costs or improve productivity through innovation and investment in new ways of doing business, they risk losing out to international competitors.

The risks and pressures are reflected in recent labour market data set out below.

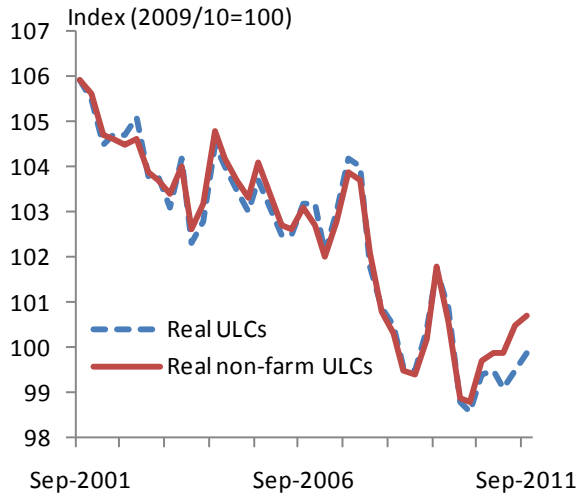
Fact: jobs growth has been very weak over the last 12 months, with no net job creation in calendar year 2011.
Fact: labour productivity has weakened markedly in recent years, with an outright decline in 2010–11.
Fact: real labour cost rises have exceeded productivity across the economy since mid-2010, eroding our competitive position.
Fact: the number of working days lost to industrial disputation has spiked since March 2011.
Fact: while some sectors and regions experience labour shortages, since late 2008 the average length of time that unemployed people are out of work has increased by over six weeks.
Fact: some groups are still under-represented in the workforce at levels below other comparable countries. For participation of women of child-bearing age (25–34) we are ranked no. 24 and for older workers (55–64) no. 11 among OEDC countries.

Labour market is softer



Source: ABS, Catalogue No. 6202, *Labour Force*, Table 1, January 2012. Note: data are trend.

Real unit labour cost levels are rising



Source: ABS, Catalogue No. 5206, *Quarterly National Accounts*, Table 38, September 2011.

The intense focus on lifting productivity in this country reflects the fact that it is the only sustainable way of increasing living standards over the longer term as our population ages, the cohort of working age people reduces and the demand for taxpayer-funded services increases.

At the same time, the level of risk for employers and investors associated with the labour market has increased. The combination of skills shortages in some sectors, rising industrial disruption and unpredictable outcomes in settling agreements is affecting how foreign investors and head offices regard the prospects of doing business in Australia.

Of great importance is the estimated $912.8 billion pipeline of resources and infrastructure projects upon which Australia's future economic prosperity depends. This pipeline represents a huge opportunity for Australia but it requires us to pull out all stops to ensure we can deliver. Australia cannot afford to assume that these projects are locked in and that our competitive strengths in resources are immutable.

Although no projects have yet been withdrawn, perceptions of the level of risk are rising. While some of this relates to the sheer scale of the projects and the dominance of Australia within one particular segment, a major factor feeding those perceptions relates to the labour market – its capacity to supply the necessary skills and amount of labour at a competitive cost.

Changing nature of the Australian workforce and workplaces

The Australian labour force of today is the product of historic changes in economic activity, as well as demographic and social changes that have transformed the scope and composition of the workforce.

Economic activity, together with new technologies and organisational and management thinking, have changed the type of work available, the skills required to undertake it, and where and how it will be undertaken.

The composition of the Australian workforce of today includes increased numbers of better and differently skilled, and better educated workers. It includes more women and older workers, and a greater diversity of employment relationships.

Greater flexibility in working arrangements and the capacity for more direct communication between employer and employee to adjust operating requirements over the last two decades has brought great benefits for Australians. It has been a major factor in Australia's economic resilience and our capacity to withstand shocks, saving jobs during the global financial crisis that would otherwise have been lost.

It has enabled many women, older workers and people with disabilities to secure employment, and has provided many people who are genuinely disadvantaged with a stepping stone to employment. It has allowed people to work in flexible ways that suit their own personal circumstances.

As our economy changes, Australian workplaces and the workforce continue to evolve.

As some sectors grow, others reduce or become less labour intensive. Employers need the flexibility to readily match their workforce to changing patterns and levels of demand. Individuals need to be able to move relatively effortlessly into emerging employment opportunities. Australia needs to optimise the use of available skills and ensure they support emerging competitive strengths.

While international data shows that, by comparison, Australia's labour market has reasonable flexibility, it has declined since the introduction of the Fair Work Act. This is at odds with international trends and is not conducive to strengthening our competitiveness when we need it most.

The system Australia needs

In short, Australia needs a workplace relations system that reflects the changing nature of our economy, our workers and our workplaces. It needs to support Australia in taking advantage of the opportunities available to us and in staying ahead of unfolding challenges.

As employers face these opportunities/challenges, they need labour market settings that are forward looking. They, like individuals, need a predictable environment in which unnecessary uncertainty and risk is removed. This cannot be achieved by a system where conditions, work roles or ways of working are frozen in time.

Rather, job creation, satisfaction and security are best achieved by building a strong capacity for innovation, adaptation, mobility and resilience. Why? Because they support the capacity of both individuals and businesses to cope with the inevitable transitions from a changing economy.

The essential productivity improvements we seek will flow from working smarter, not harder, by being innovative in product and service design, by adopting new technologies, work processes and supply chains – changing what businesses do and how they do it.

Over three decades, the Business Council of Australia has looked at the features of systems, here and around the world, that promote international competitiveness, productivity and employment in the context of an economy's changing needs.

Fundamental features of a high-performing system include that:

- it allows businesses to be internationally competitive by ensuring they have the flexibility and capacity/capability to address competitive challenges quickly
- it fosters productive, high-performing, positive workplaces by supporting direct engagement between employer and employee at the enterprise level

- it is simple and efficient
- it creates a predictable environment, which eliminates unnecessary uncertainty and risk
- it removes or does not create barriers to job creation
- it promotes collaborative, rather than adversarial, relationships and minimises industrial conflict
- it delivers fair remuneration outcomes that reward effort and provide a safety net to prevent exploitation of less-empowered workers
- it promotes safe and healthy workplaces.

When the Business Council of Australia highlights the need for a workplace relations system that provides the flexibility our member companies need to stay competitive – for the benefit of the nation as a whole – this is what we mean.

At the same time, we recognise there is a limit to how much changes in regulation can be expected to improve the performance of the labour market, and help build constructive and collaborative relationships in the workplace. But at the very least, regulation should not be a barrier to the achievement of these aims.

Our experience of the system under the Fair Work Act

First, we applaud the establishment of a national workplace relations regulatory regime, together with a simplified set of modern awards. The Act has been simplified and is more coherent than its predecessor as a result of being completely rewritten. The national coverage of the Act creates the basis of the more mobile labour market the current process of economic structural adjustment requires.

However, the test of the Fair Work Act hinges on the answer to the question of whether it promotes collaborative, productive and harmonious workplaces that are helping Australia to stay economically competitive. This led the Business Council of Australia, in 2008, to advise government that it would evaluate the impact of the Fair Work Act on the economy against the following criteria:

- international competitiveness – whether member companies (and the economy as a whole) have sufficient flexibility to respond to changing international market trends and stay competitive
- productivity – whether the Act promotes or hinders overall productivity
- enterprise focus – whether the Act promotes collaborative and constructive workplace relations, including communication and direct relationships between employers and employees, and meets the needs of individual businesses
- administration and timeliness – whether the system is administratively simpler and less costly than the one it replaced, and whether system timeframes allow for timely implementation of business improvement strategies
- impact on job creation – whether the Act promotes employment growth.

This submission details the experience of our member companies against these criteria and our recommendations for improvement.

What we have found is that the Act affects companies and economic sectors differently. The greatest impact is on members and sectors that are also most affected by changing global market conditions and consumer preferences.

Our concerns particularly relate to the resources sector – on which Australia is heavily reliant – and the manufacturing and retail sectors, which are under great pressure from the high dollar and increased global competition.

The need to ensure businesses in these sectors can stay competitive by adapting to changes and seizing opportunities quickly is at the core of our concern and driving our recommendations for improvement to the Fair Work Act.

The key findings of our research are set out below.

Issues of concern

Affecting competitiveness

- New legislative provisions have enhanced the bargaining power of unions, in particular in the construction and resources sectors, which are experiencing skills shortages. This bargaining power has increased industrial disputation, threats of disruption and protracted negotiation. The fact that more matters can be on the table for negotiation has increased the likelihood and scope for disagreement and delayed implementation of critical business transformation.
- The system is being used to facilitate intervention in, or veto of, business decision-making beyond the rights and conditions of employees, muddying accountabilities of managers and company directors.
- The system does not allow for timely negotiation of effective arrangements for major new projects (greenfield projects) because of the removal of agreement options and fewer mechanisms to break negotiating impasses.
- Provisions in some modern awards, such as definitions of 'normal' hours, are making it difficult for companies working to meet new patterns of consumer demand.

Affecting productivity

- The Act has not promoted increased productivity.
- Many unions have refused to agree to productivity offsets for wage increases but have sought benefits that are largely irrelevant to employees and productivity.
- Productivity improvement is being jeopardised by claims that seek to reduce employer decision-making on the use and choice of contractors, employee rosters and overtime.
- Productivity improvement is conceived within the Act as an intermittent feature of business practice. This does not reflect a modern business approach of continual change and adaptation.

Enterprise focus

- The Act has reduced the range of agreement options, notwithstanding continued support by many employees for a greater diversity of arrangements.
- Greater involvement of third parties is jeopardising direct engagement between employer and employee, and competition between some unions for membership is driving new demarcation disputes.
- Some unions have adopted standardised clauses that seek to reinstate union-friendly practices such as training leave for delegates, compulsory arbitration and narrower scope for individual flexibility arrangements. These clauses do not necessarily reflect the needs or preferences of individual employees or the workplace.

Administration and timeliness

- System timeliness is highly variable and outcomes uncertain.
- The highly prescriptive and technical nature of the Act allows it to be used to create delays and uncertainty for employers needing to respond quickly to market changes. It also discourages employees from nominating as bargaining representatives.
- There have been significant management, administrative and legal costs, which are not expected to reduce over time.
- Lack of trust in the system and the way it operates continues to impede constructive workplace relations.

Job creation

- The Act, together with some modern awards and agreements, has created some disincentives to job creation and reduced career pathways.
- Higher costs associated with some modern awards have had the effect of reducing the number of hours available for employees.
- Transfer of business provisions have led to some employees being made redundant where, under the previous Act, they would have been offered ongoing employment.

Consequences

The impact of the features of the Fair Work system described above on Australia's largest companies has far-reaching consequences.

In essence, they limit the flexibility of employers to respond to a particularly dynamic economic environment by aligning production to changed patterns of demand, changed technology and increasingly diverse requirements of the workforce.

Members are finding the Act in operation doesn't support them in deploying their workforces to meet changing circumstances. It is not giving them the flexibility they need to stay competitive by adjusting operating hours, core and non-core activities, and the role of contractors and contracting. It is not giving workers the flexibility they need around where and how they work.

What this means is that the workplace relations system, in its current form and operation, is not supporting an effective match-up between the flexibility requirements of employer and employee at a particularly challenging time for the Australian economy.

What we have instead is a situation where unless an employer has managed to negotiate a highly flexible agreement upfront, they can only make the necessary adjustments through complex, time-consuming, costly and unpredictable renegotiations involving third parties.

Rather than providing the capacity for the flexibility we need, our monitoring of the experience of Business Council of Australia members indicates that the current system is:

- limiting the ability of some businesses to adjust quickly to stay internationally competitive and survive in volatile times
- limiting career opportunities for employees and, in some cases, reducing job security

- constraining business capacity to adapt to Australia's changing economy and demographic circumstances by limiting options for business transformation and restructure
- jeopardising business efforts to improve productivity, the key to wage growth and improved living standards
- leading to increased industrial disruption, which is hurting Australia's international reputation as a reliable supplier
- making it more difficult for companies to meet the diverse needs and preferences of employees
- disrupting workplace culture and relationships as third parties become more active in workplaces, and the rise of adverse action threats is undermining trust and confidence
- making it more difficult to take on people who face employment barriers because of the resistance to more diverse forms of employment
- extending the time it takes for businesses to implement fundamental decisions
- increasing business costs.

This experience shows that, as with any new piece of significant legislation, there is a need to evaluate experience of operation to ensure it allows ongoing adaptation. On that basis, it is clear that some important improvements can be made to the Fair Work Act.

Other submissions to the review may well seek to trivialise the consequences of employer issues with the Fair Work Act and portray business as simply 'wanting its own way'.

The reality is that these issues go to Australia's capacity to protect and grow the economy. Their consequences are being felt increasingly by individual Australians. This is a time in our nation's history when we need to facilitate the greatest possible speed of adjustment to take account of new conditions.

What can be done?

Summary of proposed amendments

In this submission, Business Council member companies have identified provisions which are being used, frequently in combination, to undermine competitiveness, impede productivity and job creation, and add unnecessary delays and costs to doing business.

Our recommended amendments are grouped around specific areas of the Fair Work Act. They seek to identify provisions or decisions that are supporting this behaviour and suggested changes that would prevent the Act being used in this way.

1. Bargaining processes: amendments to improve the validity and efficiency of bargaining processes
   - establish more robust bases of establishing majority support for bargaining, allow this support to be tested when negotiations are lengthy and unproductive; make them a precondition for protected action
   - reduce the range of matters upon which bargaining can occur, and specifically make unlawful those clauses that restrict the use of, or regulate the payments to, contractors

- prevent late entry of bargaining representatives to the bargaining process, other than in exceptional circumstances
- ensure that the scope of bargaining relates only to the classes of employees with whom the employer has agreed to bargain.

2. Flexibility arrangements: amendments to strengthen flexibility arrangements for both individuals and employers, and remove the capacity to restrict the use of contractors
   - mandate the agreed individual flexibility model clause
   - make unlawful those clauses that restrict the use of, or regulate the payments to, contractors.

3. Industrial conflict/disputation: amendments to reduce the capacity for unnecessary industrial disruption by removing enablers in the legislation and providing employers with more capacity to respond
   - require majority support determinations to be made before protected action applications can be made
   - put more effort into dispute prevention, as opposed to dispute management and settlement
   - enable Fair Work Australia to suspend all protected action for up to 90 days in certain circumstances and expand their capacity to suspend action for the purposes of 'cooling off'
   - introduce employer options for earlier industrial action as an alternative to full-scale lock-out.

4. Agreement approval: amendments to improve the efficiency and predictability of Fair Work Australia decisions to enhance the credibility of the tribunal
   - reduce delays by increasing the discretion of Fair Work Australia to approve agreements despite technical breaches of requirements; require agreements to be dealt with within 30 days
   - clarify that the Better Off Overall Test (BOOT) is to be applied as an overall test and on classes of employees
   - review all Fair Work Australia forms with a view to simplifying them.

5. Greenfield projects (new projects): amendments to provide more efficient and timely outcomes, and help overcome impasses
   - create more employment options such as employer-only agreements
   - require the good faith bargaining principles to apply to greenfield project negotiation
   - lower the threshold for application of the public interest test to allow earlier intervention for cases of significant harm.

6. Transfer of business: amendments to remove unintended, negative consequences for both employees and employers
   - restore the 12-month sunset clause for transferring instruments

- articulate more clearly the triggers to the provisions to ensure that they do not interfere with sensible redeployment of skills and assets
- ensure that the provisions do not apply to employees transferring between associated entities where there is an unexpired enterprise agreement binding on the new employer.

7. General protections/adverse action: amendments to reduce the scope of the general protections (adverse action claims) to align with other anti-discrimination legislation; re-introduce the 'sole and dominant' test as the basis for claim.
8. Modern awards: review the modern awards to address anomalies between awards and ensure that they allow companies to be competitive.
9. Australian Building and Construction Commissioner: retain the ABCC.
10. Compulsory superannuation contribution increase: legislate to ensure that the increase is offset against future wage increases and is taken into account when Fair Work Australia is setting the minimum wage.

INTRODUCTION

The Business Council of Australia (BCA) represents the CEOs of Australia's top 100 companies. Those companies are significant drivers of Australia's economic prosperity, accounting for 30 per cent of Australia's export earnings and contributing $30 billion in corporate taxes and paying dividends worth more than $35 billion in 2010 and employ more than 1.2 million people.

The labour market is a key determinant of Australia's overall economic performance and capacity to generate the wealth required to support our quality of life. The past decade has seen many changes in the composition and forms of employment in Australia's labour market as employers responded to changing patterns and levels of demand for goods and services and the consequent changes to work processes and preferences of a demographically more diverse workforce. With projections of continued volatility in global markets and structural change within Australia's economy, the labour market must continue to adjust and adapt if Australia is to prosper and take advantage of emerging opportunities. Its regulatory structures, institutions and labour market policies and programs therefore must be focused on facilitating and supporting those changes for employers and (would-be) employees alike.

Labour market regulation (in this instance, the Fair Work Act 2009) is an important element in shaping the way in which the labour market operates, but regulation alone cannot mandate good labour market performance or outcomes. Other policy levers are available to governments to influence its outcomes. Yet historically governments have often focused on industrial legislation and regulation to achieve particular outcomes without first seeking to explore whether alternative forms of intervention might be possible or more cost-effective. This is exemplified by the lack of a Regulatory Impact Statement in relation to the policy objectives for Fair Work Act.

The historical over-reliance on regulation as a means of influencing labour market outcomes has resulted in a highly complex and legalistic regulatory structure, the operation of which is dominated by technical experts distant from the demands of running competitive and viable businesses.

As the economy changes structurally, the location, composition and structure of employment changes accordingly. Regulation of the labour market should ease as much as possible the necessary transitions for both businesses and individuals and certainly not create barriers to movement that will unnecessarily add to the costs of transition either in terms of propping up uncompetitive businesses or through delaying individuals' inevitable changes of job or role. But it is also clear that regulation alone cannot assist the restructuring process and it is for this reason that labour market regulation cannot be seen in isolation from other labour market policies and services, or from other areas of public service provision.

In this submission therefore the Business Council of Australia will consider the impact of the Fair Work Act through the experience of its members within the context of the performance of the overall labour market.

Part A notes the well established economic and demographic structural changes reflected in the labour market, together with the economic challenges facing Australia and Australian businesses over the next five to 10 years. It assesses Australia's labour market performance by reference to a range of measures and notes its comparative performance internationally. It outlines the characteristics of an appropriate regulatory

system that would enable Australian businesses to respond effectively to those changes and challenges.

Part B analyses these experiences in more detail and identifies the issues within the Act that have proven most problematic for members and proposes changes that would make the adjustment process easier and less costly.

PART A: AUSTRALIA'S LABOUR MARKET IN CONTEXT

The economic challenges and opportunities

KEY POINTS

- Australia's economy is facing both short-term and longer-term challenges and opportunities. The process of economic restructuring will continue in response to the challenges and opportunities.
- To take advantage of the opportunities and to deliver the pipeline of key investment projects upon which future prosperity depends, we must have the right policy settings to enable individual businesses to innovate and respond quickly, building vibrant and high-performing organisations. Individuals need labour market settings that allow them to move readily into new sectors, roles, work in new work processes and with new technology and in workplaces that are harmonious, safe and in which they can utilise their skills and from which they can balance family and community responsibilities.
- To compete successfully, we must be a high-productivity nation.

This submission presents the perspectives of the CEOs of Australia's top 100 companies on what labour market regulatory change is needed to help Australian businesses remain internationally competitive and viable in the face of both short-term and medium-term challenges. The full extent of these challenges is spelled out in the BCA's recent Budget Submission but in summary they include continuing global economic uncertainty, together with domestic economic challenges around the structural pressures from our high terms of trade, competitiveness and lagging productivity. The long-term challenges and consequences arising from an ageing population on government outlays and declining workforce availability are also noted.[1]

Viability, the high dollar and competitiveness

Viability in the short term

In the short term, continuing international volatility arising from the global financial crisis, together with the high Australian dollar and rising real unit labour costs, will make business conditions difficult and uncertain for both trade-exposed and domestic businesses facing new sources of competition and reduced consumer confidence. Viability will be the short-term challenge for many businesses. Competitiveness in the face of an extended period of a high dollar and lagging productivity will be the longer-term challenge.

Developments in Europe affect Australian businesses. First, weaker demand for both exports and goods and services domestically as a result of lower business and consumer confidence has already led to a slowdown in activity and employment in parts of the economy.[2]

Second, Australian banks expect to face increased cost of funds and reduced availability of credit, as European lenders divert scarce resources to their home markets to meet more stringent regulatory standards. Any consequential restrictions or higher costs of

[1] See Business Council of Australia Budget Submission 2012–13.
[2] Commonwealth of Australia, *Mid-Year Economic and Fiscal Outlook 2011–12*, November 2011; ABS, Catalogue No. 6202, *Labour Force*, January 2012.

business finance will reduce the investment necessary to build capacity or to achieve essential productivity improvements.

The additional flexibility in the labour market provided by the growth in new forms of employment and the capacity of businesses to adjust rosters and hours helped businesses to respond to lower demand through the 2008 downturn and was a key factor in avoiding major retrenchments during the GFC. All indicators suggest that this capacity is going to be required for the foreseeable future as the Eurozone and debt/credit crises continue unabated and growth in China and India slows.

The high dollar

Australia's terms of trade are at a 140-year high and around 85 per cent higher than the 20th-century average, driven by high demand and strong price rises for key exports arising from China and India's industrialisation and urbanisation. This has resulted in a large boost to Australia's national income but has also led to the appreciation of the Australian dollar to levels not seen since the exchange rate was floated.

The high dollar, together with the strong demand for skilled labour and other inputs that the pipeline of investment projects (see below) creates, brings considerable competitive pressures for businesses (and other employers) in the non-resource sector. Unless they are able to reduce costs or improve productivity through innovation and investment in new technologies and skills, they risk losing out to international competitors. Australian jobs therefore depend on these businesses staying competitive.

The BCA's recent paper *Assessing Australia's Trade and Investment with Asia* highlighted again the expansion opportunities for Australian businesses in meeting growing demand among emerging economies for a wide range of resources, energy, agricultural products and services, assuming that the other drivers of skills, infrastructure and business development are put in place.

However, in highlighting these opportunities, the paper also warned against complacency, noting that Australia's future was not assured merely because of historical links to these markets or current levels of trade. Australia's capacity to take advantage of these opportunities depends on our overall competitiveness in the fastest growing region of the global economy. On the one hand, China, India and other resource and energy importers want to diversify their sources of supply and on the other hand, new competitors from other emerging and developed economies are competing for access to supply these markets. The sustainability of Australia's higher commodity prices is already under pressure in contract negotiations, and threats to the continuity of supply – or threats of delayed supply – have heightened fears about assured supply from Australia.

Meeting these competitive challenges and taking advantage of the new opportunities within the fastest growing region of the global economy will depend on Australia's competitiveness. That, in turn, will depend on ensuring that we have the right policy settings in place to enable businesses to be innovative and competitive. That does not mean we will or should compete as a low-cost or low-wage country. What it does mean is that we compete on the basis of a stable and predictable investment climate, by being innovative and agile, and by being highly productive.

