

Productivity Commission Inquiry:  
Workplace Relations Framework

APPEA Submission

March 2015

## CONTENTS

<b>KEY POINTS.....</b>	<b>3</b>
<b>THE CURRENT WORKPLACE RELATIONS FRAMEWORK AND THE OIL AND GAS INDUSTRY .....</b>	<b>4</b>
<b>RECOMMENDATIONS .....</b>	<b>5</b>
<b>INTRODUCTION .....</b>	<b>6</b>
<b>SECTION 1 – AUSTRALIAN LNG INDUSTRY AND GLOBAL COMPETITION .....</b>	<b>11</b>
<b>SECTION 2 – REGULATORY IMPACTS ON PRODUCTIVITY AND COMPETITION .....</b>	<b>16</b>
<b>THE ISSUES.....</b>	<b>17</b>
LEARNING THE LESSONS FROM LNG GREENFIELDS AGREEMENTS TO DATE .....	18
FACILITATING BALANCED, FLEXIBLE AND MORE COMPETITIVE AGREEMENTS.....	27
MAINTAINING STABLE, FAIR AND LESS ADVERSARIAL WORKPLACE RELATIONS.....	36
<b>CONCLUSION .....</b>	<b>43</b>



## Key Points

APPEA welcomes the opportunity to provide comment on the Productivity Commission's Inquiry into the Workplace Relations Framework. As APPEA noted in its 2014 report, 'Improving Labour Productivity: a regulatory reform agenda'<sup>1</sup>, it is vital that Australia gets the labour market policy settings right today to secure Australia's future oil and gas opportunities.

This submission examines the Australian LNG industry in the context of global competition, identifies key aspects of the workplace relations framework that are currently undermining Australia's ability to capitalise on growing global demand for LNG or optimise existing project economics. It also sets out a 12 Point Reform Plan to address these problems.

APPEA's analysis and plan for reform are based on the following conclusions:

- While the oil and gas industry must take responsibility for its own productivity and competitiveness issues, the Australian Government has a critical role in creating an attractive investment environment through key policy and regulatory reforms.
- Australia's workplace relations system requires urgent reform if we are to capture and optimise the return from the once-in-a-generation opportunity provided by the growing global demand for LNG over the next two decades.
- Australia requires balanced, fair, flexible and efficient workplace arrangements that not only address employers' and employees' changing needs and priorities, but also improve productivity, optimise economic return for all Australians and contribute to making Australia attractive for investment.
- The current arrangements are clearly failing Australia.

APPEA is seeking one particularly urgent and major reform – that is the introduction of a Major Project Agreement that better reflects the economics and competitiveness of individual major projects.

Several other recommendations are also proposed. APPEA maintains these will significantly improve the workplace relations framework and, in doing so, improve the likelihood of further major oil and gas projects that would enhance prosperity for all Australians.

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<sup>1</sup> APPEA (2014), *Improving Labour Productivity: a regulatory reform agenda*. [http://www.appea.com.au/wp-content/uploads/2014/04/APPEA\\_ILP-report\\_web.pdf](http://www.appea.com.au/wp-content/uploads/2014/04/APPEA_ILP-report_web.pdf).



## The current workplace relations framework and the oil and gas industry

Australia has abundant natural gas resources and over many years has distinguished itself as a reliable, secure and proven supplier of LNG.

While global demand for LNG will continue to grow over the next two decades and Australia has more than enough capacity to meet that demand, high local costs and declining productivity mean that Australia risks pricing itself out of further investment opportunities in the global LNG market and reducing the economic benefits for Australia from existing projects.

Reliable, secure and competitively priced energy underpins Australia's economy but maintaining Australia's international competitiveness in the face of growing global competition is the major challenge to the Australian LNG industry's continued growth.

Australia is regarded as a high cost location for LNG projects. For example, Australian costs for delivering LNG to Japan can be up to 30 per cent higher than those in Canada and Mozambique.

This high cost is in part due to the complexity of building and operating LNG projects in remote and challenging locations, but is also partly due to an inflexible and unbalanced workplace relations system that is based on, and perpetuates, industrial conflict and restrictive practices.

The current workplace relations system does not address the needs and priorities of Australia's employers and employees, and will not secure or optimise the economic benefits to be had from current and future LNG projects for the Australian community.

The *Fair Work Act 2009* is not operating in accordance with its object. Rather than providing a balanced framework for co-operative and productive workplace relations, it is delivering an imbalanced, adversarial and inflexible environment that is uncompetitive and favours a small number of highly paid workers. The system is allowing the short-term gain of the few to triumph over long-term benefits for the many.

LNG projects involve massive and long-term capital investment decisions, which can make them vulnerable to short-term pressure, e.g. from industrial agreement negotiations and disputation. This has contributed to unreasonable labour costs and conditions spreading across the industry, agreements that do not reflect the real market situation and that benefit a small number of highly paid workers at the cost of the broader Australian workforce. There is a real risk that companies, once subject to such pressure, will be deterred from making further investments in Australia.