The critical importance of the major project pipeline

"We believe that Australia will be affected by these downgrades everywhere in the world only to a limited extent and the reason is that growth in Australia is importantly driven by major investment projects that are in the pipeline and these are funded by strong multinationals that do not have problems accessing funding so growth in Australia will be somewhat lower but not by a whole lot".
– Jorg Decressin, Deputy Director of the IMF research department and lead author of the IMF's latest Global Economic Outlook Report, in comments to the ABC Radio National Breakfast Show, 25 January 2012

Australia's pipeline of capital projects either underway, under consideration or in planning is worth some $912.8 billion.[3] Most are major investments in the infrastructure and resources sectors. The significance of these projects is threefold:

- they will contribute the lion's share of GDP growth for a number of years to come
- they will add to the productive capacity of the Australian economy in the medium to longer term through:
  - expanding significantly Australia's resources-related export capacity, while at the same time accelerating the developing of spin-off competencies and capacity that form part of Australia's new competitive strengths
  - providing the economic and social infrastructure needed to support productivity growth and raise living standards in our cities and regions.
- They are important for achieving many government policy objectives including growing national income, boosting productivity, achieving long-term fiscal sustainability and a return to surplus and the transition to a low carbon economy.

Our capacity to deliver these projects therefore is critical to delivering the next phase of economic growth in Australia. However, market analysts have identified concerns around Australia's ability to implement these cost-effectively, against the backdrop of rising labour and project costs.

"Australia does not have a good record of project delivery. Indeed, according to recent press reports, of the 15 projects over A$2bn to have been sanctioned in Australia since 2000, only one (Darwin LNG) was delivered on time and on budget. We estimate that the rest were an average of 32% more expensive and eight months later than anticipated. This sets a worrying precedent given the ramp up in investment expected over coming years …

Indeed expectations of development bottlenecks, increased industrial action and project delays are growing as the economy pushes up against capacity constraints."

– Macquarie Equities Research, *Australian LNG Outlook*: *Backlogs, Bottlenecks and Budget Blowouts*, 28 January 2011, pp. 2 and 4.

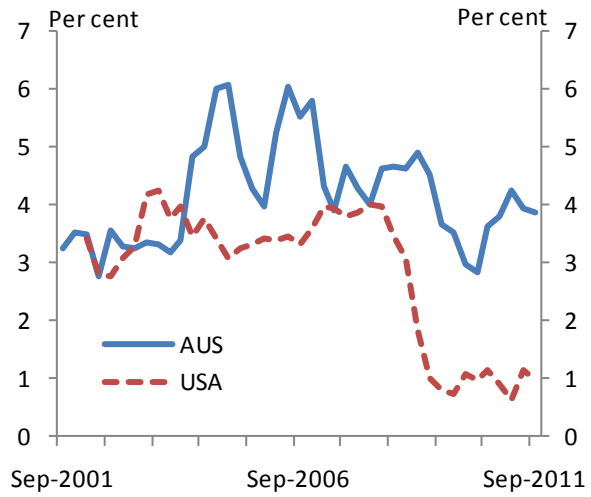
While there are several elements that make up successful project delivery, one of those relates to the relative riskiness of the labour market. The BCA is separately engaged in a study to identify the policies necessary to secure Australia's considerable investment opportunities, but BCA research reveals that both the labour-related costs and perceptions of labour-related risk for capital projects have increased, affecting both the capacity to deliver committed projects on time and to budget and investment assessments of potential projects.

[3] Deloitte Access Economics, *Investment Monitor*, December 2011, p. 1.

"Aside from its growing development challenges, wider sovereign risks to foreign investment in Australia are unquestionably rising. Specifically, notwithstanding an increasingly scarce, expensive, inflexible and less productive work force and a persistently strong local currency, we see growing political, environmental and community risks facing local operators."

– Macquarie Equities Research, *Australian LNG Outlook: Beware the False Dawn,* 25 October 2011, p. 22.

Figure 1: Comparison of construction industry wage growth (through the year)



Source: ABS, Catalogue No. 6345.0, *Labour Price Index*, September 2011, Table 5b, US Bureau of Labor Statistics, Employment Cost Index series CIU2012300000000I. Note: data are for private construction, with growth rates calculated on original data.

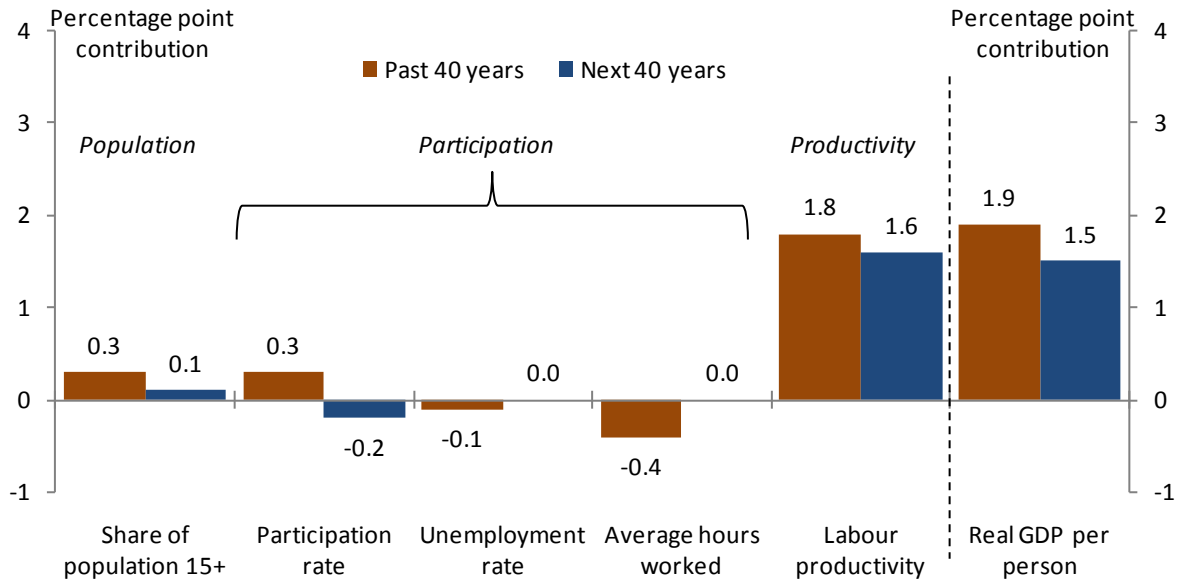
Ensuring that these projects proceed is critical to maintaining economic growth in both the short and longer term. These projects are not assured and Australia's capacity to deliver and the level of risk associated with doing these projects in Australia will be continually under review by investors. Yet, with the right policy settings they represent a major opportunity for delivering future economic prosperity.

Productivity

The recent intense focus on Australia's productivity performance reflects its importance as the most sustainable way of increasing standards of living over the longer term as Australia's population ages, the working age cohort reduces proportionately and the demand for government-funded services rise.

As Treasury's 2010 Intergenerational Report makes clear (Figure 2), labour productivity growth has been by far the largest driver of growth in real per capita incomes over the last forty years, and will be, if anything, even more important over the next 40 years to 2050.

Figure 2: Sources of growth in real GDP per person



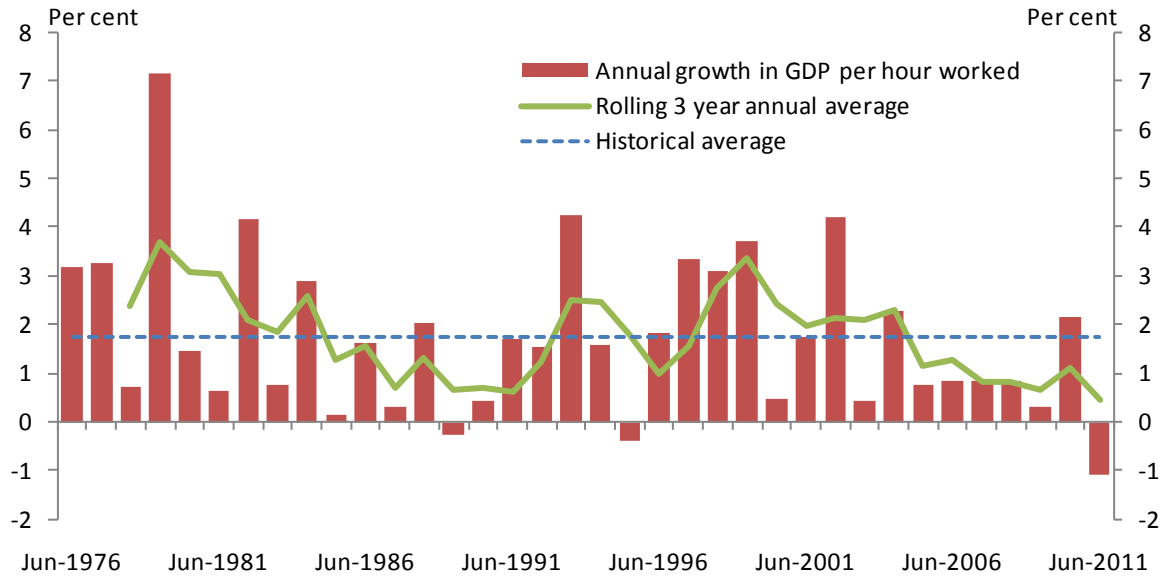
Source: Commonwealth Government, *Intergenerational Report 2010*, based on Australian Bureau of Statistics data and Treasury projections.

Against this backdrop, Australia's more recent labour productivity growth record has been disappointing (Figure 3). GDP per hour worked grew by an average of only around 0.4 per cent per year over the last three financial years, the lowest three-year average since the series began in 1975.

Averaging less than half the normal rate of 1.7 per cent per annum, we face the prospects of a slowing in our standard of living growth unless the causes are identified and remedies implemented.

Source: IBISWorld

Figure 3: Annual labour productivity growth



Source: ABS, Catalogue No. 5204, *Australian System of National Accounts*, 2010–11 (October 2011), Table 1.

Understanding the reasons for the reduced performance is made more difficult by measurement issues. However, analyses by the Productivity Commission, among others show that the low performance has resulted from poor performance in particular sectors, delays in the benefits flowing from major investments (particularly in the mining sector) and the prolonged drought and recent floods. Concern has also been expressed about the effects of the slowing pace of economic and labour market reform.

Productivity improvement flows from 'working smarter, not harder', by being innovative in product and service design, by adopting new technologies, work processes and supply chains – changing what organisations and businesses do and how they do it. Not only is this necessary to meet changing patterns of demand, but also to address the capacity constraints that are appearing in certain sectors. For example, in the healthcare and aged care sectors where productivity has been increasing only slowly, without major changes to the way in which services are delivered, the additional capacity to deliver the quantum and type of service expected will not exist. We simply will not have enough people.

It is clear therefore that we need a multi-faceted approach to improve productivity. Investment in technology and physical capital, and in people's health, education and skills and capacity to embrace change are all required. This investment and innovation will be encouraged by having the most supportive business environment possible – flexible product and labour market regulation, competition, openness to trade and investment for knowledge transfer as well as education and skills all play a part in shaping this environment.

The labour market and regulatory implications of these trends

As employers face these challenges, they need labour market settings that are forward-looking and facilitate Australia's competitiveness. At the same time, they, like individuals, need a predictable environment in which unnecessary uncertainty and risk is removed. This cannot be achieved through freezing in time conditions, work roles or ways of working. Rather, employment security is best achieved by building a strong capacity for innovation, adaptation, mobility and resilience. Structural adjustment in the economy will only accelerate as the de-carbonising of the economy starts.

In the short term, however, business viability will continue to be the major concern for both non-resource sector exporters and those facing greater competition and/or reduced demand domestically. Their capacity to absorb higher wage costs is limited and already businesses are moving to shed jobs in Australia. Recent media reports highlight these difficulties. For example, Australian banks report the impact of new capitalisation requirements and higher funding costs on operating costs. Retailers and fast food services have reduced the number of hours they offer to offset the higher costs of awards or agreements in the face of reduced consumer demand. The recent announcements relating to Alcoa have cited the impact of the higher dollar, lower commodity process and high operating costs.

Others again, such as those in traditional manufacturing sectors, will begin the process of moving to adopt new technologies and greater capital intensity or to adopt new distribution channels or business models. These employers will require instruments that allow them to make these adjustments in capacity and/or a preparedness to adopt new ways of working or role definition. Any regulations that seek to freeze role definitions, work practices and processes will hamper the adjustment processes and thus the capacity of business to create the new jobs. At the same time, continued investment in

people's skills, strong and healthy sharing of information that allay employees' anxieties and ensuring that employment services work well will be important adjuncts.

In relation to ensuring that the labour market settings and regulation supports the pipeline of major capital projects, changes are required to lower the level of labour market risk that apply to them. The 'hard bargaining' attitude seems to rest on assumptions that these projects are locked in and that Australia's competitive strengths in resources are immutable. These assumptions are incorrect. Although no projects have yet been withdrawn, perceptions of the level of risk are rising. While some of this relates to the sheer scale of the projects and the dominance of Australia within one particular segment, one major factor feeding those perceptions relates to the labour market – its capacity to supply the necessary skills and amount of labour and the cost at which these will be supplied in light of the experience to date in industrial (greenfield) agreements.

The current process specified for greenfield project agreements in the Fair Work Act, in conjunction with labour and skill shortages, is leading to higher labour cost outcomes and protracted negotiations to achieve agreements. Once agreements are in place, industrial disputes have slowed schedules and further increased costs. Members report that productivity in construction has fallen as the skill/ experience base is diluted, including for supervisory roles, and because of the re-introduction of restrictive work practices. The effect is to increase the number of people required, exacerbating skill shortages.

Reducing the labour market risks, moderating wage and other claims and improving productivity requires regulatory change (as shown in Part B), continued strong investment in technical and trade skills and greater capacity to augment local skills and experience with international skills.

Innovation, skills and flexibility will be critical if Australia's long-term slide in *productivity* is to be arrested and reversed and capacity constraints eased.

Australia's labour market: how well does it perform?

KEY POINTS

- A well-performing labour market is a critical element in generating and sharing overall economic prosperity.
- Its competitiveness affects our international competitiveness, the viability of our businesses and our capacity to compete in global labour markets.
  - Labour market structure, regulation and institutions shape and influence how the labour market performs but other factors and forces within the overall economic cycle also affect its performance.
  - The economy of the future will be different from the one we have today. We know that structural adjustment and taking up new market opportunities depends on the capacity of employers to move quickly and offer employment in different forms.
- The workforce of the future will be more diverse and will want to engage in different ways. The growth of alternative employment arrangements over recent decades has enabled many to participate in the workforce that could not previously have done so.
- Because the market is not static, its structures and regulations need to accommodate and facilitate ongoing change and market trends. The availability of alternative employment modes has been an important element in meeting the needs and preferences of many individuals and new entrants to the workforce. Curtailing or withdrawing them is at odds with individuals' preferences and the needs of employers.
- As a result of past policy and regulatory reforms, Australia's economy and labour market has performed relatively well. However, there are opportunities for further improvement and emerging threats to progress as a result of the current economic challenges.
- We need a better integrated policy framework to effect these improvements and should not over-rely on regulatory solutions alone.

A well-performing economy is characterised by competitive and viable businesses and productive, high-performing and safe workplaces

New patterns of supply and demand

A well-functioning labour market will provide for the supply of labour and skills to meet the demands of national economic activity. Or, to take another perspective, supply sufficient jobs to provide employment for all those who seek it. Implicit in this is that there is a good match between the numbers and skills of those seeking and sought for employment and there are no unnecessary barriers to their matching.

Importantly, too, Australia's labour market cannot be seen in isolation from labour markets internationally as we compete increasingly for labour or services globally and have agreed to comply with a number of important ILO conventions.

Nor are labour markets static but keep adapting to both global and domestic forces. On the one hand, the nature of economic activity and Australia's competitive strengths evolve over time in response to international market trends and changing domestic patterns of demand. On the other, the changing preferences of individuals in the

workforce reflect long-term demographic and social trends and preferences. Like most other countries, Australia's labour market today is the product of, and subject to, ongoing structural changes in economic activity as well as of demographic and social changes affecting the size and composition of the workforce.

As the economy changes structurally – some sectors grow, others reduce or become less labour-intensive – employers need the flexibility to right-size their workforce readily and individuals need to be able to move readily into emerging employment opportunities in order to match the new forms and composition of demand and supply of labour.

The former means that regulations should not create barriers or excessive costs for employers, especially those that might inhibit their hiring during upturns or use of employment instruments that tailor the employment to the businesses' needs.

The latter means that individuals should be free and enabled to move between sectors and employers. The key to this will be their employability (up-to-date skills base; capacity to work in different forms of organisation and with other skills, health) and their access to employment services, information about where the opportunities are, possible relocation assistance and access to income during the transition. For this reason, labour market regulation cannot be seen in isolation from other labour market policies and services, nor from other areas of public service provision.

The labour market needs to be characterised by flexibility and support for employers and individuals to ease the necessary transitions. Seeking to slow them through inappropriate regulation will be counter-productive and futile, providing only a façade of certainty. Labour market policies, including its regulation, should be focused on accommodating the growing diversity and easing transitions.

As noted in the preceding section, a clear priority is building the capacity for innovation within organisations and resilience, employability and embracing of change by individuals. The experience of BCA members over the past two years has been that there has been a re-emergence of attitudes more fitting to the 1970s than the realities of businesses and preferences of employees and workers in the 21st century.

The effects of regulatory and other reforms

Labour market structures, institutions and regulation shape behaviour and influence how well the overall market performs. But other important drivers of performance include availability of required skills and labour, and a satisfactory match between working hours and arrangements on offer and the preferences of those who want to participate in the labour force. Labour productivity will also depend on how healthy people are, how safe our workplaces are and the quality of workplace management, together with associated investments in technologies and infrastructure.

Major policy reforms over the past two decades, ranging from labour market regulation, employment services, taxation, welfare and superannuation changes, to public health and education and skills changes, have lifted the performance of Australia's labour market. As a result it has performed relatively well and adapted to both global trends and domestic diversity and changing preferences (Appendix 1: Australia's Labour Market Performance: Data). Unemployment is low by both historical and international standards; the higher workforce participation rate achieved four years ago has been maintained; international demand for Australian residency remains strong, suggesting strong international attractiveness; wage increases generally have been in line with the growth in the economy; industrial disputes remain low by historical standards; workplace safety has improved and educational achievement levels are rising.

Over the past two decades, policy initiatives that have enhanced Australia's human capital, together with regulatory reforms, have led to a strong economy and one in which its labour market performs relatively well. However, there is room for improvement and ongoing adjustment

However, there are also indications of emerging weaknesses and that more can be done. The supply and demand for labour is not evenly distributed across the country, with some regions or groups experiencing much higher unemployment than the national average. Despite some increases in their participation rate, older workers continue to experience discrimination in hiring; real unit labour costs are rising; industrial disputation has risen; and more needs to be done in improving education and skills and health status as chronic disease imposes avoidable productivity losses. It is also clear from recent studies that both skill utilisation and the quality of management can be improved; and the rate of improvement in workplace safety is not fast enough, particularly in some sectors.

Continuing to reform and improve the performance of the labour market will require attention to the underlying drivers of these weaknesses, while at the same time ensuring that it is sufficiently flexible to continue to adapt and meet the emerging challenges and opportunities arising from both international and domestic trends. Some improvements will be best addressed through changes to regulation; others through other policy interventions.

For example, more regulation will not improve employment security. Only a strong economy can generate sustainable jobs. People with entrenched disadvantage need more help to get access to those jobs. But regulating higher standards and conditions for casual and fixed-term employment will only make it even harder for them to compete.

Greater flexibility in working arrangements has brought major benefits for Australians. It has been a major factor in our resilience and ability to withstand shocks – saving jobs during the global financial crisis that would otherwise have been lost. It has allowed firms the capacity to adapt to changing circumstances and increased competition. And it has enabled many women, older workers and people with disabilities to secure employment at all – increasing overall participation and helping to grow our economy. Finally, it has provided people who are genuinely disadvantaged with a stepping stone to more secure employment.

Characteristics of effective labour market regulation

The BCA's longstanding research into workplace relations regulatory systems sought to identify regulatory design features that promoted international competitiveness, productivity and employment. It concluded that constructive and collaborative workplace relations at the enterprise level are the most conducive to productive workplaces and therefore economic performance.

The most recent data on high-performing workplaces reinforces these findings: high levels of direct employee engagement are correlated with strong economic performance, innovation and productivity.

As a result, the BCA believes that strong national economic performance thrives in a regulatory system that:

- allows Australia's businesses to be *internationally competitive* by ensuring that they have the *flexibility* and *capacity/capability* to meet that competition by quickly moving to change both the quantum and nature of the goods and services they provide, and to deliver high quality and high value goods and services.

- can be either highly centralised or highly decentralised, but in light of Australia's economic and geographic diversity and as a means of easing the structural changes currently underway, is best served by a *national, but decentralised* workplace relations system
- supports *productive and high-performing workplaces* as the basis for national economic performance. This is achieved when workplace relations regulation is focused on *enterprise level* relationships and recognises the specific needs of employees and the enterprise
- is *simple and efficient*
- removes or does not create barriers to the *creation of jobs*
- promotes *collaborative, rather than adversarial,* relationships and minimises industrial conflict
- delivers *fair remuneration outcomes and provides a safety net* to prevent exploitation of less empowered workers
- represents *one element in shaping the performance of the labour market* and be seen as only one of several potential policy levers that might be used to improve the performance of the labour market
- *promotes safe and healthy workplaces*.

Australia's workplace relations regulation needs to promote collaborative, productive and safe workplaces that in turn will deliver a productive public sector and competitive businesses

International comparison

From a comparative perspective, international data shows that Australia's labour market has high levels of flexibility. However, the survey data indicate a reduction in those levels since the introduction of the Fair Work Act. Although relatively small, these declines are in the wrong direction, at odds with international trends and not conducive to strengthening our competitiveness.

The World Economic Forum's 2011–12 Global Competitiveness Index shows that Australia's labour market has relative strengths and weaknesses The index ranks Australia as the best performer of 142 countries on rigidity of employment, 6th on redundancy costs and 10th on use of professional management, but 39th on cooperation at the workplace, 40th on pay and productivity and 45th on women's workforce participation. The relative ranking drops to 97 on hiring and firing practices and 116 on flexibility of wage determination.

The most recent rankings released by the World Bank (*Doing Business 2012)* and the Heritage Foundation (*2012 Economic Freedom Index)* both show Australia's comparative economic strengths. However, they too, record a declining score on labour market freedom since 2008, reflecting the re-regulation embodied in the Fair Work Act. On its Labor Freedom criterion, Heritage finds Australia has dropped to 8th place, behind the US, Singapore and Denmark.

The BCA's own research also shows that in relation to some specific issues, Australia's current regulation exceeds that of some competitor or comparable countries. For example, although the ILO conventions dictate a commitment to collective bargaining, not all countries with a history of collectivism have embedded this in a statutory requirement to bargain.

It is only by continuing to ensure that Australia's economy is open to competition, its institutions and regulation are flexible and culture innovative will we have the capacity and discipline to assure future economic and social prosperity. The correlation between economic freedom and economic prosperity, as measured by real GDP per capita, is long established. And it is this wealth that underpins the standards of living we seek.

PART B: THE BCA EXPERIENCE OF THE FAIR WORK ACT: WHAT NEEDS TO CHANGE

KEY POINTS

- There are some provisions within the Act that are being used to impede improvements in productivity and undermine competitiveness. Amendments are proposed to address these matters.
- Amendments to the Act represent only one element in an integrated strategy to improve the performance of the labour market and to promote constructive and collaborative workplace relations.

Since 2009, the Business Council of Australia has been systematically monitoring the experiences of its members in implementing the Fair Work Act. That feedback forms the basis for this Part of the BCA's Submission.

The establishment of a national workplace relations regulatory regime, together with a simplified set of modern awards, is applauded. The Act has been simplified and is more coherent than its predecessor as a result of being completely rewritten. The national coverage of the Act creates the basis of the more mobile labour market that the current process of economic structural adjustment requires (although on its own cannot achieve). But like all new pieces of legislation, it needs to be adjusted as any negative or unintended consequences become clear. Most importantly, it needs to be capable of supporting continuous improvement.

According to its objects clause, the Fair Work Act set out to create a balanced framework for cooperative and productive workplace relations that would promote national economic prosperity and workforce participation.

It is clear that the Act provides a strong safety net through the interconnecting National Employment Standards and modern awards, together with provisions for collective bargaining and representation and the Better Off Overall Test (BOOT). These provisions are generally consistent with Australia's international labour commitments in relation to the promotion of voluntary, autonomous collective bargaining. Members report that the additional flexibilities available to support working parents are being used to a significant extent – albeit with variations to reflect sectoral factors and relevant workplace arrangements.

Overall, however, the BCA does not believe that the Act is achieving of all its stated objects, or indeed is capable of doing so. Put simply, the Act in its current form does not provide a framework that promotes national economic prosperity or employment. It does not support productivity improvement and it limits the flexibility of employers to stay competitive and meet the changing preferences and needs of Australian workplaces.

In 2008, the BCA advised government that it would evaluate the impact of the Fair Work Act on the economy against the following criteria:

- international competitiveness – whether companies (and the economy as a whole) have sufficient flexibility to meet changing international market trends and stay competitive
- productivity – whether the Act promotes or hinders overall productivity
- enterprise focus – whether the Act promotes collaborative and constructive workplace relations and meets the needs of individual businesses. Has it led to an

enhanced role for third parties? Has it undermined communication and direct relationships between employers and employees?

- administrative costs and resource intensity – whether the new system is administratively simpler and less costly than the one it replaced or could be further improved
- timeliness – whether the system allows for timely responses and implementation of business improvement strategies
- impact on job creation – whether the Act has constrained employment growth.

In setting these criteria, the BCA recognised the limits of legislation in promoting particular behaviours. It also noted that in the absence of other policy initiatives and a continued compartmentalised approach to labour market policy, it was likely that labour market participants would approach the implementation of the Fair Work Act through the experience of the past. Despite the rhetoric of a system based in collaborative behaviours, and without other policy interventions, it was unlikely there would be any diminution of adversarial behaviours.

This expectation has been borne out by the experience of many BCA members.

They are concerned to see the re-emergence of more aggressive behaviours, which reflect poorly on Australia's international reputation and destabilise and divide workplaces. These behaviours are seen to be enabled by certain provisions of the Act, particularly in areas of the labour market experiencing skills shortages or where projects are time-critical.

However, our main issues with the Fair Work system are the consequences on member companies' capacity to stay competitive and meet the needs of the changing economy, workforce and workplaces.

Issues of concern

Affecting competitiveness

- New legislative provisions have enhanced the bargaining power of unions, in particular in the construction and resources sectors, which are experiencing skills shortages. This bargaining power has increased industrial disputation, threats of disruption and protracted negotiation. The fact that more matters can be on the table for negotiation has increased the likelihood and scope for disagreement and delayed implementation of critical business transformation.
- The system is being used to facilitate intervention in, or veto of, business decision-making beyond the rights and conditions of employees, muddying accountabilities of managers and company directors.
- The system does not allow for timely negotiation of effective arrangements for major new projects (greenfield projects) because of the removal of agreement options and fewer mechanisms to break negotiating impasses.
- Provisions in some modern awards, such as definitions of 'normal' hours, are making it difficult for companies working to meet new patterns of consumer demand.

Affecting productivity

- The Act has not promoted increased productivity.
- Many unions have refused to agree to productivity offsets for wage increases but have sought benefits that are largely irrelevant to employees and productivity.
- Productivity improvement is being jeopardised by claims that seek to reduce employer decision-making on the use and choice of contractors, employee rosters and overtime.
- Productivity improvement is conceived within the Act as an intermittent feature of business practice. This does not reflect a modern business approach of continual change and adaptation.

Enterprise focus

- The Act has reduced the range of agreement options, notwithstanding continued support by many employees for a greater diversity of arrangements.
- Greater involvement of third parties is jeopardising direct engagement between employer and employee, and competition between some unions for membership is driving new demarcation disputes.
- Some unions have adopted standardised clauses that seek to reinstate union-friendly practices such as training leave for delegates, compulsory arbitration and narrower scope for individual flexibility arrangements. These clauses do not necessarily reflect the needs or preferences of individual employees or the workplace.

Administration and timeliness

- System timeliness is highly variable and outcomes uncertain.
- The highly prescriptive and technical nature of the Act allows it to be used to create delays and uncertainty for employers needing to respond quickly to market changes. It also discourages employees from nominating as bargaining representatives.
- There have been significant management, administrative and legal costs, which are not expected to reduce over time.

- Lack of trust in the system and the way it operates continues to impede constructive workplace relations.

Job creation

- The Act, together with some modern awards and agreements, has created some disincentives to job creation and reduced career pathways.
- Higher costs associated with some modern awards have had the effect of reducing the number of hours available for employees.
- Transfer of business provisions have led to some employees being made redundant where, under the previous Act, they would have been offered ongoing employment.

The removal of the individual arrangement option within the Act has clearly limited flexibility for employers, but so too has it limited options for employees. The overall data show that individual arrangements continue to be important, with 37 per cent of employees having their pay set through individual arrangements, including common law contracts and unregistered agreements. The continued uptake of common law contracts and the refusal by many to take up conversion from casual status suggests the continued preference by some for this option, motivated by access to higher pay, more flexible hours and greater variety of company.

Although many employers continue to achieve business improvements outside the formal agreement-making process, and to maintain their remuneration and performance management systems, they often have to do so in the face of opposition from unions who largely disregard any remuneration or benefits that are not fixed and guaranteed.

As a result, reward for individual effort, the key linking mechanism between performance and remuneration, is undermined and defence of poor performers is once again a major focus of both management union and tribunal attention. The way in which the general protections are being used often brings what can and should be productive conversations between managers and workers into the legal arena and is polluting communication within organisations.

> The company has been proactive in providing leadership development and counselling on how to have effective difficult conversations about under-performance but the legislation has undermined this by creating uncertainty for managers about their powers and the capacity for them to make sound decisions. They feel they cannot have a conversation now with staff about performance without potentially facing a threat of adverse action. And this is in a company in which there is a relatively high level of sophistication in setting and clarifying expectations. The view is that the legislation does not promote or support honest conversations between employers and employees or quick resolution and yet all the evidence suggests that best practice is about resolving differences early and clearly through (verbal) conversations. The uncertainty and risk associated with attempting to avoid potential adverse action claims means that even relatively straightforward matters may unnecessarily grow in complexity and impact on normal business operations. **(Example provided by company.)**

Just as concerning is the way in which the general protections and changed transfer of business provisions are constraining business transformation options and/or strategy implementation. Threats of adverse action claims are being used increasingly frequently and as a result, concern about the potential for adverse action claims and consequential delays or uncertainty leads to options being discounted. The consequences are either

reduced competitiveness – the slow route to loss of jobs – or to make international options more attractive.

Furthermore, changes to the rules relating to right of entry to workplaces, and the encouragement of a competitive market for the provision of union services, has led to a resurgence of entry requests in some areas, with consequent disruption as these requests are accommodated. Increased competition for the provision of bargaining services has also caused some unions to engage in 'hard bargaining' where they focus almost exclusively on short-term gains for their members, rather than looking to the development of more collaborative arrangements that can deliver more substantial and sustainable benefits in the longer term. The re-emergence of competition for membership has also reintroduced pressures for reinforcing existing role and classification systems and against multi-skilling – changes that are essential elements of building better skill utilisation and more productive workplaces.

Consequences

The impact of the features of the Fair Work system described above on Australia's largest companies has far-reaching consequences.

In essence, they limit the flexibility of employers to respond to a particularly dynamic economic environment by aligning production to changed patterns of demand, changed technology and increasingly diverse requirements of the workforce.

Members are finding the Act in operation doesn't support them in deploying their workforces to meet changing circumstances. It is not giving them the flexibility they need to stay competitive by adjusting operating hours, core and non-core activities, and the role of contractors and contracting. It is not giving workers the flexibility they need around where and how they work.

What this means is that the workplace relations system, in its current form and operation, is not supporting an effective match-up between the flexibility requirements of employer and employee at a particularly challenging time for the Australian economy.

What we have instead is a situation where unless an employer has managed to negotiate a highly flexible agreement upfront, they can only make the necessary adjustments through complex, time-consuming, costly and unpredictable renegotiations involving third parties.

Rather than providing the capacity for the flexibility we need, our monitoring of the experience of Business Council of Australia members indicates that the current system is:

- limiting the ability of some businesses to adjust quickly to stay internationally competitive and survive in volatile times
- limiting career opportunities for employees and, in some cases, reducing job security
- constraining business capacity to adapt to Australia's changing economy and demographic circumstances by limiting options for business transformation and restructure
- jeopardising business efforts to improve productivity, the key to wage growth and improved living standards
- leading to increased industrial disruption, which is hurting Australia's international reputation as a reliable supplier
- making it more difficult for companies to meet the diverse needs and preferences of employees
- disrupting workplace culture and relationships as third parties become more active in workplaces, and the rise of adverse action threats is undermining trust and confidence
- making it more difficult to take on people who face employment barriers because of the resistance to more diverse forms of employment
- extending the time it takes for businesses to implement fundamental decisions
- increasing business costs.

Specific provisions: the experience and requests for change

In this part of the submission, the Business Council of Australia identifies the specific areas of concern with the current provisions and operation of the Fair Work Act, their consequences for business and how they might be addressed. In the following sections, examples and quotes from company representatives are used to demonstrate the points made. These do not reflect the extent of evidence found; they are illustrative of what has been presented to us.

1: Bargaining processes: amendments to improve the validity and efficiency of bargaining processes

Relevant Object of the Act: Section 3 Object, and paras (c), (e) and (f)

Refer panel questions: Nos 20–31.

See also '3: Industrial conflict/disputation'

The right of employees to choose to bargain collectively is endorsed and many of our members have maintained collective agreements throughout. In prescribing the bargaining model and the good faith bargaining obligations, the legislation avoids many of the pitfalls of similar legislation in international jurisdictions.[4] One such pitfall is to be over-prescriptive, making it even more technically complex and thereby deterring employees from undertaking their own negotiations. For this reason the BCA does not support further prescription, but rather, clarification and streamlining. This section outlines proposed amendments aimed at doing this.

Forms of employment

As a longer-term issue, however, the reduction in the forms of employment relationship appears to be at odds with emerging preferences among an increasingly diverse workforce. Many members report that many of their employees prefer to negotiate terms and conditions on an individual basis. The extent of this can be seen by the numbers of people whose actual terms and conditions are regulated by common law contracts rather than industrial instruments. We believe therefore that a forward-looking workplace regime that takes account of the growing diversity of the workforce and its needs will, in the longer term, require a fuller menu of employment options than that which is currently provided.

One of the main advantages for both the employee and the employer of individual arrangements was that the employment relationship is between the employee and the employer and not through a collective agreements or third party representation. As one member put it:

> Employees therefore believe they have more ownership and responsibility of the employment relationship and workplace conditions generally. Many employees seem to prefer to work in non-union sites because they tend to create an environment of stability of employment with no industrial disputes or action. Also, the working conditions for individual agreement employees and staff employees is almost aligned through their employment contacts. Therefore there is little differentiation between the two groups creating an employment system of alignment rather than differentiation. There is risk, however, of this alignment being disturbed once the basis of negotiation and bargaining changes, particularly in response to national or external agendas. **(Example provided by company.)**

Productivity

Experience under the Fair Work Act suggests that most collective agreements have been wages-only deals. The bargaining framework has not promoted discussion and uptake of measures to improve workplace productivity. Where employers have sought productivity improvements as part of the agreement, they have generally been rejected by union bargaining representatives. In many instances, where employers have managed to achieve productivity improvements in their agreements, it has only been

[4] Business Council of Australia, *Embedding Workplace Collaboration: Good Faith Bargaining*, January 2010.

through protracted and difficult negotiations that have exacted a high cost in management resources, legal costs and division within the workplace:

> Bargaining processes have lasted for more than 12 months at which time the business has limited ability to introduce any form of change, even if unrelated to the employment relationship. A significant amount of leadership time is spent reacting to varying negotiation positions and threats of industrial action diverting attention away from running or growing the business. Furthermore, whilst above CPI wage increments are seen as a starting point by bargaining representatives – reciprocal productivity improvements are not viewed as necessary, resisted, and in the limited occasions they are agreed – often are not implemented collaboratively. **(Example provided by company.)**

> The case demonstrates that it is possible to achieve productivity improvements under the Fair Work Act but they are extremely difficult to achieve, taking too long and requiring enormous resources. The negotiations eventually delivered a modern flexible enterprise agreement that brings the operations at the site in line with industry benchmarks, eliminates major past restrictions, such as manning and demarcation rules, restraint on engaging contract labour and an insistence on gate seniority. The result will now provide for significantly improved productivity and efficiency and serve as a basis for future investment at the site. However, the process took two years, significant time and resources in applications before FWA and was highly adversarial and confrontational, with threats of violence against employees. After a five-month delay, the case put by the company to FWA that the then agreements seriously inhibited efficiency and productivity was dismissed. The impact on productivity was not a consideration. **(Example provided by company.)**

This outcome has undoubtedly been enabled by certain aspects of the bargaining regime put in place by the Fair Work Act.

Range of matters

For example, in some instances the expansion of the range of matters that can be included in enterprise agreements has led to a shift away from the enterprise focus of bargaining – as where unions have pursued the inclusion in agreements of standardised union-friendly provisions that could not lawfully be included in agreements under WorkChoices. Furthermore, some employers have reported industrial action being taken in support of these standardised clauses where internal ‘polling’ suggested that the provisions in question were of little or no relevance to employees at the worksite (see examples below).

The expansion of the range of matters that can be dealt with in agreements has also inevitably increased the likelihood of industrial disruption for the simple reason that there are more matters on which the parties can disagree. In no case has a member of BCA reported that they have been able to use the expanded range of permissible matters to improve the performance of their business.

Administrative costs

In addition, many members have had to devote considerable time and resources to coming to grips with the good faith bargaining requirements in the Fair Work Act. While initially optimistic that these costs would reduce over time, that optimism is evaporating as experience suggests an overly bureaucratic approach by FWA to many matters. This

is reflected in the Australian Human Resources Institute's most recent survey findings, a survey endorsed by the BCA for completion by members (see Appendix 4).

Culture of bargaining

The great majority of members have reported that the good faith bargaining requirements have not improved the climate within which negotiations take place. For example:

> The behaviour at the bargaining table has never been worse – disrespectful, playing the person and there have been several cases of intimidatory behaviour of non-union reps. **(Example provided by company.)**

> The GFB provisions are totally irrelevant to the bargaining we have experienced … unions move straight to the threat of industrial action. There are real risks in presenting unions with confidential information … there have been instances of confidential information being selectively used to create an impression of safety risks and declining standards in the public domain. This seems to be a standard industrial tactic.
> **(Example provided by company.)**

> The Victorian unions behave exactly the same as under the previous legislation – there is no difference in behaviour under the Fair Work Act. If they are given an opportunity to restrict businesses they will do so. Under the Fair Work Act this restriction has taken the form of diluting IFAs so they provide no opportunity to deviate from the agreement. **(Example provided by company.)**

The BCA notes that the legislation does contain a number of provisions that in principle could be used to address some of the frustrations employers have encountered with the bargaining process. Generally, however, most employers have chosen not to go down this path – principally because they lack confidence in the likely outcomes in the tribunal and the time period in which they might be achieved.

> The bargaining process was unwieldy and cumbersome as a result of the number of bargaining representatives and the late entry of many of them. We could have gone to the tribunal it would have delayed the process further and we couldn't be certain that it would have improved the process anyway … **(Example provided by company.)**

Members have pointed to a number of areas where they believe the bargaining provisions in the Fair Work Act can be improved. For example, many consider that the basis of establishing whether employees want to engage in bargaining is not sufficiently robust. In particular, many question the appropriateness of using petitions as the means of establishing majority support for bargaining. Others point to the fact that there is no formal mechanism whereby continuing support for bargaining can be reassessed when bargaining processes have been long-drawn out, and/or where there has been little active bargaining over an extended period. The BCA considers that there is a clear case for the introduction of some such 'recall' mechanism.

One company that has been engaged in protracted negotiations over more than two years as a result of a majority support determination won on the basis of less than 60% of the eligible employees. It believes that there should be a mechanism available to employers to test whether support for continued bargaining exists. The negotiations

have led to significant distractions in management time when strategic decisions and new products were to be launched. They have also led to large legal and representational costs.

In a second example a company had in place a single common law agreement covering all of its employees on site. All employees had signed the four- year agreement. After only a year in operation, about two thirds of the workforce signed a petition that was then used by the union as the basis for seeking bargaining orders from FWA to commence bargaining for an enterprise agreement to cover the workforce:

> From the outset, the company challenged the methodology of the union's petition. Employees had signed the petition because they had been told that the current agreement wasn't registered, that it wasn't legally enforceable and that by signing the petition they were in effect asking the company to simply register their current agreement. The company presented a second petition signed by the majority of the workforce stating they were satisfied with the current agreement and that they didn't want to pursue an alternative enterprise agreement to cover the workforce. In addition, employees independently presented to FWA a third petition essentially reinforcing their satisfaction with the current agreement. The company also presented to FWA a sworn affidavit by an employee whose signature appeared on the union petition but who never actually signed the document. This development was never comprehensively addressed by the tribunal in its written decision on the matter. However, FWA determined that an independent vote needed to be conducted to determine the actual wishes of employees. The AEC ran the vote in which only two employees voted in favour of bargaining for an agreement. FWA dismissed the union's application. The application was heard by FWA over three separate occasions. Both parties made written submissions and filed various affidavits. From the time employees originally signed the union petition to dismissal of the application by FWA the matter took three and a half months to resolve. **(Example provided by company.)**

BCA members have identified a number of other sources of inefficiency in the system as currently configured. They include the potential for negotiations to be impeded by the presence of large numbers of bargaining representatives – and the capacity for new bargaining representatives to enter the process at a late stage. On occasion this latter factor can result in matters that had been agreed needing to be reopened.

> It is difficult to negotiate the whole package if some aspects are seen as discretionary – for example bonuses of cash and shares. Even though we are paying these regularly, they do not always seem to be taken into consideration by employees when considering the overall package simply because they might not be paid. The process initially was quite unusual and protracted because of the formality imposed by the FWA (both at the start and at the completion of the process). We have quite an open relationship with our employees and suddenly we became concerned about our communications with them and whether we were breaking any rules about good faith bargaining or applying any undue pressure on employees. As such it made it difficult to fully understand their concerns on a one-on-one basis and this was a great surprise to them. This made it difficult for both sides and prolonged the negotiations unnecessarily. The make-up of the bargaining representatives was unexpected – there were over 20 representatives and not all of them were employees or representatives of unions which our employees were members of (which is permitted under the FWA). Having so many representatives made the negotiations complicated and protracted since not everyone realised their roles and what their responsibilities were to the employees they represented. In theory, anyone, irrespective of

qualification or knowledge of the issue, can be appointed a representative. **(Example provided by company.)**

In bargaining for the last enterprise agreement, the company encountered some difficulties due to differences of opinion between its unions and different factions (state-based) within one of its unions. Agreement had been reached on most matters, other than wages. A pay offer to break the impasse was put by the company but because one union could not agree internally whether to accept the offer (disagreement between state branches), it could not be delivered. An option out of this situation was for the company to apply for a good faith bargaining order. However, we felt the prospects of an order being granted were not high and, in any event, any order was unlikely to lead to a successful bargaining outcome while the union divisions remained. **(Example provided by company.)**

The company received 46 nominations for bargaining representatives throughout the bargaining process, including as late as only four weeks prior to the EA being lodged with FWA for approval. By the end of the fifth month of a seven-month bargaining process, the majority of the content had been discussed between the bargaining representatives that had nominated at the beginning of the bargaining process. However, the new representatives wished to raise issues that had been raised and settled earlier. Having representatives nominate throughout the process unnecessarily complicated bargaining for all parties involved … the company was required to give 'genuine consideration' to the proposals and provide responses to all claims, even those from bargaining representatives that joined when the process was in the final stages of bargaining. The late nomination of those bargaining representatives resulted ultimately in a claim for bargaining orders which sought to re-open the entire bargaining process that the group had spent seven months to achieve. **(Example provided by company.)**

Scope of bargaining

Members also reported instances where the scope of bargaining orders was in question and found there could be clarification in the process by which agreement to bargain is made. An example:

The company commenced renegotiation of an enterprise agreement, which has traditionally covered operators in two neighbouring geographic areas in somewhat similar work. Twenty per cent of the group indicated that they wanted to have a separate agreement.

– Claim lodged for separate agreement to cover the smaller site.

– Parties agreed to consider claim in context of overall package settlement, and seek recourse to FWA for a scope order failing a suitable settlement being achieved.

– It became apparent that a minority union and its members were not intending to follow the agreed path for resolving the matter in favour of taking protected industrial action immediately after the nominal expiry date. This was apparently in an effort to force the company to concede to the separate agreement claim – they coined the phrase "do a JJ Richards on them".

– Protected action would cause significant disruption and economic loss due to the integrated nature of the operations.

– Fortunately, negotiations with major unions resulted in separate agreements with common terms and conditions, and critical provisions dealing with transfer of labour between site operations was agreed, without recourse to protected action.

As a result of the *JJ Richards Full Bench Appeal Decision* in June 2011, it has enshrined the ability to access protected action irrespective of Scope Order determinations, significantly increased the risk associated with the enterprise agreement renegotiations. It also confirms the views of unions that there needs to be no attempt to discuss or resolve a matter before taking industrial action.
(Example provided by company.)

In the following table we identify the drivers to these experiences, their consequences and proposed solutions.

1: BARGAINING PROCESSES		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Majority support determinations The Act leaves it to FWA to determine the means by which it will verify claims of majority support. Petitions have been accepted in many instances as an appropriate mechanism. There is no time limit or expiry date on majority support determinations.	Some employers feel they have been forced into bargaining on the basis of unsound evidence of support for bargaining. For those for whom the bargaining process has been extended but sporadic, they report being distracted by bargaining requirements that may have proceeded over a long period without any particular interest of urgency from either unions or employees. Unnecessarily prolongs	Specify in Act that secret ballot is to be the basis for establishing majority support determination (see Appendix 3, BCA Submission to the Minister for Workplace Relations, May 2011). Employee and employer bargaining representatives be permitted to apply for an MSD (currently only employee reps can apply). An employer bargaining representative be permitted to apply to FWA for a further

	bargaining process and its outcomes for majority for sake of few. Inefficient and continues diversion of management resource to bargaining unnecessarily.	secret ballot to test whether there is still majority support for the negotiation of a collective agreement, after a protracted period of bargaining.
Range of permissible matters Removal of prohibited content provisions. Reinstatement and expansion of matters relating to union covered by agreement and employer relationship.	See also 'Industrial Action' Increases the number of matters upon which bargaining can occur (and therefore upon which protected action can be taken.) Some of those matters may not be of direct concern to employees at the site and but represent third party agendas. Reduces enterprise focus.	Expand the range of matters in relation to which it is not permissible to bargain – in particular to make clear that it is not permissible to bargain for/include provision in an agreement which has the effect (direct or indirect) of limiting the employer's capacity to use contract or on-hire labour or in any way to seek to regulate or set the terms and conditions of employment of an employee that is not covered by the Workplace Agreement (see below).

EXAMPLES: RANGE OF PERMISSIBLE MATTERS

EXAMPLE 1

A recent report in Workplace Express (25 January 2012) illustrates the core issues in dispute in negotiations that have been underway for 15 months and subject to industrial action over six months:

"A bargaining document lists the issues still outstanding between the parties as:

- the agreement's application, with the [Single bargaining Unit] SBU wanting safety officers employed in statutory roles to remain covered by the document and step-up supervisors not to be covered, while the BMA wants the reverse
- terms of contracts for temporary employees, with the unions wanting a maximum 12 months and BMA greater flexibility
- the BHP Billiton Code of Business Conduct and Workplace Conduct Policy, which the SBU doesn't want referred to in the new deal while BMA does
- training, with the SBU opposed to give non-EA covered employees training preference, while BMA wants no restrictions
- contractors and labour hire, with the SBU seeking agreement rates and conditions and BMA the 2007 arrangements
- payroll deduction of union dues, which the SBU wants and BMA doesn't
- super, with the SBU seeking 12% and the BMA offering a fixed-dollar

contribution above the 9% legislative minimum

- breaks, with SBU maintaining they shouldn't include wash-up times and BMA arguing for the status quo, where breaks are exclusive of travel time but inclusive of wash-up time
- a third crib break on night shift, which the SBU is seeking and the BMA rejects
- personal/carer's leave, with the SBU wanting a reference to disciplinary action over the leave removed from the agreement, which BMA rejects
- community service leave, with the SBU seeking paid leave for attending voluntary emergency training
- redundancy, with the SBU wanting a return to the more generous 2004 levels for Gregory mine
- representation, with the SBU seeking the return of pre-WorkChoices representation rights
- medicals, with the SBU wanting paid leave to attend statutory health assessment when not rostered- on to work, and BMA offering an hour's pay at overtime rates where an employee can't attend during rostered working hours.

On wages, the SBU has said all along it wanted terms and conditions sorted out before it talked money, while [the company] BMA has offered 5% annually. The SBU also hasn't agreed to BMA's $15,000 annual bonus offer.

Smyth said that site-specific negotiations had also reached an impasse on issues including housing and scheduling. While those talks were separate to the main negotiations, he said unions still regarded them as part of an overall package that had to be agreed.

BMA asset president Steve Dumble said it a statement that the outstanding issues were largely those items that would limit the company's ability to manage its business effectively. He said the key issues holding up progress related more to union "benefits" then benefits to employees."

EXAMPLE 2

The company faced three major industrial disputes, the most intractable components of which were union bargaining claims that sought to regulate, control and reduce the company's access to third party labour and/or business services and control business strategy and the opportunities for the business to improve productivity.

For example, one union made claims that included the building of a new heavy maintenance facility fully tooled and staffed, restrictions on third party providers and defining the scope of the work to restrict access to productivity improvements and technological and regulatory changes as well as excluding other union's members from undertaking certain new functions.

A second union claimed explicit controls and constraints on the company's use of contractors.

The third union sought to use the current legislation to in effect regulate the terms and conditions of employment of employees who work for other companies, whether associated entities or not. The relevant triggers for the application of the claim would be the use of a shared service number by an associated entity, or the use of any element of the company's branding.

The claim seeks to:

- override or supplement terms and conditions already set under applicable agreements approved by FWA or its predecessor
- override or supplement terms and conditions set for employees of other companies who are engaged in and reside in another country and who work under contracts set in accordance with the country of residence and citizenship (including New Zealand, Singapore and the USA)

The purpose of the claim is to influence the company's business strategy including the development of multiple differentiated brands. Its actual economic and business impact if conceded would be to weaken Australian-based companies relative to their international competitors and partners.

In addition, company payment for officials performing union duties has been claimed by one of the unions.

1: BARGAINING PROCESSES (continued)		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Number of bargaining representatives Fair Work Act allows for employees to appoint bargaining representatives; the union is the default bargaining representative in respect of its members. The Act is still technically complex and the process of bargaining resource-intensive. The Act seeks to facilitate 'competition' for bargaining services and therefore does not limit either the number or entry point for representatives.	Few employees have nominated themselves as their own bargaining representatives. Nor are there many instances of employees (or other non-union parties) being nominated as bargaining representatives for work-groups. Instead, employees appear to prefer to leave the process to better-resourced unions. On the other hand, where employees have self-nominated they have tended to focus on specific issues rather than the broad array of matters upon which bargaining is required and/or to represent only a small group of the workforce, leaving many represented only through the default representation provision. Old union demarcation disputes have re-emerged at the expense of employers when industrial action is taken. Some employers feeling the need to compromise earlier than would otherwise to avoid attracting attention of a new union with which they have no relationship.	In principle, BCA supports further simplification of the Act with a view to empowering employees to undertake negotiations directly with employers.

1: BARGAINING PROCESSES (continued)		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
No time limit on entry into bargaining process	Unnecessarily prolongs bargaining process and its outcomes for majority for sake of few. Inefficient and continues diversion of management resource to bargaining unnecessarily.	Impose a time period of 14 days for nomination from the date of issue of the last notice of representational rights, but with a reserve power for individuals/employers to change their representative at later point in the process – for example, where they consider that their existing representative is not adequately representing their interests.
Scope of bargaining	The effect of the decision of the Full Bench of FWA in *MSS Security Pty Ltd v LHMU* [2010] FWAFB 6519 is that a union can require an employer to issue notices of representational rights to all employees in relation to whom the union wishes to bargain, even though significant parts of the workforce may not want to be covered by the agreement sought by the union, or by any agreement.	Limit employers' obligation to negotiate to those employees in relation to whom it has agreed to bargain, or who are covered by a majority support determination or a scope order.

2: Flexibility arrangements: amendments to strengthen flexibility arrangements for both individuals and employers, and remove the capacity to restrict the use of contractors

Relevant Object of the Act: Section 3, Object and paras (a), (c), and (f)

Refer panel questions: Nos 13, 14

Particular clauses are being used to limit the flexibility of employers. Two are of particular concern. The first relates to the limitations placed in the Act and subsequent negotiations on individual flexibility arrangements. The second relates to the pressure to restrict or regulate the use of contractors and/or hiring practices.

One of the ways in which flexibility for employers was to have been assured under the Fair Work Act was through the requirement that modern awards and enterprise agreements include a flexibility term allowing for the making of individual flexibility arrangements (IFAs), subject to the BOOT. A model clause was adopted as part of the award modernisation process, and is the default clause for enterprise agreements by force of s 202(4) of the Act.

The model clause is included in all modern awards, and in almost 60 per cent of enterprise agreements. However, in many instances BCA members have found that unions have not been prepared to reach agreement on flexibility terms that provide more than a minimal level of flexibility , and even where agreements do include more expansive flexibility terms (such as the model clause), they appear to be little used in practice. This is because employers feel that it would not be worth the effort and expense of putting individual arrangements in place because they are both limited in scope, cannot be offered at employment and can be terminated on just 28 days notice.

> The ability to enter into individual agreements with employees in the workplace is virtually non-existent. The modern award flexibility provisions do not allow us the same flexibility compared to the individual agreements under the previous legislative regime. The current flexibility agreements are restricted to a number of specific areas and also either party can terminate the agreement with 28 days notice. With the negotiation of enterprise agreements the union movement has sought to nullify the flexibility clauses with re-worded clauses that are incorporated into the agreement. Individual agreements under the pre-existing industrial relations system gave employers and employees with the company the capacity to negotiate benefits to all parties. This can be exemplified by matching starting and finishing times to bypass the hottest parts of the day, especially in North Queensland. **(Example provided by company.)**

> We have found in negotiations that unions … will not accept the model [IFA] clause and insist it being diluted even where employees want the flexibility or don't care about the wording. The insistence has unnecessarily prolonged the bargaining process and strikes have been called in relation to it.
> **(Example provided by company.)**

Standardised clauses sought by several unions would operate to restrict flexibility previously available to individuals. For example, the endorsed items for one union agenda sought to ensure that the industry had no casual employment and any job share arrangements or fixed-term contract arrangements were opposed, making it difficult for employers in that industry to address work–family and gender issues.

> In the unionised part of the business unions were very quick to quash discussion of the model clause on individual flexibility arrangements. This has inhibited the development of family-friendly work arrangements in our blue-collar shift environments. **(Example provided by company.)**

As recently highlighted in negotiations with labour hire companies, one union has insisted on a clause that forces automatic casual to permanent conversion irrespective of individual or business desires. Yet one company has found that there has been no take-up as a result of letters that have been sent to eligible employees, and follow-up internal polling indicates a strong motivation by employees to retain their casual status. The three key reasons given include higher pay rates, more flexible hours and greater variety of employer.

Several members pointed to the differences between unionised and non-unionised sites, with the latter being characterised by much higher levels of flexibility, multi-skilling and productivity. The extension of restrictions on the hire of contractors to include the re-emergence of preferred hiring practices has also had consequences for the quality of work performed and the level of ongoing industrial disputes once agreements have been implemented (see also 'Greenfield projects').

> Unions in bargaining have generally undermined the intentions of the legislation and the model clause. Although some previous flexibility has been preserved, generally union agendas are overriding employee agendas. Where there is no agreement and no union presence then the company relies on the award, market rates or its client agreement. The company pays what is necessary to attract the numbers and quality of employee required. Employees are pretty flexible and so specific flexibility arrangements are unnecessary. These are managed through common law contracts. Where the company needs flexibility arrangements is where unions are present and they then need to deal with rosters, manning levels, hours worked, length of shifts, start/finish times and how penalty rates apply. **(Example provided by company.)**

> The ability to achieve mutually beneficial and flexible working arrangements with employees has been constrained by continual opposition by unions in the negotiation process. Even the model flexibility clause in the regulations is not permitted, with IFAs being watered down to matters that ultimately restrict employee choice and constrain employer efforts to achieve flexibility and productivity in the enterprise. **(Example provided by company.)**

Furthermore, as a result of the expanded range of matters that can be subject to bargaining, together with interpretation by some FWA commissioners of what matters pertain to the employment relation in the requisite sense, several unions have insisted upon the inclusion in agreements of clauses that would limit whether, how or on what basis the employer can use contractors or on-hire providers. This inevitably limits the capacity of employers to respond to changing market conditions or to make best use of the skills of their employees.

> The reverse of the contractor clauses are the insertion into employers/clients agreement of clauses that require contractors to be paid at the higher rates of client agreement. The company has agreed to a clause in some agreements so that it meets clients' rates where it is vulnerable and they are not able to refuse them without jeopardising continuity of services, for example in the electricity industry. **Example provided by company.)**

Finally, the BCA also notes that the government has treated this model clause differently from to the model dispute resolution clause (which includes compulsory arbitration as the last stage of the process) in the Fair Work Principles which now regulate government procurement. Unlike the dispute resolution clause the IFA clause does not have to be included in enterprise agreements that apply to business organisations seeking government procurement contracts.

In the following table we identify the drivers to this experience, the consequence and propose solutions:

2: INDIVIDUAL FLEXIBILITY ARRANGEMENTS AND CONTRACTOR CLAUSES		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Individual flexibility clause Union opposition to entire concept of IFAs on the basis they are AWAs by another name, and therefore undermine collective agreements. The usefulness of the IFA mechanism is reduced because: (1) offers of employment cannot be made conditional upon agreeing to make an IFA (2) IFAs can deal with only a relatively limited number of matters (3) IFAs can be terminated by employees (or employers) with 28 days' notice.	IFAs were intended to provide for some of the flexibilities that were formerly available for employers through AWAs. The model clause was debated hard as part of the consultation process, and the model clause was the resultant compromise. The provisions have been rendered ineffectual in many instances, with the consequence that flexibility has been eliminated for employers but boosted for employees through their capacity to agree limited flexibility under this clause, and the additional rights to request flexible working arrangements under the NES.	Mandate the model clause (Appendix 3 of this submission). Amend the Act to make it permissible to make offer of employment conditional upon agreeing to enter into an IFA. Amend the Act to provide that IFAs are to be terminable on 28 days' notice, or such longer period as the parties may agree in writing. As a point of principle, the BCA believes that there should be a full menu of employment options for employers and employees.
Contractor clauses Extended range of matters allowable, plus some FWA members' interpretation of what matters fall within the 'matters pertaining to the employment relationship'.	If successfully negotiated, clauses that restrict employers' use of contractors limit management's flexibility and capacity to respond to market conditions.	Remove ambiguity arising from previous decisions by outlawing clauses that are intended to/have the effect of inhibiting use of contractors/labour hire (see Appendix 3 of this submission).

3: Industrial conflict/disputation: amendments to reduce the capacity for unnecessary industrial disruption by removing enablers in the legislation and providing employers with more capacity to respond

Relevant Object of the Act: Section 3, Object and paras (a), (e) and (f)

Refer panel questions: Nos 52–61

The BCA notes that the Act continues to restrict the use of industrial action except in certain circumstances. However, members are reporting that resort to protected industrial action is often premature and undertaken in such a way that it imposes significant costs on employers, with minimal cost to employees and that they have few options available to them to counter this. This problem is particularly acute in situations where union bargaining power has been enhanced as a result of labour market shortages and/or negotiations relating to time-critical projects.

The recent increase in formal days lost show that the tendency to take action is rising, consistent with the qualitative data received from BCA members since 2009. They reported early in the operation of the Act a rise in the incidence of threats of action much earlier than in previous rounds and that applications for protected action ballot orders were frequently being lodged after only one or two meetings. This occurred in some sites where previous rounds of bargaining had not led to any time lost.

The Full Bench of Fair Work Australia in the *JJ Richards Case* means that it is possible to seek a protected action ballot order in circumstances where the employer has not agreed to bargain, and where the union concerned has not obtained a majority support determination or scope order: in other words, unions can take industrial action to force employers to bargain. This has the effect that the Act's good faith bargaining regime processes, involving majority support determinations, scope orders and good faith bargaining orders, can be bypassed and effectively undermined by allowing access to protected industrial action, irrespective of determinations by Fair Work Australia regarding majority support determinations, scope orders or good faith bargaining orders.

Several provisions of the Act are operating in combination to enable this increased industrial action. They include the expanded range of matters upon which there can be disagreement (see 1); the encouragement the Fair Work Act gives to competition for bargaining services, and the basis upon which unions are choosing to compete (which is leading to a re-emergence of the old demarcation disputes); the extended rights of entry for union officials that enable more active recruitment and encouragement of conflict; the acceptance by FWA that hard bargaining is not inconsistent with good faith bargaining; and the reduced range of options available to employers to retaliate to action by employees.

This state of affairs is at odds with both the government's assertion at the time that the Act was introduced that industrial action would be a last resort and the Act's stated intent of establishing a basis for more collaborative behaviour at the workplace. This increased preparedness to threaten, and to take, industrial action has inevitably served to damage the competitiveness of many businesses, both in terms of cost and of security of supply.

The BCA further notes that the pattern of industrial action is one whereby unions inflict maximum disruption upon employers with minimal pain for them and their members. This includes notifying industrial action for a certain date(s), and then cancelling the notified action at the last minute – the employer meanwhile is put to the trouble and expense of making contingency arrangements to minimise the impact of the projected action.

> The union has deliberately called six-hour stoppages that have maximum disruption to production processes and minimal to pay packets … the industrial activity has been on sites that have, for the past decade, been through negotiations without any lost time. **(Example provided by company.)**

> A two-hour stoppage for a production facility takes about two weeks to safely get production back up and costs us at least $24 million. **(Example provided by company.)**

> There is a pattern of employees providing notice for industrial action, the business implementing costly mitigation strategies, then employees withdrawing the notice at the eleventh hour. Good faith bargaining provisions then prevent an employer from enforcing the bargaining representatives' initial decision to take industrial action, and the ability to engage in employer-response action may not be possible. This circumstance significantly disadvantages one party in the bargaining process. **(Example provided by company.)**

Some members have also reported that they have been subject to industrial action in relation to trade union security issues (such as paid leave for union training or other duties, notice boards, provision of facilities) that were of little interest to employees in the enterprise. This again seems to raise questions about unions' commitment to enterprise-based and focused agreements.

In relation to unprotected action, members report that FWA has generally responded speedily to applications for return to work orders under s 418 of the Act. However, some members have found that the delays and agreements made in relation to penalties imposed by the Federal Court mean that the compliance regime is still weaker (and therefore the incentives to observe the letter and the spirit of the law are weaker) than they could be.

As a result, the BCA strongly believes that:

- it should not be possible to seek a protected industrial action ballot in order to try to force an employer to enter into negotiations unless the union concerned has first obtained a majority support determination. In other words, the Fair Work Act should be amended so as to reverse the effect of the *JJ Richards* decision
- there should be more options for employers to respond to threatened action.

3: INDUSTRIAL CONFLICT/DISPUTATION		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
The Act continues the right to protected action once bargaining has begun, subject to obtaining a ballot order from FWA, and employee support in a subsequent ballot. However, the Richards Case, although currently on	Early industrial action seen as a softening up tactic not conducive to good faith bargaining; introduces/strengthens cynicism among employers. Nor is it conducive to development of productive	Legislate to require that majority support determinations (MSD) be obtained before protected action ballot orders can be obtained (See Appendix 3 of this submission).

further appeal, has decided that a majority support determination is not required before protected action ballot can be sought in situations where the employer has not yet agreed to bargain. FWA decisions that recognise that there is a legitimate role in the system for 'hard bargaining' on the part of both employers and employees/unions. The Act has reduced the options available to employers to counter industrial action or its threats. Unlike its predecessor, the Fair Work Act does not allow pre-emptive lock-outs or retaliatory action apart from lockouts Those who have sought to have action terminated have not been able to establish economic damage to the threshold required by the Act, even where international supply contracts have been jeopardised. Although many feel the threshold is too high and that a lock-out is not a viable option for brand and market reasons, some have successfully applied lock-outs to break an impasse.	and high-performing workplaces Members report increased and earlier threats of action; data shows increase in working days/lost in last reporting period (albeit coming off an historically low base). The pattern of industrial action/disruption understates the amount of production and service discontinuity. Some employers are experiencing costly disruption to production schedules or putting in place alternative arrangements which are then not required (for example, it takes two weeks to get an oil refinery back on schedule; flights cancelled) but staff have to be paid because action has been cancelled at the last minute. Employers feel they have few options in the bargaining process, and as a result of competitiveness pressures that relate to continuity of supply and enabled by higher prices are making concessions that they would not otherwise make. This undermines the proposition that the Act does not require parties to agree. And is evidence of uneven bargaining power.	Government needs to ensure that there is appropriate weight and resources allocated to dispute prevention rather than dispute resolution (See *Embedding Workplace Collaboration: Preventing Disputes*). Enable FWA to suspend the capacity to take all protected industrial action for a period of up to 90 days in circumstances where a bargaining representative is found capriciously or unreasonably to have notified and withdrawn notice of protected industrial action. Introduce the concept of employer claim action, whereby employers could initiate lock out action in circumstances where employee claim action has been authorised by a protected action ballot. Such action would be subject to the same requirements as to notice etc., as employee claim action. Employer response action should be retained in its present form. Expand the capacity of FWA under s 425 of the FW Act to suspend industrial action for purposes of 'cooling off' – for example by enabling FWA to order suspension on its own motion or on application by the minister or persons who would be adversely affected by continuation of the industrial action. At present only bargaining representatives for an agreement can make such application, although there is provision to extend the list of potential applicants

		by regulation. Note: this represents an alternative to arbitration. If agreement still has not been reached, then in some instances action will resume without a further ballot; in others a ballot to renew authority to take action will be required.

4: Agreement approval: amendments to improve the efficiency and predictability of Fair Work Australia decisions to enhance the credibility of the tribunal

Relevant Object of the Act: Section 3, Object, and paras (a), (e) and (f)

Refer panel questions: Nos 28 and 64

Many members have experienced significant delays in obtaining approval of agreements by Fair Work Australia. This can have an adverse impact upon relationships with employees who are frustrated by delays in the implementation of agreements to which they have already provided agreement. It can also make it difficult for members to advise investors of timing for critical business performance outcomes.

Members have also been greatly frustrated by the approaches to decision-making that have been adopted by some members of FWA – especially in relation to the application of the BOOT. The Fair Work Act requires that each award-covered employee to whom an agreement is to apply must be better off overall if the agreement rather than the modern award applied to them. Some members of FWA are adopting an excessively 'legalistic' approach to the application of this test, and there are significant differences of approach as between different tribunal members – even when faced with essentially the same provision.

There is also a tendency on the part of some tribunal members to assess agreements by reference to a range of instruments, including those that may have been superseded. Although in some instances these are old instruments that are in the process of being phased out, use also appears to being made of some other instruments that are outdated and/or are not relevant to the circumstances dealt with by the agreement. These difficulties are compounded by the fact that some members of FWA have been applying the BOOT by reference to the circumstances of individual employees, rather than classes of employees – despite the fact that assurances were given during the passage of the legislation that the test would be applied by reference to the circumstances of classes of employees rather than individuals.

> Identical agreements were handled by two different commissioners and treated differently. Despite a 90% yes vote and union support, the commissioners both raised issues, but each was different. The lengthy time delays and the absence of a settled agreement polluted the atmosphere of trust between managers and employees. The delays and variability also makes predicting how an agreement will meet the BOOT and the length of time to obtain approval extremely difficult and uncertain.
> **(Example provided by company.)**

> A company has a long-term agreement that has been specifically designed and negotiated to suit its particular business model and competitive environment. That agreement has targeted greater flexibility for both the employees and the business and has resulted in higher productivity and wages over many years. It has been renegotiated under the various applicable legislative frameworks for over 15 years and always overwhelmingly passed the "fairness test" of the day with no concerns. The latest agreement was voted on by 80% of over 20,000 employees, received a 95% yes vote and was supported by the union. In considering the agreement, FWA applied the BOOT against the modern award for individuals rather than classes of employees. From the random sample of employees provided, one individual was considered by FWA to be disadvantaged and as a result, undertakings had to be made. These undertakings resulted in restrictions to rostering provisions that have

led to much reduced flexibility for some employees and the business – effectively a "loss" on both sides. The administrative cost and impost along with the difficulty of dealing with employees effected (some could no longer work rosters that previously existed by their own choice) make it difficult to rationalise where this could be regarded as being in any way an improvement on previous rules. In an effort to ensure that they were negotiating an agreement that would meet the requirements of the new Act, the business had taken their proposed agreement to FWA as part of a "pre-approval"/assistance process. It took FWA 3 to 4 months to provide definitive advice and assistance. Having been given no indication that there were any concerns from that process, the business then took the proposed agreement to a vote. When the agreement was submitted to FWA for approval post the very strong positive vote, issues were raised that might have been avoided if a more consistent interpretation and application of the Act was applied. This then resulted in a further 5 to 6 month process as the business had to re-create and provide an enormous amount of new and different information to FWA, which FWA then took a long time to assess. Feedback from this division and others in the group is consistent with this experience: FWA demonstrates difficulty in being able to interpret the new legislation in terms of its intent, the structure of the BOOT and its relationship to the new so-called modern awards. The latter is confusing and does not incorporate a balanced assessment of either the history of workplace arrangements previously existing within a business, or the specific market in which a business operates. Employees sadly end up very confused and in many cases unduly concerned by the grossly extended processes (both administrative and negotiation) that precede their needing to make an assessment at ballot time.
(Example provided by company.)

One of our businesses recently lodged three agreements with FWA. The three were renewals of existing agreements with minimal changes, in one there was a new spread of ordinary hours. They were updated to recognise the new Modern Awards and the NES. The rates were increased for the new agreements. All three agreements received greater 75% acceptance from employee secret ballots. Employees had selected to represent themselves during the meetings and the employee representatives kept their members and union informed along the way. During the FWA conference the following points were of concern. The company was advised, during the reminder phone hearing call, that FWA had been in contact with a union regarding our submission. There was no correspondence with our business regarding any concerns and/or need for union involvement. We received a "yes" vote for the EA document and employees were not aware that the union had any concerns. During the phone hearing FWA questioned our need for two separate agreements for our testers (whilst we can partially understand FWA's concern), referring to the agreement of another business. This has no real relevance to us as we are not required to copy other companies' agreements or arrangements; we are only required to pass the "Fairly chosen" work group. We were advised that we needed to appease the union concerns before proceeding with any further reviews. The employees' representatives participated in the negotiations and although keeping the union informed, did not invite them to the meetings. The following statement was concerning:
PN61 – *If, however, it is the very clear intention of the company that this agreement is not to permit Fair Work Australia to exercise any arbitral function then I will revisit each and every clause of the agreement, because if there's looseness in the language of any clause and a dispute about the operation of a clause cannot be resolved to finality, then the only way I can then resolve those issues is by carefully*

examining the clauses and, if necessary, expressing concerns and seeking further undertakings about the concerns I've expressed.
(Example provided by company.)

The driver to get an agreement was the modern award. The company's employees are classified under the finance award yet the company is in another sector, which is in very different circumstances. The company could not as a result of external market conditions offer anything that would increase the company's cost structure due to the very difficult financial circumstances applying at the time. The bargaining process involved 32 employee bargaining representatives from across the company and was a productive process. The representatives understood the sector and its particular characteristics. The agreement was voted on by 50% of the company's employees and achieved 86% support. Despite not being at the bargaining table, FWA invited the relevant union to put arguments against various provisions in the agreement and as a result sought further information on several matters, delaying the approval of the agreement. **(Example provided by company.)**

Many find the processes of FWA overly bureaucratic and the forms complex. Delays are experienced when procedural technicalities are found.

The following table outlines the consequences of these delays and requirements and proposes solutions.

4: AGREEMENT APPROVAL		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
There are points of ambiguity in the Act (many of which were identified during consultation on the draft legislation) which, in the absence of legislative amendment, can now be resolved only by case law. FWA is a quasi-judicial body and BCA understands that as such it was considered inappropriate to provide guidance to members as to the exercise of their powers, other than through formal decisions of FWA. The procedural requirements for the approval of agreements, and some of the prescribed forms, are both demanding and complex.	Employers are confronted with continuing uncertainty in relation to the interpretation of the Act, and the timeframes within which matters will be dealt with. These uncertainties are compounded by the demonstrated difference of views between commissioners, unpredictability of who, within a panel, will deal with a matter, and the nature of the process that will be used by the tribunal to deal with matters that are before it. No doubt many of these problems will ease as case law develops, current levels of uncertainty have given rise to very real operational difficulties, and have caused employers to incur significant administrative, legal and management time	Take active steps to ensure that highly credentialed individuals are prepared to apply for/accept appointment to FWA. Provide that FWA must deal with applications for approval of agreements within 30 days of lodgement, other than where there are exceptional circumstances which prevent the matter being dealt with within the prescribed period. That FWA be given a discretionary power to approve agreements where there have been technical (but not substantive) breaches of the procedural requirements. That FWA be required as a matter of priority to undertake a comprehensive

	costs. It has also made it difficult for members to inform investors of timing for critical business performance improvement outcomes. Even when members have had a satisfactory experience themselves, their observation of the experiences of others has undermined their faith in FWA. Some evidence that some employers may prefer to revert to relying only on awards rather than negotiating enterprise agreements because of the expense, time and opportunity costs in terms of management time and the difficulty of meeting BOOT. This works against the enterprise focus and reduces one dimension of competition. (see also *Bargaining Processes*)	review of all forms associated with agreement-making with a view to simplification.
Individual commissioners vary in how they apply the BOOT. Some apply it on a line-by-line basis. Others have applied it on the basis of the impact on individuals rather than classes of employees. Some require/allow written undertakings as a variation to the agreement; while others require revised agreement be put back to a vote.	The need for a full vote of staff for an agreement is costly and time-consuming, and confusing and frustrating to employees who voted the agreement up in the first place, especially where changes are technical or procedural. In some instances agreements have been approved subject to the giving of undertakings in order to protect the interests of one or more individuals. However the employer has then found it necessary to change rosters to offset the additional costs incurred as a consequence of the undertakings. This in turn has resulted in fewer hours being available, thereby	Tighten s 193(7) to make clear that the BOOT can/should be applied on an employee class basis and an overall outcome.

	disadvantaging the majority to protect the interests of a small minority.	

5: Greenfield projects (new projects): amendments to provide more efficient and timely outcomes, and help overcome impasses

Relevant Object of the Act: Section 3, Object and paras (a), (c), (e) and (f)

Refer panel questions: [No direct question(s) in relation to these provisions]

In Part A of this submission the BCA noted the critical importance to Australia's short-term and long-term economic prosperity of attracting and successfully delivering major resources and infrastructure projects.

The Fair Work Act established a new process by which labour agreements for greenfield projects would be set, removing the options previously available to employers to negotiate employer-only agreements or to offer individual statutory agreements. The removal of these options, together with a range of other factors led to a significant escalation in labour costs and delays in completion of capital projects. These additional factors include: the fact that FWA cannot intervene in bargaining for greenfield agreements; the time-critical nature of such projects; skill shortages; and perceptions (especially on the part of unions) that the projects and Australia's resources boom are immutable.

The negotiations and bargaining processes relating to greenfield projects are causing significant problems and need to be addressed urgently if perceptions of Australia's labour market risk and capacity to deliver these large projects is not to be jeopardised. As noted in Part A, costs have already increased, and the risk premiums associated with the labour market have already been increased.

The difficulties that are being encountered in this context provide clear support for the BCA's view that the legislation ought to provide a broader range of agreement-making options in greenfield situations – especially where the relevant union(s) refuse to adopt an approach to negotiation which accords with the avowed intent of the legislation.

In May 2011 the BCA wrote to the then-Minister for Tertiary Education, Skills, Jobs and Workplace Relations drawing attention to its concerns in this area, and offering to participate in constructive discussions to address them. The BCA has not yet received any formal response to this offer.

5: GREENFIELD PROJECTS		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Lack of options available to employers in terms of the forms of agreements they may make. Time-critical nature and scale of projects means stakes are high; points of vulnerability. Desire/need for certainty on labour costs prior to starting a project required by companies and their investors, customers.	Harder for employers to get certainty/predictability in labour costs associated with new projects prior to starting the project. Adding risk to new projects. 'Gun to head' negotiations are leading to increased labour costs and ongoing industrial disruption. Consequences of risks to pipeline of large-scale projects are economy-wide	As a long-term principle, the BCA believes that there should be an option for an employer-own agreements, the term of which matches the duration of the relevant project. Encourage FWA to place greater emphasis on the 'public interest' factor for purposes of s 187(5)(b). Amend the Act to make good faith bargaining

Requirement to deal with all relevant unions and consequent competition between unions for membership. Apparent short-sighted view on the part of unions about short-term benefits in parallel with high commodity prices.	(see the BCA's capital projects study). Projects not yet jeopardised but risks increasing rapidly, especially in comparison with overseas competitors. General view is that there will be no moderation of behaviours and claims until a project is cancelled, however, if it gets to this point the doubt about Australia's capacity to deliver such large-scale projects is heightened with consequences for capacity to attract capital funding.	obligations apply to negotiations for greenfield projects. Failure to negotiate in good faith should enable the making of orders which 1) deprive the relevant union(s) of the capacity to negotiate for the agreement in question and 2) enable the employer to reach an agreement with any other union that has the capacity to represent the industrial interests of the employees who will be engaged on the project. If there is no such union, then the employer should have the capacity to make an agreement with itself. Enable employer to make greenfield agreements where they have not yet engaged or assigned any employees to work on the relevant project. [This would enable an employer to make a greenfield agreement in situations where they will (or may) assign employees who are presently engaged in some other part of their business to the new project.]

6: Transfer of business: amendments to remove unintended, negative consequences for both employees and employers

Relevant Object of the Act: Section 3, Object and paras (a) and (f)

Refer panel questions: Nos 34–36

The transfer of business provisions in Part 2-8 of the Fair Work Act have extended the circumstances in which industrial instruments apply to an employee transferring between business entities. In particular, the new provisions expressly provide that the transfer of business principles apply to both outsourcing, and in-sourcing. This has had major adverse consequences both for those who provide and those who acquire services on an outsourced basis. It is constraining business restructuring options and making changes outside Australia more attractive, with consequent impact for Australian jobs and standards of living. They have also had immediate negative consequences for job security and career development for employees whose work is outsourced.

It is true that the capacity to outsource functions like IT has not necessarily reduced, but doing so now comes at a premium to cover the loss of scale efficiencies. Businesses believe that in passing non-core functions to experts in those functions, they will be better managed. The specialist managers can achieve economies of scale and have the expertise to more professionally manage the specialist staff. This benefits the economy through greater efficiency and through better utilisation of scarce skill resources.

The current transfer of business provisions have several detrimental effects. The first is that there are administrative costs that flow from the need to maintain separate payroll and related systems and practices that are now factored into costs. This represents a diminution of efficiency. Second, staff transfer with their original instruments, reflecting the needs and characteristics of another industry to the one in which they are transferring. This negates the objective of industry-specific instruments. Third to the extent that employers are now discouraged from transferring functions, employees are denied the opportunity to diversify their employment risk by working with organisations that have a wider spread of clients and more extensive career paths.

> The transfer provisions inhibit the ability of the company to transfer employees between associated entities where plants operate in close proximity, especially where the opportunity presents itself in situations where employees could be transferred following plant shut downs or restructuring of operations resulting in surplus labour requirements. The difficulty is when transferring employees to another site the employee's award or agreement covering conditions and pay from the previous operations may vary markedly and cause a situation where employees undertaking a similar role have different rates of pay and conditions.
> **(Example provided by company.)**

> Machinery transferred from one company entity to another company entity, which would see the end of production of a particular product at the originating site. The receiving site would need staff to operate the machine (team of eight). A team with these skills and capabilities would be in redundant roles at the originating site which was adjacent to the receiving site. Both sites have separate and quite distinct EBAs but have common union coverage.
>
> – Transfer of machinery (and labour) triggered transfer provisions.
>
> – Both locations were currently negotiating EBAs with completely different terms and conditions, due to different ownership history.
>
> – The originating site team's preference was to remain as a team and transfer across with the machinery. This was not viable as the originating team's EA would follow the labour across under transfer of business provisions, which would have facilitated employees of the same company, with the same skills, on different terms and conditions, and facilitated a 'cherry picking' approach by unions to upcoming EA negotiations. The team wished to remain as a team and transfer across as their view was "we all work for the same company". The company was not prepared to take the industrial risks.
>
> – The originating site team was retrained and redeployed into different operations at their home site, which would not normally have been possible – they would otherwise have been retrenched.
>
> – Detailed knowledge and experience of the transferring machine operations remained at the wrong site, resulting in inefficiency-related cost issues.
>
> – Had impact on casuals at site as could not make permanent until all full-time employees had been redeployed.
>
> – Uncertainty and general frustration saw the loss a couple of experienced team operators.
>
> – The receiving site had to hire and train from scratch resulting in inefficiency-related cost issues.
>
> – Double-up of training requirements at both businesses.
>
> **(Example provided by company.)**

Members that have used the provision that allows employers to seek exemptions from FWA have almost invariably obtained approval – especially where the transfers have been agreed by the relevant employee/employer/union. However, they question the value-add of the procedure and unnecessary tribunal involvement in an arrangement that is sought by the employee. Further, the de facto need to obtain union support prior to the application being made to FWA constitutes an unwarranted avenue for third-party intervention in the operation of members' businesses.

> This company provides a good example of the bureaucratic hurdles facing large companies that seek to provide employees with opportunities across a range of related entities. The company had longstanding arrangements, in some cases included in industrial agreements, for all categories of staff to apply for positions between entities that each have their own workplace agreements. This includes professional staff, customer service and, engineering and supervisory staff moving between entities. As a result of the transfer of business provisions, the company has been required to make numerous resource intensive applications to FWA for case-by-case orders to prevent the transfer of instruments in these circumstances. In some cases staff have lost opportunities as a direct result of these provisions because an order was not already in place or because of the time periods involved in seeking union cooperation in any approach to FWA. No application by the company has been rejected; equally each application takes considerable resources to process

for what, in all cases, are voluntary moves.
(Example provided by company.)

For other members they have sought to exercise other modes of 'transfer' to provide career development opportunities for employees and as a means of improving skill utilisation within their group. These arrangements are administratively complex and again, appear to be unnecessary in light of the voluntary nature of the transfer.

6: TRANSFER OF BUSINESS		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
The FW Act provides that where there is a relevant connection between an 'old' and 'new' employer, and employees of the old employer are engaged to perform the same work for the new employer, then any industrial instruments that applied to the transferring employees transfer to the new employer. Once transferred, the transferring instrument remains binding upon the new employer until terminated or replaced.	Outsourcing to other domestic providers is less attractive and more costly, even where the wage rates are the same. This is because separate payroll arrangements must be maintained and thus the benefits of scale and improved labour mobility and more professional management are lost. For mergers and acquisitions, the provision means that the benefits of scale or uniform quality can often be achieved only by negotiating single agreements to replace multiple agreements. The process is unwieldy and unpredictable in terms of timing and outcomes and must be repeated for each acquisition. Risk premiums for M&A on labour have therefore increased. Where employers seek lower rates or substantially changed business processes, the incentive is now much stronger to off-shore the work rather retaining it in Australia. Inter-group transfers now involve significant cost or risk for employers. Consequently some organisations no longer offer inter-group transfers; others	Amend provisions to restore 12-month 'sunset clause' for transferring instruments. Articulate more clearly the triggers and tests for in-sourcing and outsourcing (see Appendix 3 of this submission). Amend Part 2-8 to provide that where the only 'connection' between the old and the new employers is that they are associated entities, and the new employer is covered by an unexpired enterprise agreement, then the old employer's industrial instrument does not transfer to the new employer. Interested parties (including unions covered by one or both agreements) should, however, have the capacity to apply to FWA for an order that the old employer's industrial instrument is to transfer.

	do so through administratively expensive work-arounds. This means lower skill utilisation and reduced career development options.	

7: General protections/adverse action: amendments to reduce the scope of the general protections (adverse action claims) to align with other anti-discrimination legislation; re-introduce the 'sole and dominant' test as the basis for claim

Relevant Object of the Act: Section 3 Object, and paras (a), (c) and (e)

Refer panel questions: Nos 37–41

The scope of the general protections for employees and the capacity to take adverse action claims against employers is being used frequently to challenge and delay management decisions, to undermine enterprise agreements that have been approved, and to sidestep internal dispute processes. Most employers are now experiencing a growing volume of both actual and threatened claims. This is demonstrated by the growth in dispute notifications to FWA (275 in 2008-9 to 1748 in 2010–11).[5] The adverse action provisions are increasingly being threatened or used to delay or thwart business transformation for established firms within Australia. They are also being used frequently by external lawyers on behalf of individuals in relation to performance management issues. Both kinds of claim are constraining management behaviour. The first reduces the strategic options available to meet increased competition OR the capacity to implement these in a timely way. The second is affecting the environment in which managers and employees can have constructive conversations about performance which may in fact lead to earlier escalation of an issue than would otherwise be the case. Members report that many claims are trivial and/or lacking in merit. There is a clear need for some kind of effective filter mechanism to reduce the risk of employers having to devote time and resources to responding to trivial and unmeritorious claims, and that ensure that the courts do not have to waste time dealing with such claims. Overall, Part 3-1 of the Act embodies an approach that increases both employee rights and employer obligations, while at the same time reducing the scope for employers to address performance management issues at an early stage. The comparable notion of reciprocal obligation by employees is conspicuous by its absence. These experiences are illustrated in the following:

> Since the FW Act the number of disputes has increased exponentially; we now have hundreds of live disputes, including individual adverse action claims. The wide scope now provided for adverse action claims and the Bendigo TAFE decision make it almost impossible to manage or discipline a union delegate. The effect of the provision is to move from review of an action after the event to one which stops the process; that is, i.e. management processes are now stop-start. Adverse action has been used in an attempt to thwart many dismissals, whether that dismissal was for safety breaches, misconduct or poor performance. What it means is that each dismissed employee has at least two bites of the cherry – unfair dismissal and adverse action. Not necessarily being successful or getting money settlements but enough to 'intimidate' managers on what are already difficult processes. **(Example provided by company.)**

> There needs to be a limit to the number of vexatious adverse action claims. Our experience is that unions are using them as a tactic where there are no other grounds for complaints. Depending on who the complaint is allocated to in FWA, some are quickly dismissed but others press for resolution to a non-issue. Because unions are typically using these to thwart performance management processes for poor performers, it is making an already difficult process of performance

[5] Source: Fair Work Australia Annual Report 2010–11, Table 2.

management even more difficult for managers. The latter are becoming wary of entering into difficult conversations for fear of attracting an adverse action claim. **(Example provided by company.)**

Another issue that arose from bargaining was the unions' use of the adverse action provisions. The breadth of the provisions meant that actions taken by the company to mitigate against industrial action and keep its business operational were able to be characterised by the unions as a potential breach of the adverse action laws. The company believes the provisions are too broad and leave open the possibility that sensible business actions or inadvertent breaches give rise to claims. For example, we required our field workforce (i.e. employees who repair our dispersed infrastructure) to return their operational vehicles (work vans) if taking industrial action. This was necessary so the vans (and the tools and equipment contained in them) were available to colleagues or contractors to perform work if required. The company was the recipient of claims that we were taking adverse action by removing operational vehicles.

We also had employees working away from their home base in a remote area of Western Australia. One union issued notification that this work group was taking protected industrial action and the employees made their own way home to Perth. They then advised that they were planning on resuming work and requested that the company pay for flights back to their work location, a request which we refused. Again, this was the subject of an adverse action claim. Although these matters did not proceed to a full hearing, managing the claims was time-consuming and caused further expense to be incurred by way of legal fees. The union's use of the adverse action provisions in this manner demonstrated the very real potential for these provisions to become another tool for unions to achieve particular bargaining outcomes (even where employer action is reasonable and not ultimately in breach of the provisions).
(Example provided by company.)

The company has received several general protections/adverse action matters. All claims were pursued via lawyers, not unions, and have background links to workers compensation claims or redundancy claims. Claims have little if any merit and tend to be used as a vehicle for pursuing redundancy or ex-gratia payment. The company believes that in combination, the broad scope of the general protections and adverse action are too broad, the reverse onus of proof and FWA conciliation before proceeding to the Federal Court, means claims don't have to be substantiated at the front end of the process. There have been significant costs incurred to prepare defence.

Example A was a wages employee (operator) terminated, after written warnings, for failing to notify of absences and/or provide evidence in support of absences as per specific instructions in warning letter. However, Example A was represented by the union throughout the process and recommended he take a negotiated termination arrangement, but he declined and subsequently lodged an adverse (GP) claim. Example A also has an unrelated and ongoing workers compensation claim and the same lawyer running his workers comp is now running his GP's claim re: adverse action and breach of workplace rights (claims employer contrived circumstances and terminated him on a technicality – i.e. terminated because he took sick leave not because of failure to comply with notification and evidence procedures) – seeking

redundancy and change to reason for termination to reactivate weekly workers comp benefits. Conciliation before FWA – matter not settled and potential Federal Court action pending.

Example B was a staff employee (planner/scheduler) on long-term workers comp and was terminated, based on medical evidence, due to inability to resume full normal duties. She presented with increasing restrictions and ultimately no suitable duties available, hence termination. Example B lodged GP's claim re: adverse action and breach of workplace rights – related to raft of w/comp and related return to work, and discrimination related rights – sought substantial redundancy payment in settlement. Conciliation before FWA – negotiated settlement agreed at approximately quarter of claim, and significantly less than legal costs involved in defending claim.

Example C is a senior staff employee refusing reasonable changes to role and claiming redundancy. Gone off on sick leave and engaged legal representation who have foreshadowed Breach of Contract court action and/or potential GP's claim, and has made related bullying and harassment allegations. Seeking substantial redundancy.
(Examples provided by company.)

There is an increasing trend to pre-emptive action with current employees looking to circumvent appropriate performance management. This is popular with litigant law firms. The problem in these circumstances is that the performance management is essentially suspended until the FWA conference is conducted and continuation of performance management after this is problematic under threat of further action. A recent matter was based on an alleged breach under s 346 – i.e. singling out an employee for performance management because that employee is a union delegate. Under the reverse onus of proof, it is difficult to prove that the employee is *not* being singled out. Under previous legislation, an employee would be able to intervene if there was an allegation of discrimination through the respective state discrimination jurisdictions or the AHRC. Alternatively, the employee could allege a breach of enterprise agreement, award provision or freedom of association provisions. These were rarely used. The current situation is turning into a lawyer's picnic. There is little substance to the claims, and in some cases, the applications do not even bother to particularise the matter.
(Example provided by company.)

7: GENERAL PROTECTIONS/ADVERSE ACTION		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
The General Protections provisions extend the range of employer behaviours that can be challenged as 'adverse action' on either 'workplace right' or 'industrial activity' grounds. Employer concerns in this context are compounded by the fact that there is a reverse onus of proof in general protection cases. The Federal Court decision in the Bendigo TAFE case has given rise to a perception that workplace union representatives are 'untouchable' in terms of performance management etc.	Good practice suggests grievances are best dealt with early and in discussion between the person and nearest relevant manager. Yet the adverse action claim takes the matter out of the organisation into FWA and/or the courts, thereby marginalising the internal processes (which are also required by the Act) and making managers wary of having what are already hard conversations. Even within organisations which have made substantial investments in culture, direct engagement and management development, the rise of adverse action claims is leading to a legalistic and constrained communication. This is exacerbated by the common view among employers that the Bendigo TAFE decision, now subject to appeal, means that unconscious discrimination might still be found to be unlawful. Claims which consume a large amount of management time and give rise to legal costs in relation to relatively minor matters that never make their way into court, let alone result in adverse findings against the employer.	Bring the general protections back into line with other anti-discrimination legislation; reduce scope by returning to the 'sole and dominant' test (See Appendix 3 of this submission). Monitor the outcome of the High Court proceedings in the Bendigo TAFE case, and amend legislation if the outcome does not reflect a satisfactory balance between the interests of employers and employees. Modify the compliance provisions in Division 8 of Part 3-1 so that: all alleged adverse action cases (not just those involving termination of employment) must be referred to FWA for conciliation; if FWA forms the view that a court application in relation to the complaint would not enjoy a reasonable prospect of success, it must issue a certificate to that effect; a complainant who wishes to proceed with an application to the Federal Court or the Federal Magistrates Court in the face of such a certificate must obtain leave of the court to do so, would not be entitled to the benefit of the reverse onus provision in s 361, and would be exposed to the award of costs in the event that the application was unsuccessful.

8: Modern awards: review the modern awards to address anomalies between awards and ensure that they allow companies to be competitive

Relevant Object of the Act: Section 3, and paras (a). (b) and (c)

Refer panel questions: Nos 8–11 and 13–19

The modern awards process has led to a major streamlining and simplification, and government should be applauded for this.

However, while many awards allow businesses to compete successfully, others do not. The latter – especially in the retail, accommodation and entertainment sectors – do not reflect current operational realities and consumer preferences, where hours of operation are not Monday to Friday, 9am to 5pm.

Other issues that need to be addressed in this context include the fact that some awards have omitted some key provisions (for example, cashing out of annual leave and annualised salaries), and the retention of even a small number of occupation-based awards has meant that employers have to deal with differentials within groups of staff, separate human resource and payroll administration and inappropriate operating models within certain industries.

A number of members have expressed concern at the fact that, contrary to undertakings given prior to the 2007 federal election, enterprise awards that have not been modernised are to expire at the end of 2013. These concerns are compounded by the fact that FWA has rejected most, if not all, modernisation applications that have come before it. This has the effect of removing one more option for employers in seeking to respond to the competitive pressures with which they are confronted.

8: MODERN AWARDS		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Government policy: (a) recognises the concept of 'anti-social' hours and assumes that there is a need for compensation for working such hours; and (b) seeks to reflect the notion that no worker would be worse off and no business face higher costs as a consequence of the modernisation process. In the event, greater weight was accorded to the 'no worker to be worse off' limb of this commitment, although a transition period was agreed for implementation. Old awards had been superseded by individual instruments that meant the hours and rostering structures	Many businesses in the affected sectors now face significantly higher labour costs as a result of the introduction of modern awards. The effects are different between states and sectors, but most modern awards were based upon the highest common denominator. Identifying the appropriate award pay rates continues to be a complex and difficult process for both employers and employees. The fact that many employers who are found to have breached their award obligations in relation to rates of pay are considered to have done so	The BCA notes that the review's terms of reference exclude award review matters. However the BCA feels it appropriate to point out the need for modern awards to be future-facing rather than reflecting the best of the past. In other words, they must be fit for their purpose in terms of meeting competition. This suggests that the underlying government policy on anti-social hours that favours workers over consumers and does not reflect the current trends in demand is at the root of current problems for some sectors. The adoption of a

overridden. Greater effort given by government agencies to enforcement, starting under Work Choices, means that employers (especially small businesses) can no longer ignore award obligations with (relative) impunity.	inadvertently is evidence of the need for further simplification. One effect of the re-introduction of penalty rates has been that flat all-inclusive rates favoured by employers as budget forecast and control tools have been made redundant. Some businesses have managed through EBAs to reintroduce flat rates and to renegotiate the shift structures to reduce their exposure, especially in 24x7 operations. However, to offset their higher costs they have rationalised rosters and reduced the number of hours they offer (that is, they employ fewer people).	'preferred hours' provision would better match the requirements of consumers, employers and many employees. Awards need to be simple and straightforward for both employers and employees. All modern awards should be required to include provision for annualised salaries. This provision could appropriately be based on cl 17 of the Clerks – Private Sector Award 2010.
The modern awards were developed by the AIRC in accordance with the applicable legislation, and government policy as reflected in numerous iterations of the Award Modernisation Request. The tribunal's decisions also took account of submissions made by unions, employer associations and individual businesses. They reflect different inputs.	Some employees are now covered by awards who had not previously been so covered. This includes some white collar staff within professional services firms where historically common law contracts have prevailed. Many staff were affronted by being 'de-professionalised', and have not understood that the changes were a result of legislative change as opposed to employer policy. Created some suspicion. Because some occupational awards have been retained, staff within the same workgroup may have differential benefits, not have access to benefits previously provided by their employers (for example cashing out of annual leave) or be entitled to terms and conditions at odds with the standards of the industry in which they work (for example clerical	

	staff on FIFO shifts).	
Some aspects of the Act relating to awards are unnecessarily complex – for example the provisions concerning the application of awards to high income employees.	These provisions are so complex that many employers simply do not attempt to take advantage of them, with the consequence that awards continue to apply to significant numbers of employees where it may not be appropriate or necessary for them to do so.	Amend the legislation to remove the need to provide a guarantee of earnings, and simply stipulate that no modern award is to apply to any employee who earns more than the prescribed amount.
Enterprise awards are due to cease operation at the end of 2013 unless 'modernised'.	The removal of enterprise awards removes one further option for employers and requires more work with FWA.	Honour commitment and allow enterprise awards to continue.

9: Australian Building and Construction Commissioner

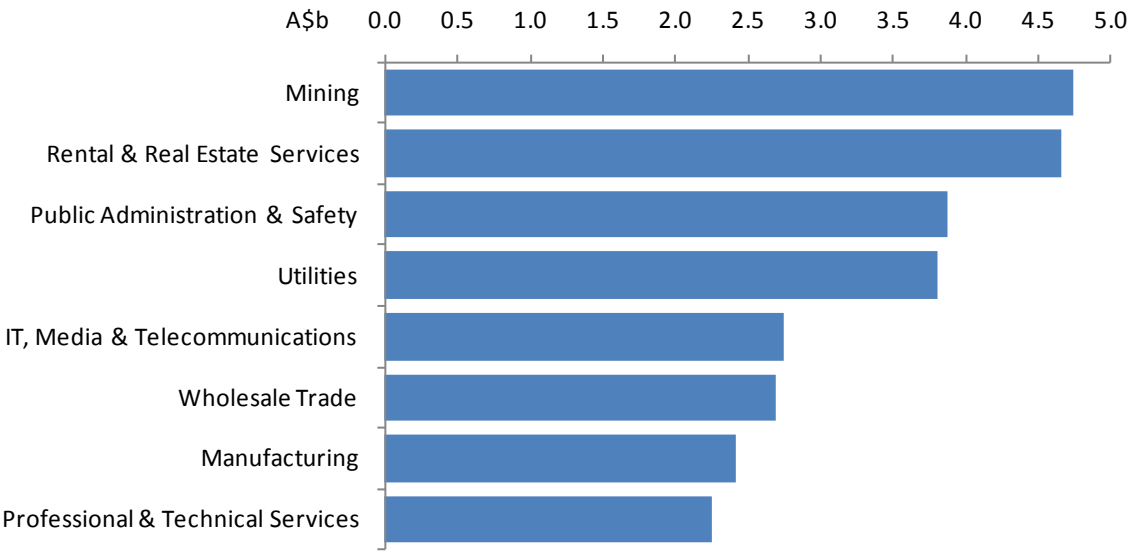
Relevant Object of the Act: Section 3, Object and paras (a), (e) and (f)

Refer panel questions: [No specific questions directed to this issue]

See also 5 regarding greenfield projects

The building and construction industry accounts for 7.7 per cent of GDP, making it the third largest industry by output in Australia. However, its significance extends beyond that, with much of its output used as an intermediate input to other industries. Figure 4 illustrates the nearly 10 per cent of construction output that is used as an input into selected key industries. Construction undertaken for other sectors affects the capacity of those sectors to achieve increases in output and productivity. It also affects the capacity to respond cost-effectively to the demands of individual consumers through the residential real estate markets. Further information on the sector is included at Appendix 5.

Figure 4: Value of construction output used as an intermediate input into other key industries



Source: ABS, Catalogue No. 5209.0.55.001, *Australian National Accounts*, Annual Input–Output Tables 2007–08, Table 5.

The re-emergence of restrictive work practices – such as fixed manning levels, restrictions on the use of contractors, and inflexible roster arrangements – have resulted in significant reductions in productivity and major cost overruns within the sector. Experience on the Victorian desalination plant furnishes a particularly telling illustration of these difficulties.

Industrial disputation has again increased on major construction projects with pressure on employers and contractors to accept claims that undermine productivity, lead to increased costs and exacerbate skills shortages. This pressure arises because any delays typically give rise to significant additional costs from liquidated damages for late delivery and/or program acceleration expenses (including extra overtime); and extended costs of hire and rental of equipment including cranes, mobile plant, and sheds.

Moreover, this becomes a spiral. New rates establish new benchmarks that other projects must meet or exceed. For example, we heard of the additional premium

commanded for projects in Victoria based on historical relativities with other states, such as WA, that are no longer relevant in terms of the distance and skill shortage issues now applying in WA and Queensland.

Sub-contractor tender prices will rise. Those that have survived will factor in premiums to counter expectations about potential delays. And to the extent that many sub-contractors do not survive because additional costs imposed after tenders have been settled mean there is reduced competition in the sector.

Disputes (days lost) have risen recently, reversing some of the reduction achieved since the introduction of the ABCC. Although critics of the current legislation point to its discriminatory nature, the building and construction industry consistently loses more days per 1000 employees due to industrial disputes than the average of all industries in Australia and has been more often characterised by intimidatory and violent behaviour, as documented by the Cole Royal Commission, the most recent reviews and confirmed by the factual circumstances that led to a number of recent decisions of the Federal Court and the Federal Magistrates Court.

Some of the most recent disputation relates to the re-emergence of competition between unions for membership – notably that between the AWU and the CFMEU.

The BCA notes that the government remains committed to the abolition of the ABCC, but that it proposes to retain a separate division in FWA to deal with the building and construction industry. It is of the utmost importance that these changes do not lead to the re-emergence of the violent, corrupt and inefficient practices that characterised the industry in the recent past.

These significant additional direct and indirect costs are borne by the industry, its clients and ultimately by the community as a whole.

9: AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Employers have reached agreements but in many instances have done so on time-critical projects and subject to excessive pressure. The Act has allowed for competition between unions. Rights of entry by unions to workplaces extended by no longer requiring that the terms and conditions of employees with whom union officials wish to hold discussions be regulated by an award or agreement that is binding on the official's union.	Reports of re-emerging violence and intimidation and the reinstatement of inefficient work practices. Some contractors are expected to fail as a result of rising costs. Changed rights of entry mean greater union presence on site competing for membership.	Retain original Australian Building and Construction Commissioner powers Reinvigorate the National Code of Practice for the Construction Industry and (especially) the Implementation Guidelines. Reinstate requirement that the terms and conditions of employees with whom union officials wish to hold discussions be regulated by an award or agreement that applies to the official's union.

10: Compulsory superannuation contribution increase

Relevant Object of the Act: Section 3, Object and paras (a), (b) and (c)

Refer panel questions: [No specific questions directed to this issue]

The BCA supports the increase in compulsory superannuation contributions as part of responsible provisioning for the future of both individuals and the Commonwealth Budget. However, these contributions need to be seen as deferred remuneration and thus offset against potential wage increases.

The BCA would, therefore, view with great concern any suggestion that the increase in compulsory superannuation contributions should not be offset against expected wage increases.

10: COMPULSORY SUPERANNUATION CONTRIBUTION INCREASE		
CAUSE/DRIVER/ENABLER	**CONSEQUENCE**	**SOLUTION**
Lack of offset policy statement or legislation by government. ACTU statements that there should be no offset.	Labour costs increased by amount of compulsory contribution increase – lack of recognition of superannuation as deferred salary and part of total hire costs.	As government enacts to provide the proposed increase in superannuation contribution by employers, legislate specifically to offset against wage increases. Require FWA to take account of any compulsory increase in employer superannuation contributions when setting wages in terms of: • annual minimum rates review • low pay determinations • arbitration where a bargaining period has been cancelled.

APPENDIX 1: AUSTRALIA'S LABOUR MARKET PERFORMANCE: DATA

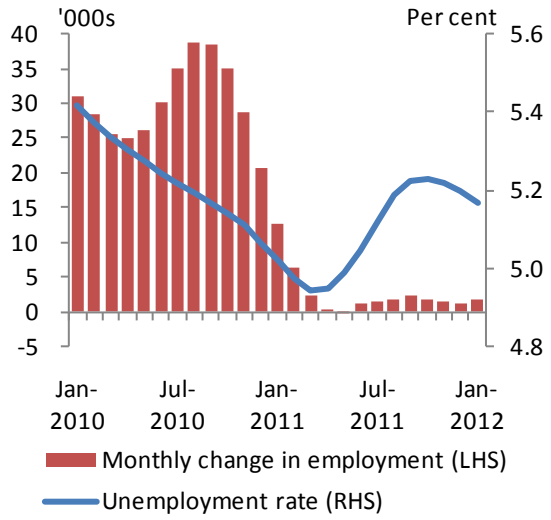
STRENGTHS	WEAKNESSES
Match of supply and demand for labour Employment: the number of people employed has increased from 7.6 million in December 1991 to just under 11.5 million in 2011 Unemployment is hovering just over 5 per cent, about 1½ percentage points below the 20-year average	Overall jobs growth weakened notably over the last year, with no net job creation from December 2010 to December 2011 (see charts), while ANZ data suggest job ads, a forward-looking indicator, have also softened over the last 12 months Since late 2008 the average length of time the unemployed are out of work has lengthened by over six weeks (rising to around 38 weeks), at the same time that certain sectors and regions are experiencing shortages
Labour market mobility Diversity in forms of employment, with casuals representing around 20 per cent of employment, and independent contractors a further 10 per cent Two million Australians leave their jobs in any one year, whereas unfair dismissal applications are about 15,000	Regional variations in unemployment are notable, with unemployment around 3 per cent in Perth and around 9 per cent in Far North Queensland
Wages Full-time average weekly earnings have more than doubled since 1994, rising to around $1,400 Wage increases have been generally moderate overall	Real unit labour costs have been rising since mid-2010 (see chart below)
Participation Participation rates have trended up over recent decades, led by much stronger female labour force engagement Since 1981 female participation has increased by around 14 percentage points, leading to an overall 4¼ percentage point rise The overall participation rate is currently just over 65 per cent – up around 2 percentage points on a decade ago	Overall participation has edged lower over the last year There are opportunities to increase engagement, with workforce participation among some groups below other comparable developed countries Participation rates of older workers (55–64) are ranked 11th in the OECD, while child-bearing-age female participation rates (25–34) are ranked 24th Indigenous people experience high levels of unemployment despite being in many of the regions of labour shortage

International attractiveness In 2010–11 there were 13 per cent more primary applications lodged for 457 visas than grants, up from almost 6 per cent excess demand in 2007–08	
Labour productivity, skills, health and safety Skill and education levels have increased over the past 10 years – the proportion of people with a vocational or higher education qualification rose from 49 per cent to 63 per cent Workplace fatalities have declined by 42 per cent since the early 2000s, while injury claims are down 25 per cent	Labour productivity has weakened markedly over recent cycles (see Chart 5 below), with an outright decline in labour productivity recorded in 2010–11. Our OECD Programme for International Student Assessment scores, a comparative benchmarking process, have not increased and continue to decline, despite notable policy attention in this area Workplace injury rate reductions of 25 per cent is below the target rate of 40 per cent
Conflict The long-term trend in working days lost has fallen dramatically – declining from just under 200 days lost per 1,000 employees per year in the early 1990s to around 20 days lost per 1,000 employees through the year to September 2011	Off a low base, industrial disputation edged higher over 2011, with the number of working days lost per 1,000 employees rising in every quarter since March 2011 (see Chart 6)
Regulatory complexity Workplace regulation is now national, removing some potential blockages to mobility of labour against the backdrop of economic change Single coherent Act reduces legislation from 1,200 pages to 600	Still sufficiently complex to require technical expertise Wages schedules associated with modern awards are complex National OHS legislation not yet achieved

Labour market outcomes overall

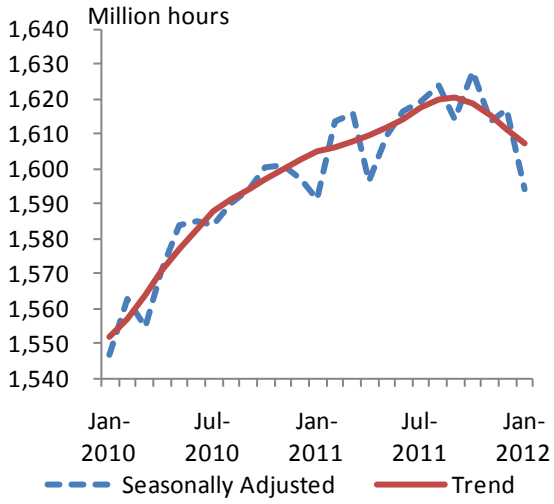
Australia's labour market weakened over 2011, with unemployment trending higher. Overall employment was flat over the calendar year.

Chart 1: Labour market



Source: ABS, Catalogue No. 6202, *Labour Force*, Table 1, January 2012. Note: data are trend.

Chart 2: Aggregate monthly hours worked



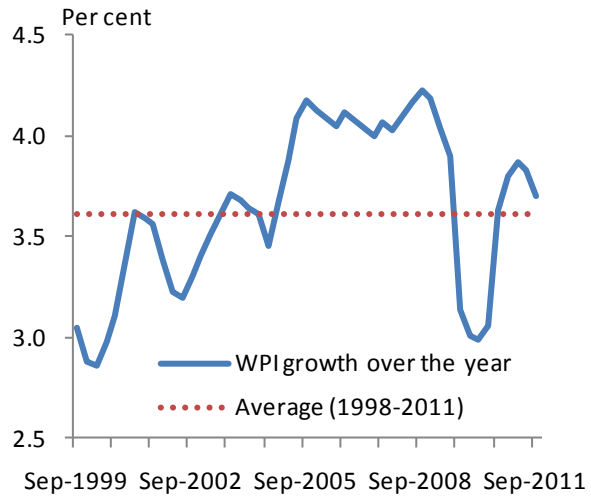
Source: ABS, Catalogue No. 6202, *Labour Force*, Table 19, January 2012.

Labour cost outcomes

ABS data show the Wage Price Index (WPI), the preferred measure of wage costs, grew by a moderate 3.6 per cent through the year to September 2011. While WPI cost growth accelerated over 2010 and through 2011, from a post-global recession influenced low of 3.0 per cent over the year to December 2009 (Chart 3), current wage cost pressures are not high historically.

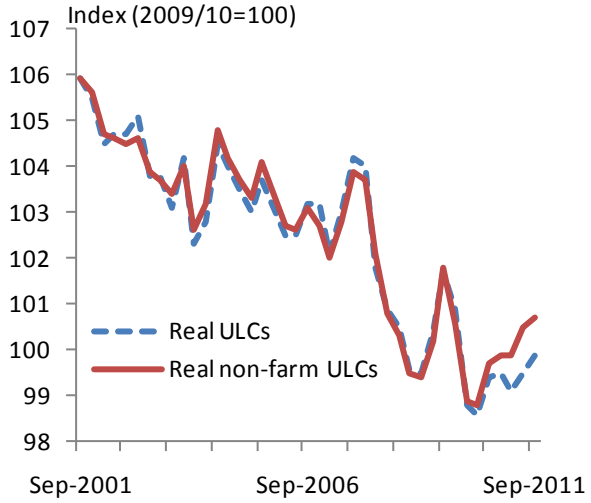
Nonetheless, against the backdrop of weak national productivity performance, real unit labour costs (ULCs) have moved up since mid-2010 (Chart 4), a trend that bears watching given its implications for competitiveness.

Chart 3: Wage price index outcomes (trend)



Source: ABS, Catalogue No. 6345, *Labour Price Indexes*, Table 1, September 2011.

Chart 4: Real unit labour cost levels

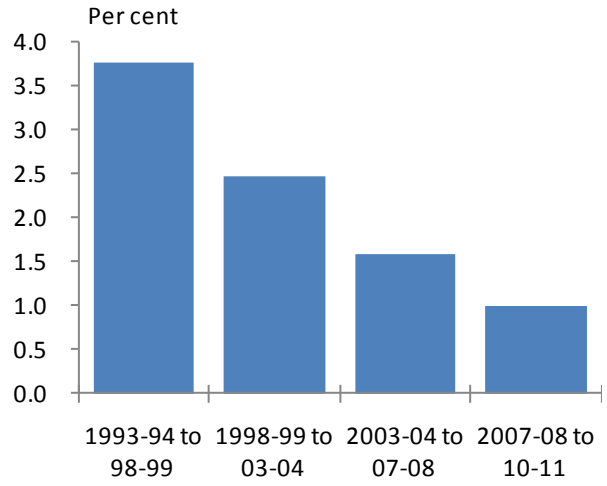


Source: ABS, Catalogue No. 5206, *Quarterly National Accounts*, Table 38, September 2011.

While weaker productivity outcomes, wages rises and the strengthening of our exchange rate may have subsequently weakened our international competitive position, historical OECD data for the latest year with comparable data show that Australia's nominal unit labour costs in 2006 were ranked 15th out of 32 OECD countries in terms of the comparable cost of producing one unit of output in the market sector.

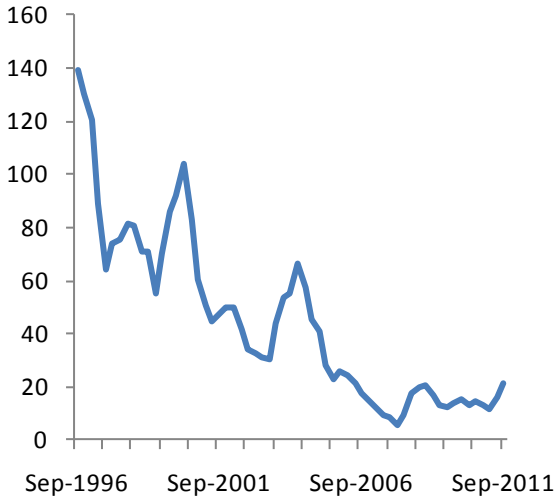
In terms of methods of setting pay, there has been a shift away from centralised pay setting arrangements over the last decade, with the share of employees whose pay was set by award only decreasing from 23 per cent in May 2000 to 15 per cent in May 2010. The proportion of employees with their pay set by an individual arrangement has increased by 3 percentage points in the 10 years to May 2010, rising from 34 to 37 per cent. The proportion of employees whose pay was set by collective agreements also increased, rising from 37 per cent to 43 per cent.

Chart 5: Annual labour productivity growth across recent cycles



Source: ABS, Catalogue No. 5260.0.55.002, Experimental Estimates of Industry Multifactor Productivity, Table 6, January 2012. Data are for the core 12 market industries, current cycle incomplete.

Chart 6: Working days lost per 1,000 employees over the last 12 months



Source: data constructed from ABS Catalogue Nos 6321, *Industrial Disputes,* Table 1, September 2011, and 6291.0.55.001, Labour Force Detailed Electronic, Table 8, December 2011.

APPENDIX 2: GUIDE TO PANEL QUESTIONS

	Questions	Answers
GENERAL		
	Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?	See the introduction to Part B
	Can the Fair Work Act provide flexibility for businesses and is this being achieved? If so, how? If not, why not?	See the introduction to Part B
	Does the Fair Work Act adequately take account of Australia's international labour obligations?	See the introduction to Part B
	Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?	See the introduction to Part B
	Has the Fair Work Act's focus on enterprise level collective bargaining helped to achieve improved productivity and fairness?	See the introduction to Part B
	What has been the impact, if any, of the Fair Work Act on labour productivity?	See the introduction to Part B
	What has been the impact of the creation of a national workplace relations system for the private sector? What has been the impact of the system being constitutionally underpinned by referrals of subject matters/powers from the states as well as the corporations' power of the Constitution?	See the introduction to Part B
SAFETY NET		
	Is the safety net established under the Fair Work Act fair and relevant?	See '8: Modern awards'
	Is the safety net simpler, more streamlined and easier to read and apply than the previous arrangements?	See '8: Modern awards'
	What are the advantages and disadvantages of the Fair Work Act providing a safety net of employment conditions on a national basis through the National Employment	See '8: Modern awards'

	Questions	Answers
	Standards and modern awards rather than a state by state basis?	
	Does the Fair Work Act allow for safety net terms and conditions of employment to be set in a way that is appropriately industry or occupationally specific? If not, why not?	See '8: Modern awards'
	Are employees responsible for the care of young children using the right to request provisions under the National Employment Standards to negotiate flexible working arrangements or request additional unpaid parental leave in order to care for children? If not, why not?	
	Do Individual Flexibility Arrangements, as provided for in modern awards, allow employers and employees to individually tailor modern award conditions to meet their genuine personal needs? If so, how? If not, why not?	See '2: Flexibility arrangements' and '8: Modern awards'
	Are employees appropriately protected when making Individual Flexibility Arrangements? Is the safety net of minimum employment conditions appropriately guaranteed and protected from being undermined?	See '2: Flexibility arrangements' and '8: Modern awards'
	How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?	See '8: Modern awards'
	Do the criteria for Fair Work Australia's (FWA) setting of minimum wages fairly balance social and economic factors?	See '8: Modern awards'
	What has been the impact of requiring FWA to implement minimum wage adjustments from 1 July each year, rather than at a time of the tribunal's choosing?	See '8: Modern awards'
	Without examining particular content in modern awards (which is a matter to be dealt with in FWA's review of modern awards), what has been the impact on employers, employees and regulators of consolidating the large number of state and federal awards and transitional instruments that applied before the Fair Work Act and replacing them with significantly fewer modern awards made on a national basis?	See '8: Modern awards'
	What has been the impact of providing an award system which includes modern awards that cannot be varied (except in limited circumstances) other than during four-yearly reviews by FWA, or in the initial FWA interim review	See '8: Modern awards'

	Questions	Answers
	in 2012?	
BARGAINING AND AGREEMENT-MAKING		
	Does the bargaining framework promote discussion and uptake of measures to improve workplace productivity?	See '1: Bargaining processes'
	How have employers pursued productivity improvements during bargaining for a new enterprise agreement? Are there any obstacles to achieving productivity improvements in bargaining in the legislation? How do these obstacles differ from the situation that existed prior to the Fair Work Act?	See '1: Bargaining processes'
	Have enterprise agreements helped employees to better balance work and family responsibilities?	See ''1: Bargaining processes'
	What has been the impact of allowing a wider range of matters to be included in enterprise agreements by removing the list of "prohibited content" provided under the Workplace Relations Act? What has been the impact on bargaining and productivity? What has been the impact on employees' capacity to be represented in the workplace?	See '1: Bargaining processes'
	Did Individual Transitional Employment Agreements help to provide greater certainty of wage costs for employers using Australian Workplace Agreements and assist in the transition to a system focussed on enterprise level collective bargaining?	See '1: Bargaining processes'
	Are Individual Flexibility Arrangements allowed for under the flexibility terms of enterprise agreements providing employers and employees with the flexibility to tailor working arrangements to meet their genuine needs? If so, how? If not, why not?	See '1: Bargaining processes'
	Are employees appropriately protected when making Individual Flexibility Arrangements?	See '1: Bargaining processes'
	Did the replacement of the fairness test with the no-disadvantage test and then the better off overall test improve protection of employment conditions in the agreement-making process?	See '1: Bargaining processes'
	Has the new approval process under the Fair Work Act expedited the approval of agreements and provided greater certainty for employers and employees compared to the approval process under the previous legislation? If so, how?	See '1: Bargaining processes' and '4: Agreement approval'

	Questions	Answers
	If not, why not? What has been the impact on employers, employees and their representatives of the changes to the agreement approval processes?	
	How have the good faith bargaining requirements affected enterprise agreement negotiations?	See '1: Bargaining processes'
29 a	Are there ways in which the good faith bargaining requirements could be improved to better facilitate bargaining?	See '1: Bargaining processes'
29 b	Are the powers possessed by FWA adequate to remedy breaches of the good faith bargaining requirements?	See '1: Bargaining processes'
	Have majority support determinations and scope orders encouraged enterprise bargaining? If so how? If not, why not?	See '1: Bargaining processes'
	Has the low-paid bargaining stream encouraged bargaining in workplaces and/or industries that have not historically engaged in enterprise bargaining?	See '1: Bargaining processes'
EQUAL REMUNERATION		
	What has been the impact of the changes to the test for the making of an equal remuneration order?	
	Have FWA's powers in relation to equal remuneration helped to ensure equal remuneration between men and women workers for work of equal or comparable value?	
TRANSFER OF BUSINESS		
	Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?	See '6: Transfer of business'
	What has been the effect of the new transfer of business provisions on corporate restructuring activities, such as in-sourcing and outsourcing?	See '6: Transfer of business'
	Do the range of matters which FWA must consider when making an order in relation to a transfer of business strike the right balance between protecting employee and employer interests?	See '6: Transfer of business'
GENERAL PROTECTIONS		

	Questions	Answers
	Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?	See '7: General protections/adverse action'
	Do the provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?	See '7: General protections/adverse action'
	Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?	See '7: General protections/adverse action'
	Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations? What impact has this had?	See '7: General protections/adverse action'
	Section 351 of the Fair Work Act proscribes discrimination "because of the person's" race, sex, etc. This provision appears in Part 3-1 Division 5. This Division is headed "Other Protections". Would section 351 and any related provisions be better placed in a Division dealing solely with discrimination?	'7: General protections/adverse action'
UNFAIR DISMISSAL		
	Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?	
	Consistent with the government policy objectives, does the Fair Work Act provide genuine unfair dismissal protection? If so, how, if not, why not?	
	Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?	
	Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?	

	Questions	Answers
	What has been the impact of the introduction of qualifying employment periods before an employee is eligible to make a claim for unfair dismissal? Has the 12 month (small businesses) and 6 month (larger businesses) qualifying period provided clearer guidance to employers and sufficient time for employers to assess the suitability of an employee for a role?	
	Is FWA's emphasis on telephone conciliation in unfair dismissal matters desirable? If so, why, if not, why not?	
	Are the remedies available in the case of an unfair dismissal appropriate?	
	Is the Small Business Fair Dismissal Code an effective tool in helping small business to understand their obligations and fairly dismiss employees?	
	What has been the impact of removing the genuine operational reasons defence to an unfair dismissal claim and replacing it with the requirements for genuine redundancy?	
	Have the unfair dismissal provisions under the Fair Work Act had an impact on the ability and willingness of business to take on new employees?	
INDUSTRIAL ACTION		
	Is the process for applying for and conducting protected action ballots simpler under the new system? If so, why, and if not, why not?	See '3: Industrial conflict/disputation'
	What effect has the obligation for the Australian Government to fund the full cost of conducting a protected action ballot had on the propensity of employee bargaining representatives to make an application for a protected action ballot order?	See '3: Industrial conflict/disputation'
	Should applications for protected action ballots be permitted where no majority support determination has been made by FWA, and where the employer has not agreed to engage in collective bargaining? If so, why, and if not, why not?	See '3: Industrial conflict/disputation'
	Are the powers and procedures possessed by FWA to suspend or to terminate protected industrial action adequate to resolve intractable disputes? If not, why not, and if so,	See '3: Industrial conflict/disputation'

	Questions	Answers
	why?	
	Should compulsory conciliation play a more prominent role, either generally, in the enterprise bargaining regime, in settling disputes over the application of enterprise agreements or more especially in the machinery which governs the settlement of intractable disputes?	See '3: Industrial conflict/disputation'
	Are employees able to resort to protected industrial action more easily or quickly since the passage of the Fair Work Act? If so, which provisions of the Act facilitate this?	See '3: Industrial conflict/disputation'
	Is the taking of industrial action in support of pattern bargaining effectively prohibited by the Fair Work Act?	See '3: Industrial conflict/disputation'
	What has been the effect of the removal of the mandatory four hour minimum deduction of pay for protected employee industrial action?	See '3: Industrial conflict/disputation'
	What has been the effect of allowing for a proportion of an employee's pay to be withheld in the case of a partial work ban?	See '3: Industrial conflict/disputation'
	What has been the effect of removing the reverse onus of proof for employees taking industrial action out of a legitimate concern for his or her health or safety?	See '3: Industrial conflict/disputation'
RIGHT OF ENTRY		
	What has been the impact of union right of entry being linked to the right of a union to represent the industrial interests of an employee, rather than coverage by a type of instrument?	See '3: Industrial conflict/disputation' and 9. ABCC
	Do the right of entry provisions balance the right of unions to enter workplaces to meet with employees and investigate breaches of legislation and the right of employers to go about their business without undue inconvenience?	
INSTITUTIONAL FRAMEWORK		
	Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia appropriate having regard to the matters coming before it? What changes, if any, would you suggest?	See '3: Industrial conflict/disputation'

	Questions	Answers
	Does the consolidation of workplace relations institutions provide more easily accessible services and information to users of the national workplace relations system?	
	Does the requirement for FWA to conduct and publish research relevant to minimum wages help to better inform parties who make submissions to the Minimum Wage Panel?	
	Do the enhanced powers of Fair Work Ombudsman (FWO) inspectors assist in the expeditious resolution of matters under investigation?	
	In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act?	
	What has been the impact of the new ability for the FWO to accept enforceable undertakings as an alternative to prosecution?	

APPENDIX 3: BCA SUBMISSION REGARDING THE MONITORING OF THE OPERATION OF THE FAIR WORK ACT 2009 (MAY 2011)

Sent to Senator the Hon. Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, on 19 May 2011

As you will be aware, the provisions of the Fair Work Act 2009 (FW Act) collective bargaining and associated matters will have been in operation for two years as of 1 July 2011. Those relating to modern awards and the National Employment Standards (NES) will have been in operation for 18 months on that date.

Over the period that the legislation has been in operation, the Business Council of Australia (BCA) has been monitoring the operation of the legislation in a number of ways, including by conducting regular feedback meetings with its members, both in group discussions and on a one-on-one basis. This process has served to highlight a number of issues that are of concern to significant numbers of BCA members. The purpose of this letter is to draw these matters to your attention, and to open a dialogue between the BCA and the government as to possible ways of addressing these concerns.

1. Executive Summary

The BCA has identified eight areas that are of particular concern to its members, and where it considers that there is a demonstrated need for legislative change. It has also identified a number of issues where it is not clear whether legislative action is feasible or necessary at this stage.

The areas that appear to require legislative intervention include:

Scope of the general protections in Part 3-1 of the FW Act. The BCA does not take issue with the need to protect employees (and others) against unwarranted adverse action for industrial reasons. However, the unqualified character of the proscriptions set out in sections 340, 343 and 346 of the FW Act has the effect that the protective net is cast too wide – especially in light of the 'multiple reasons' and reverse onus provisions in sections 360 and 361. The BCA considers that the generality of the statutory proscriptions should be subject to a qualifier such as 'wholly or mainly'.

Ascertaining 'majority support' for collective bargaining. The BCA considers that the existing provision enabling Fair Work Australia (FWA) to 'work out' whether a majority of employees want to engage in collective bargaining by 'any method' it considers appropriate is potentially open to abuse – for example by employees being misled or pressurized into signing a petition in support of commencement of collective bargaining. This leads the BCA to the view that majority support determinations (MSD) should be available only on the basis of a secret ballot.

MSDs as a pre-condition for protected action ballots. The BCA considers that FWA should not be able to make orders for protected action ballots in situations where the parties have not yet commenced bargaining unless the employees/union have first obtained an MSD.

Intra-group transfers and the transfer of business provisions. The BCA considers that in their present form sections 22(7)(a) and 311(6) of the FW Act have the undesirable effect of requiring the transfer of industrial instruments from one entity to another within a corporate group in situations where an employee transfers employment between entities within such a group as part of a process of career progression.

Establishing a 'connection' between 'old' and 'new' employers under section 311(3). The term 'arrangement' in section 311(3) is a source of unnecessary uncertainty – especially when applied to intangible assets such as good will. At the very least, the subsection needs to be amended to make clear that there needs to be some articulated and deliberate transaction or agreement for the transfer of assets. It is also necessary to amend section 311(3) to make clear that a 'connection' can be established in reliance upon this provision only where the 'new' employer actually assumes ownership of any assets that were formerly 'used' or 'enjoyed' by the 'old' employer.

Definition of outsourcing and in-sourcing. The BCA is not comfortable with the fact that outsourcing and in-sourcing can constitute a transfer of business for purposes of the FW Act, but if the concept is to be retained, there should at least be a more clear delineation of what will constitute an outsourcing and an in-sourcing for purposes of section 311(4) and (5).

Access to Individual Flexibility Arrangements. The BCA is most concerned at the reluctance of some trade unions to agree to the inclusion of meaningful flexibility clauses in enterprise agreements made under the FW Act, and to encourage their members to enter into Individual Flexibility Arrangements (IFA) in accordance with such flexibility clauses as may be agreed. Ideally, all enterprise agreements should be required to include a flexibility clause which conforms to specified legislative minima. At the very least they should be required to include the model flexibility clause that is set out in Schedule 2.2 to the Fair Work Regulations 2009.

Contractor Clauses. There appears to be considerable confusion as to the extent to which enterprise agreements can regulate the use of contract and agency labour. The BCA considers that the FW Act should make clear that a term which purports to regulate, or have the effect of regulating, use of contract and agency labour would be an 'unlawful term' for purposes of section 194 of the FW Act.

- The policy issues to which the BCA wishes to draw the attention of the government include:
- Trade-off of superannuation contributions. The BCA considers that it should be clear public policy that the projected increases in employer superannuation contributions over the period 2013–20 should be set-off against minimum wage increases.
- Greenfields agreements in the resources sector. A number of BCA members have expressed grave concern about the practice of unions in the resources sector using conclusion of greenfields agreements for major new projects as leverage for exaggerated employee claims which may then flow through to the rest of the resources sector, and eventually to other parts of the economy.

2. Legislative Issues

2.1 Adverse Action

- The general protections that are set out in Part 3-1 of the FW Act are exceedingly wide-ranging in scope, and provide levels of protection against victimisation and other forms of discriminatory treatment that are extremely high by international standards. They are given added force by the fact that section 360 provides that if a particular course of conduct is to any extent motivated by a particular reason then that conduct is taken to have been engaged in for that reason for purposes of Part 3-1, whilst section 361 stipulates that where a person is alleged to have acted for a

particular reason then it is for the person taking the action to prove that it was not motivated by the proscribed reason.

- The BCA notes that, until recently, few cases involving alleged breaches of Part 3-1 have found their way to FWA or the courts. However, many members have advised that employees and/or unions have routinely been threatening proceedings under Part 3-1 in order to gain some strategic advantage in disputes (for example about individual disciplinary matters or proposed changes to work practices) and/or to secure the payment of 'go-away money'. Furthermore, it now appears that significant numbers of cases are being dealt with by FWA, and the Federal Magistrates Court and the Federal Court of Australia. The outcomes of some of these decisions are themselves a further cause for concern – most notably the decision of the majority of Full Court of the Federal Court in Barclay v Board of Bendigo Regional Institute of Technical and Further Education [2011] FCAFC 14. The effect of this decision is to cast significant doubt upon the capacity of employers to discipline or dismiss employees who also happen to be union officials.
- The BCA does not condone victimisation or discriminatory treatment in the workplace, but at the same time it considers that in its current form Part 3-1 does not strike an appropriate balance between the interests of employers and would-be complainants. It suggests that this imbalance could in some measure be redressed by amending section 340(1) so as to provide that a person must not take adverse action against another person 'wholly or mainly' for the reasons proscribed in paras (a) and (b) of that subsection. It would also be necessary to make corresponding changes to the proscription set out in section 340(2).
- The BCA considers that such a change would not prevent meritorious applicants being able to obtain relief in respect of any unlawful treatment to which they may have been subjected, but would prevent unmeritorious claimants from deriving leverage from the fact that it may sometimes be hard to prove that conduct which on its face might constitute 'adverse action' was not motivated to any degree by a proscribed ground in situations where the dominant reason for that action was in fact something other than the proscribed ground. It would also help mitigate some of the uncertainty flowing from the decision in Barclay.
- We also suggest that a similar change should be made to section 343(1) so that it proscribes 'any action against another person wholly or mainly with intent to coerce to other person' to do or not to do the things set out in paras (a) and (b) of that subsection.

2.2 Majority Support Determinations

- As presently drafted, section 237(3) of the FW Act permits FWA to 'work out' whether a majority of employees want to engage in collective bargaining by using 'any method FWA considers appropriate'. The BCA notes that para 979 of the Explanatory Memorandum for the Fair Work Bill suggested that these 'methods' might include 'a secret ballot, survey, written statements or a petition'. It also notes that in practice FWA has used all of these techniques, plus union membership records and union 'pledge cards' in working out whether there is majority support for collective bargaining in particular situations.
- A number of members have expressed concern about the use of techniques other than secret ballots for this purpose. These concerns derive from the possibility that employees may be subjected to inappropriate pressure to sign petitions or pledge

cards, and/or or misled as to the nature of any petition or other document they may be asked to sign.

- It is suggested that this problem could readily be addressed by requiring that MSDs may be made only on the basis of a secret ballot conducted by the Australian Electoral Commission (AEC). As with protected action ballots, the cost of such ballots should be borne out of public funds – otherwise groups of employees other than unions might be dissuaded from seeking the making of MSDs.
- The BCA acknowledges that introducing a mandatory ballot requirement might give rise to some delay in the bargaining process. On the other hand, the AEC clearly manages to conduct protected action ballots under Division 8 of Part 3-3 of the FW Act within a very tight timeframe, and there does not appear to be any good reason why it should not be able to do the same in the present context.
- There is also some risk that introducing a mandatory ballot requirement might encourage the 'Americanisation' of the Australian workplace relations system: for example, by encouraging litigation about the nature of the questions to be put to ballot, and about what can be said, and how it can be said, in support or opposition to a proposed ballot.
- The BCA clearly recognises that this would not be a desirable outcome, and also considers that it is not an inevitable one. In the first place, the consequences of a successful ballot are very different as between the two systems: in the United States a successful recognition ballot gives the relevant union the exclusive right to bargain for an agreement in respect of the employees covered by the ballot. A successful ballot under the FW Act does not do this: rather, it provides a trigger for the commencement of bargaining (including for the making of bargaining orders), with all employees retaining the right to appoint the bargaining representative of their choice. Furthermore, the exercise of good sense and judgment on the part of FWA in framing the questions to be put etc., should ensure that the excessive litigiousness of the American system is not imported into Australia. The restraint so far exhibited by FWA in relation to the importation of North American jurisprudence in relation to good faith bargaining provides some cause for optimism in this respect.

2.3 MSDs as a Pre-Condition of Protected Action Ballots

- In *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia [2010] FWAFB 9963* a Full Bench of FWA, in a majority decision, determined that in principle FWA could grant an application for a protected action ballot in a situation where the Transport Workers' Union of Australia had unsuccessfully been trying to persuade Richards to commence negotiations for an enterprise agreement for a period of more than eight months. The company (supported by the Australian Mines and Metals Association and the Australian Chamber of Commerce and Industry as interveners) argued that the proper course would have been for the union as bargaining representative for its members to have applied for an MSD, rather than seeking to use industrial action to persuade the company to enter into negotiations.
- In the course of their joint opinion Vice President Lawler and Commissioner Bissett acknowledged that if the circumstances of the case had permitted recourse to the Explanatory Memorandum for the Fair Work Bill for assistance in interpreting section 443(1)(b) of the FW Act, 'this would likely lead to the adoption of the construction for which the appellant contends' (para [72]). However, they went on to determine that it was not possible to look to the Explanatory Memorandum for assistance due to the fact that (ibid) 'after section 443(1)(b) has been construed in the context of the FW

Act as a whole, and having regard to the relevant object and purpose, it has a meaning – its ordinary meaning – that is clear and is neither ambiguous nor obscure'.

- In contrast, Senior Deputy President O'Callaghan came to the conclusion that the meaning of section 443(1)(b) is uncertain or ambiguous, and in consequence felt able to refer to the provisions of the Explanatory Memorandum that supported the view that protected action ballots were available only where the parties were actually bargaining and/or an MSD had been made under section 236. These passages are conveniently summarised and analysed at paras [171]-[175] of the decision of Senior Deputy President O'Callaghan.
- This analysis led the Senior Deputy President to conclude that (para [164]):
- In my opinion the FW Act, taken as a whole, requires that bargaining be occurring before a protected action ballot can be granted. The FW Act provides a mechanism whereby employers can be required to bargain, if the majority of employees confirm through a majority support determination, that they wish to bargain. I consider that it logically follows that where an employer has declined to bargain, a bargaining representative who is genuinely trying to reach agreement should then establish that there is employee support for bargaining for an agreement because, absent that support, no agreement is possible.
- His Honour was confirmed in this view by the 'significant consequences' that flowed from the question of 'whether or not a protected action ballot is available before bargaining has commenced'. They include:

'Whether protected industrial action can occur if a majority of employees reject a bargaining proposal through the majority support determination process' (para [167]). In other words, his Honour was concerned that there was a logical inconsistency in the notion that a group of employees could seek a protected action ballot in circumstances where the majority of employees in a particular enterprise did not want to engage in collective bargaining in the first place. He was reinforced in this view by the fact that the constituency for a protected action ballot is likely to be smaller than for an MSD.

- The difficulties that flowed from permitting bargaining representatives to seek a protected action ballot in circumstances where employees had not yet been notified of their representational rights and their capacity to nominate a bargaining representative other than their union (para [168]).
- The possibility that the concept of genuinely trying to reach agreement could be reduced to a requirement that there simply be a request for negotiations, since on the majority view an applicant for a protected action ballot could show that they were genuinely trying to reach agreement even before bargaining had commenced (para [169]).
- With respect, the BCA shares the concerns expressed by Senior Deputy President O'Callaghan, and also considers that his Honour's reading of the requirements of Part 2-4 is correct. The fact that the majority came to a different conclusion suggests that there is room for doubt on the matter. That being so, the BCA suggests that, in order to put the matter to rest, the FW Act should be amended to make clear that FWA cannot grant a protected action ballot application in circumstances where bargaining has not commenced and/or FWA has made an MSD. As is clear from the Explanatory Memorandum, such an amendment would be fully consistent with the intention of the Fair Work Bill as originally introduced in, and enacted by, the parliament.

2.4 Intra-group Transfers and the Transfer of Business Provisions

- A number of BCA members have identified what may be an unintended consequence of the interaction of the transfer of business provisions in Part 2-8 of the FW Act and the extended meanings of 'service' and 'continuous service' set out in section 22 of the FW Act.
- This problem derives from the fact that section 311(6) provides that, for purposes of Part 2-8, there is a relevant 'connection' between an old and a new employer where the new employer is an associated entity (within the meaning of section 50AAA of the Corporations Act 2001) of the old employer at the time that the transferring employee becomes employed by the new employer. This means that, assuming that the work performed for the new employer is 'the same, or substantially the same, as the work the employee performed for the old employer' (section 311(1)(c)), any industrial instrument that covered the employee with the old employer would also cover the new employer in relation to that employee. Furthermore, section 22(5) and (7) have the effect that the transferring employee's service with the old employer counts as service with the new employer, irrespective of whether there has been a transfer of business as between the two associated entities.
- Taken together, these provisions can operate as a disincentive to internal transfers within corporate groups – for example where a pilot at a regional airline seeks to transfer to a larger carrier within the same corporate group as part of a career-advancement strategy. The combined effect of sections 311(6) and 22(5) and (7) is that the new employer would find themselves having both to recognise continuity of service as between the two employers, and to observe the terms of the regional airline's agreement in relation to the transferring employee whilst its other employees were covered by its existing agreement. Assuming that the terms of that agreement were more advantageous than those of the transferring agreement, the new employer (and employee) would have to choose between: (i) living with an anomalous situation whereby the terms and conditions of pilots doing the same work were governed by different industrial instruments; (ii) making up the difference between the entitlements under the two agreements by (express or implied) contract, but still observing any relevant procedural or administrative provisions of the 'old' agreement; or (iii) applying to FWA for an order under section 318 of the FW Act to the effect that what would otherwise be a transferring instrument is not to apply to the transferring employees. If the terms of the 'old' agreement were in any way superior to those of the new employer's agreement, then it would not be possible to 'contract down' to the level of the new employer's agreement, given that it is not possible lawfully to contract in a manner that is inconsistent with an agreement under the FW Act. It might also be difficult to persuade FWA to exercise its discretion in favour of ordering that the employer's agreement not transfer in such circumstances. This suggests that only the first of the three options noted above would be available in such circumstances.
- The difficulties associated with the application of section 311(6) may be compounded by the fact that section 389(2) of the FW Act has the effect that a 'redundancy' is not to be regarded as 'genuine' for purposes of Part 3-2 if 'it would have been reasonable in all the circumstances' for an employee whose position has been made redundant to have been redeployed within 'the enterprise of an associated entity of the employer'. Not only does this impose a significant administrative and logistical burden upon large corporate groups, it may also have the consequence that employees who are successfully redeployed may bring with them transferring industrial instruments in the manner outlined above.

- The BCA recognises that some, but not all, of these difficulties can be resolved by application to FWA under section 318. However, even assuming a favourable outcome for such an application, the entire exercise appears to impose an unnecessary administrative burden without any significant advantages to either employer or employee, or any obvious benefits in terms of attainment of government policy objectives. It seems appropriate, therefore, that section 311(6) be amended to make clear that there needs to be something more than the mere transfer of work to establish the existence of a 'connection' in the relevant sense. As will appear presently, the most obvious way to do this would be to provide that there needs to be a transfer of business rather than just work to establish a 'connection' under this provision.
- If the redeployment option is to be retained as an express consideration in determining whether a 'redundancy' is 'genuine', then section 389(2)(b) should at least be qualified so that it is necessary to explore redeployment opportunities only with associated entities which carry on similar business to the 'old' employer, and which do so within reasonable geographical proximity to the old employer.

2.5 Establishing a 'connection' under section 311(3)

- Section 311(3) of the FW Act deals with what might be described as the 'classic' concept of transfer (or 'transmission' in the former iterations of these provisions) of business: that is, the situation where one entity transfers all or part of its business to another entity. The concept is well-recognised, and has been subject to interpretation by the High Court on a number of occasions. The problem is that section 311(3) adopts an approach to this issue which creates considerable uncertainty in practice, and which appears to extend the reach of the concept of 'transfer' to a number of situations which the BCA considers should not constitute a transfer of business in the relevant sense.
- The problem appears to be twofold. First, the concept of 'arrangement' is not sufficiently precise. Would it, for example, encompass a situation where an 'old' employer encouraged its former employees to accept employment with a new employer on the basis of an (express or implied) 'understanding' between the two employers that the old employer would encourage and/or facilitate the transfer of employees, but where there was no formal contractual provision to that effect? Again, can the former employees of the old employer, and/or their accrued skills and experience, be regarded as 'assets (whether tangible or intangible)' for purposes of subsection (3)? Employees are certainly not chattels that can be bought and sold in the same way as other assets of the business, but it is not at all inconceivable that that for purposes of section 311(3) the 'asset' could be seen to be the benefit to the new employer of having access to an experienced and stable workforce as a consequence of the old employer encouraging or facilitating the transfer of the workforce. This suggests that the term 'arrangement' should be defined to make clear that it encompasses only situations where there is a clear and articulated commercial transaction between the old and new employers.
- This leads to the second set of difficulties associated with section 311(3): the lack of clarity as to what will constitute 'beneficial use' of assets in this context. As the subsection is presently framed, for example, it appears that a 'connection' can be established where, in consequence of an 'arrangement' between the old and new employers, the 'new' employer has use of some or all of the same physical assets as the 'old' employer, but where those assets are owned by, and made available by, a third party. Similar issues could arise in relation to 'intangible' assets such as the

'goodwill' of a business that is operated by the old and the new employers on behalf of a third party, or intellectual property that is owned by a third party but which is used for purposes of the 'transferred' business. The BCA considers that these are not situations which ought to constitute a 'connection' for purposes of section 311, and suggests that the appropriate course would be amend subsection (3) to make clear that it applies only where the new employer actually assumes ownership of the asset in accordance with a formal transaction between the old and new employers (as proposed in the previous paragraph).

2.6 Defining 'outsourcing' and 'in-sourcing'

- The BCA is not persuaded that it is appropriate that a 'connection' can be established by means of an 'outsourcing' or 'in-sourcing' as contemplated by section 311 (4) and (5). Quite apart from anything else, in many instances this acts as a disincentive for businesses that provide services on an outsourced basis to engage employees of the 'old' employer. This can generate a 'double whammy', whereby the employees of the old employer lose their jobs, and the new employer is deprived of the benefit of the skills and experience of the existing workforce. However, if government remains of the view that the transfer of business provisions ought to extend to outsourcing and in-sourcing, it should at least introduce amendments to ensure that outsourcing and in-sourcing can establish a 'connection' only where there is a transfer of business as between the old and the new employer, rather than just a change in the identity of the service-provider.

2.7 Access to Individual Flexibility Agreements

- The BCA notes that the stated objects of the FW Act include providing a regulatory regime that is 'fair to working Australians', that is 'flexible for businesses' and 'promote(s) productivity and economic growth for Australia's future economic prosperity' (section 3(a)).
- The BCA fully endorses these objectives. It also considers that if they are to be achieved it is of the utmost importance that employers have the capacity to reach arrangements with individual employees as to the manner in which industrial instruments which cover those employees are to operate in practice so as to accommodate the needs of both businesses and individuals. This is clearly recognised in sections 144(1) and 202(1) of the FW Act, which require that both modern awards and enterprise agreements contain a 'flexibility term' that enables 'an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement [or award] in relation to the employee and the employer, in order to meet the genuine needs of the employee and the employer'.
- The BCA notes that the Australian Industrial Relations Commission adopted a model flexibility clause for purposes of the award modernisation process, and that that model clause then formed the basis of the model flexibility term that is set out in Schedule 2.2 to the Fair Work Regulations, and which is to be assumed to be part of all enterprise agreements in situations where the parties have not agreed upon an individual flexibility clause for themselves.
- This approach is not without its merits as a matter of principle. Unfortunately, many BCA members have found that these provisions are not operating in a satisfactory manner. First, employees appear to be reluctant to make IFAs under either modern awards or enterprise agreements, and there is some anecdotal evidence to suggest that employees are exercising their right unilaterally to terminate IFAs simply

because they no longer wish to work in a flexible manner as contemplated by the flexibility clause. Second, and even more worrying, certain unions are reluctant to make agreements that include even the model clause, let alone a clause that is tailored to the circumstances of a given business. These same unions also appear actively to discourage their members from entering into IFAs under such clauses as have been agreed – whilst (presumably) taking care not to engage in conduct that might be characterised as 'adverse action' for purposes of Part 3-1 of the FW Act.

- The BCA views these developments with great concern. They need to be addressed as a matter of urgency. It is suggested, therefore, that the union recalcitrance issue could appropriately be addressed by amending the FW Act to require that an enterprise agreement cannot be approved by FWA unless it contains a flexibility clause that meets specified criteria. Those criteria should clearly include those presently set out in section 203, but should also include more robust, substantive requirements such as those set out in the model clause. An alternative approach would be to require that agreements must include a flexibility term that provides a degree of flexibility that is at least equivalent to the terms of the current model clause (or a modified version thereof). This would be a 'second-best' option due to the fact that it would not provide sufficient incentive for parties to develop flexibility terms that were truly adapted to the circumstances of their business, but would still be preferable to the current situation where a number of unions are simply not prepared to agree to any flexibility term that has the capacity to provide any meaningful degree of flexibility.
- The problem of employee reluctance to enter into IFAs is perhaps more intractable. The BCA recognises that its members have an important role to play in helping employees to appreciate the benefits of such arrangements both for themselves and for their employers. The Fair Work Ombudsman should also be encouraged to exercise vigilance to ensure that employees are not being coerced into refusing to enter into IFAs and/or to terminate them in situations where they have in fact made an IFA. Beyond that, the BCA considers that it would be appropriate to explore the possibility of permitting employers to make offers of employment conditional upon the employee being prepared to enter into, and maintain, an IFA at least for the nominal life of the relevant enterprise agreement – with an option unilaterally to terminate on (say) 28 days' notice after that time. It would also be necessary to make provision for situations where either the employee or the employer had good reason to terminate the IFA during the nominal life of the enterprise agreement – for example because of a major change in the employee's personal circumstances, or significant change in market conditions.
- A possibly less contentious option would be to place an onus upon employees who refuse an employer's reasonable request to enter into an IFA to demonstrate that it was reasonable for them to decline the request. This again should be qualified by a capacity to terminate in the event of changed circumstances, and subject to the option of permitting unilateral termination after the nominal expiry date of the agreement.
- It must be recognised that any attempt to introduce provision along the lines outlined above is likely to attract strong opposition from the trade union movement. That does not alter the fact that the issue needs to be addressed as a matter of priority, otherwise continuing inflexibilities in the labour market must inevitably compromise the attainment of the statutory objects noted earlier.

2.8 Contractor Clauses

- The use of contract and agency labour has been a contentious issue in Australian industrial relations for many years. Unions tend to see it as a threat to their membership base, and to the terms and conditions of those they represent. From a business perspective, on the other hand, the capacity to engage labour on this basis can provide a vital element of flexibility in the organisation of work. Without it, the competitiveness of many businesses would be severely compromised.
- As the BCA understands the matter, there is clear High Court authority (R v Commonwealth Court Industrial Judges; Ex parte Cocks (1968) 121 CLR 313) to the effect that the decision to engage or not to engage contract labour is a matter that does not 'pertain' to the employer/employee relationship in the requisite sense (see now section 172(1)(a) of the FW Act). It is true that there is judicial support for the view that the terms and conditions that must be observed in relation to the employees of contractors do pertain to the relationship between the principal and its employees (R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia (1978) 140 CLR 470), but Cocks remains authority for the proposition that the decision to engage or not to engage contract (or agency) labour does not 'pertain' to the employment relationship in the relevant sense.
- It appears, however, that some unions have been seeking the inclusion of terms in enterprise agreements that purport to regulate the terms and conditions to be observed by contractors and labour hire agencies in such a way as, in effect, to control the engagement of contract and agency staff. Some members of FWA appear to be not unsympathetic to these endeavours. The BCA considers that this is not only inconsistent with established High Court authority, but also constitutes a potentially severe constraint upon the improved productivity upon which the future of the Australian economy depends. It is suggested, therefore, that the definition of 'unlawful term' in section 194 of the FW Act be amended to make clear that those terms encompass any provision which purports to place restrictions upon the engagement of independent contractors or labour hire agencies, or the terms and conditions which such contractors or agencies must observe in relation to their own employees or contractors. The same effect could be achieved by a similar amendment to the definition of 'objectionable term' in section 12 of the FW Act.

3. Policy Issues

3.1 Increase in Superannuation Guarantee

- In May 2010 the government announced that between 2010 and 2013, the minimum employer superannuation contribution would increase from its present level of 9 per cent to 12 per cent. As is right and proper, the potentially significant cost increase is to be phased in over an extended period. The BCA recommends that the cost increases associated with this process should be off-set against any wage increases put in place by FWA as part of its annual wage review process, starting in 2013.
- *3.2 Greenfields Agreements in the Resources Sector*
- A number of BCA members have raised concerns at the practice of a number of unions in the resources sector of pressing for extremely generous terms and conditions in the context of negotiations for greenfields agreements to apply to new projects, or new stages in existing projects (such as commissioning a new drilling platform or constructing a new loading facility at a coal port). If agreed to, such agreements can not only provide excessively generous terms and conditions of employment for the employees concerned, they can also raise the baseline for

negotiations elsewhere in the resources sector and, eventually, in the broader economy.

- It is true that unions do not have the capacity to organise protected industrial action whilst negotiating for such agreements – if only because by definition there are no employees who could take such action. However, the unions can often achieve very much the same result by refusing to sign a greenfields agreement until such time as they get their way. In principle, the employer could simply refuse to sign an agreement on terms that they regard as unacceptable, and commence operations without having any agreement in place. However, it is widely recognised that the industrial and commercial realities of the resources sector are such that in many instances this is simply not feasible.
- This problem has existed for many years. During the Work Choices era, employers derived some leverage from those provisions which permitted the making of employer greenfields agreements, although even this was of limited value if the unions in the relevant part of the industry took the view that the terms of the employer greenfields agreement, or even the mere fact of making such an agreement, were unacceptable. Even that limited option is no longer available, following the repeal of the Workplace Relations Act in 2009.
- The BCA does not suggest that there is any 'quick-fix' for this problem. It is of the clear view, however, that this issue has the potential to have a significant adverse impact upon future investment decisions in the resources sector. It proposes, therefore, that the government should engage it and other major organisations in the industry in an open and constructive debate about how these issues can most appropriately be addressed.
- The BCA suggests that a similar approach should be adopted in relation to the other issues that have been raised in this letter, and would be happy to participate in such consultations as and when appropriate.

APPENDIX 4: AUSTRALIAN HUMAN RESOURCES INSTITUTE SURVEY

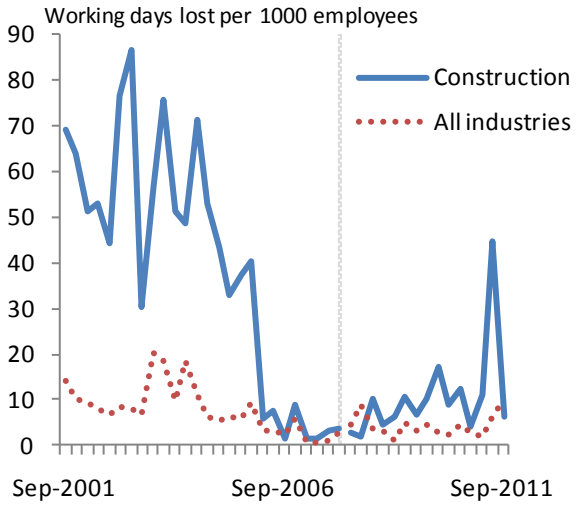
Taken from *The Fair Work Act: Its Impact on Australian Workplaces*, Australian Human Resources Institute Research Report on Annual Survey, Melbourne, January 2012.

Key findings at a glance:

- 63% of respondents report an increased level of record keeping under the Fair Work Act (58% reported that in 2010)
- 47% of respondents believe that operating under the Fair Work Act will decrease their organisation's willingness to employ people over the next three years
- 51% believe industrial relations costs will increase further in a year's time (37% believed that in 2010)
- 65% report it taking more time to formulate employment contracts (down marginally from 68% in 2010)
- 47% report spending more time bargaining over employment contracts (40% reported that in 2010)
- 46% report the negotiation of employment contracts is more difficult (38% reported that in 2010), but 38% also believe negotiating employment contracts will become more difficult in 12 months time (25% believed that in 2010)
- 29% report productivity has decreased (13% reported that in 2010)
- 31% believe that allowing individual labour contracts, subject to a "better off overall' test, would either somewhat or greatly improve productivity
- 31% believe allowing a choice between union and non-union negotiated agreements would somewhat or greatly improve productivity
- 40% believe greater flexibility in use of contractors and labour hire firms would positively impact productivity
- 47% report the importance of managing union relations has increased (39% reported that in 2010)
- 41% report the number of union visits to work sites has increased (29% reported that in 2010)
- 58% report labour costs have increased (45% reported that in 2010)
- 33% report the number of parent leave days allowed per annum has increased (20% reported that in 2010)
- 31% report the number of personal carer days allowed per annum has increased (20% reported that in 2010)
- 47% report that overall remuneration has increased (30% reported that in 2010)
- 42% report flexible employee working arrangements have increased while 18% report they decreased, with 38% reporting 'no change'. This question was not asked in 2010
- 35% report that under the new unfair dismissal threshold it has been harder to make jobs redundant (26% reported that in 2010)

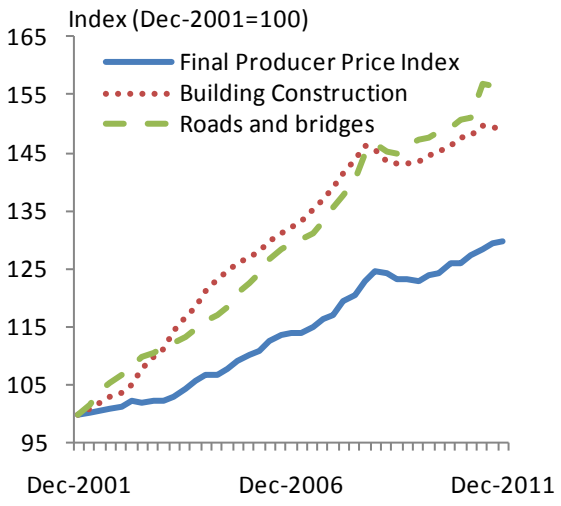
APPENDIX 5: BUILDING AND CONSTRUCTION SECTOR FACTS

Chart 1: More working days are lost in construction than the all industry average



Source: ABS, Catalogue No. 6321.0.55.007, Industrial Disputes, September 2011 and December 2007. Note: Data from March quarter 2008 onwards use ANZSIC 2006 industry classification, data before are ANZSIC 1993.

Chart 2: Construction prices have risen faster than final producer prices since 2001



Source: ABS Catalogue No. 6427, *Producer Price Indexes* December 2011, Tables 1 and 15.

The construction industry has consistently lost more working days per 1,000 employees to industrial disputes than the average of all industries in Australia (see Chart 1). Since construction represents a large share of Australian GDP, and has flow-on effects to other sectors, increased levels of industrial disputation have a negative impact on the economy.

Construction prices have also risen rapidly over the last decade (Chart 2), with the producer price of building construction up over 49 per cent since December 2001, well above the rise for general final producer prices of around 30 per cent over the same period.

According to recent Victorian Government research and analysis. Australian construction costs are uncompetitive internationally across a range of cost components, including road construction, high-rise apartments and raw material costs. Research has identified that Australia has the highest or second highest construction costs in 17 out of the 33 cost components analysed, when compared to Canada, Germany, the United Kingdom and the United States.[6]

[6] Victorian Government, Submission to the Senate Committee on Education, Employment and Workplace Relations Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, February 2012, p. 12.

CONTRAVENTIONS INVESTIGATED BY AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER, 2007–2011

	2007–08	**2008–09**	**2009–10**	**2010–11**
Right of entry	139	109	213	90
Unlawful industrial action	199	222	200	223
Coercion	156	107	157	103
Independent contractor	11	11	109	238
Freedom of association	114	67	65	37
Strike pay	67	62	50	17
Breach of other WR Act provisions	97	84	41	1
Breach of other FW Act provisions	–	–	32	45
Wages and entitlements	–	–	–	154
Other	29	21	20	27
Total	812	683	812	935

Source: *Australian Building and Construction Commissioner Annual Report 2010–11*.

GLOSSARY

ABCC – Australian Building and Construction Commission
ABS – Australian Bureau of Statistics
ACTU – Australian Council of Trade Unions
AEC – Australian Electoral Commission
AHRC – Australian Human Rights Commission
AHRI – Australian Human Resources Institute
AIRC – Australian Industrial Relations Commission
AWA – Australian Workplace Agreement
AWU – Australian Workers' Union
BOOT – Better Off Overall Test
CFMEU – Construction Forestry Mining and Energy Union
CPI – Consumer Price Index
EA – Enterprise Agreement
EBA – Enterprise Bargaining Agreement
FIFO – Fly In Fly Out
FW Act – Fair Work Act
FWA – Fair Work Australia
FWO – Fair Work Ombudsman
GDP – Gross Domestic Product
GFB– Good Faith Bargaining
IFA – Individual Flexibility Arrangement
ILO – International Labour Organization
M&A – Mergers and Acquisitions
MSD – Majority Support Determination
NES – National Employment Standards
OECD – Organisation for Economic Co-operation and Development
OHS – Occupational Health and Safety
PC – Productivity Commission
SBU – Single Bargaining Unit
ULC – Unit Labour Cost
WPI – Wage Price Index

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