More recently, downward pressure on oil prices is affecting project economics. While the oil and gas industry is experienced in managing this scenario and is focused on its business fundamentals and reducing costs, governments must also exercise discipline and drive critical policy and regulatory reforms.



## Recommendations

To better support the oil and gas industry in both construction and operational phases of projects, APPEA offers to the Productivity Commission a 12 Point Plan for Reform. The plan is structured under three headings and 12 key areas for reform which are summarised below:

### **Learning the lessons from LNG greenfields agreements to date**

1. Establish a new category of agreement (Major Project Agreement) under the *Fair Work Act 2009* (FWA) that is applicable for the 'life' of major projects or extend the term of enterprise agreements to 6 years for major projects.

### **Facilitating balanced, flexible and more competitive agreements**

2. Limit the scope of matters over which bargaining can take place and upon which agreement can be reached.
3. Outlaw forced pattern bargaining (pyramid contract arrangements)
4. Provide scope for individual options and opt-outs
5. Provide new options for making collective agreements
6. Amend the object of the FWA to make clear the interests of productivity and efficiency, and take into account when arbitrating bargaining disputes
7. Offer greater capacity to terminate current agreements

### **Maintaining stable, fair and less adversarial workplace relations**

8. Raise the bar to take protected industrial action
9. Lower the bar to end protected industrial action
10. Impose greater penalties for unlawful industrial action, as well as the capacity to seek injunctive relief.
11. Provide greater controls over right of entry
12. Improve anti-picketing and secondary boycott laws



## INTRODUCTION

Reliable, secure and competitively priced energy is crucial to Australian industry, communities and households. The oil and gas industry has a vital role to play in finding and developing this critical energy supply. The industry has created thousands of jobs and will deliver major export income and tax revenue for Australia, as well as cleaner energy for Asia.

Almost \$180 billion is being invested in oil and gas projects, including major LNG export projects, with more under consideration.

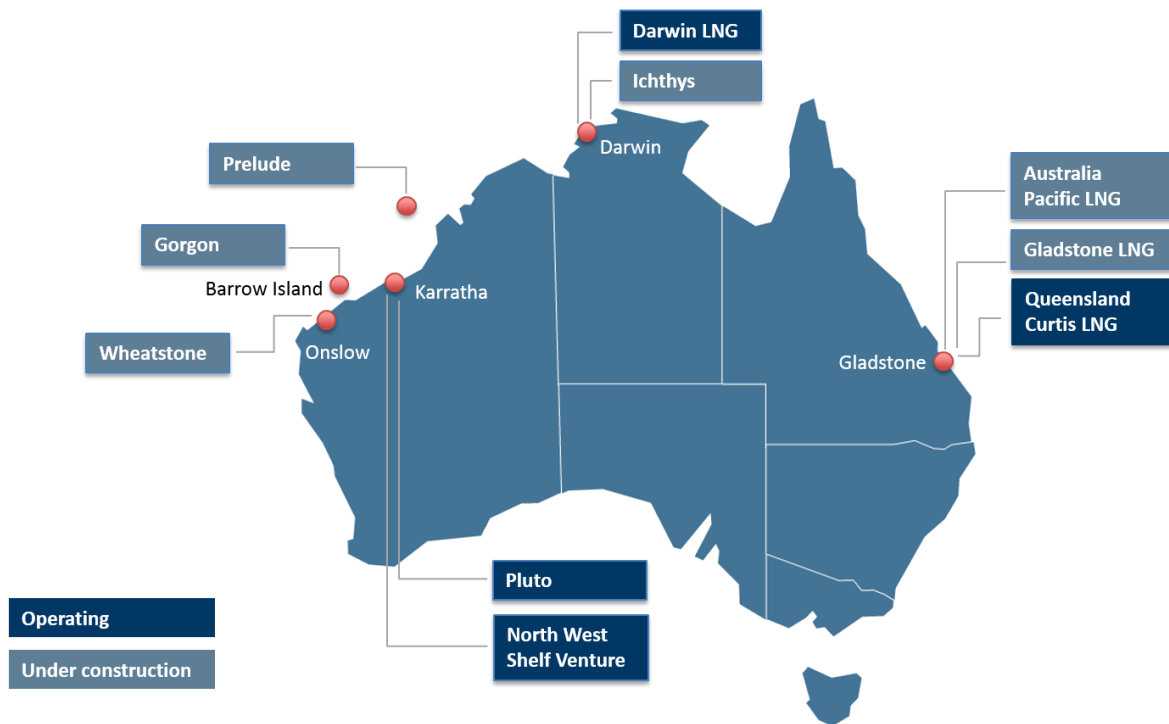
Australia currently has four operating liquefied natural gas (LNG) plants:

- North West Shelf
- Darwin LNG
- Pluto
- Australia Pacific LNG

There are another six projects more under construction:

- Gorgon
- Wheatstone
- Gladstone
- Ichthys
- Queensland Curtis
- Prelude (Floating)

**Figure 1: Australian LNG Projects**



Source: Department of Industry (2014)



These projects include:

- largest resources projects and some of the largest capital projects ever undertaken in Australia;
- world's first projects featuring CSG to LNG developments;
- world's first floating LNG project; and
- largest greenhouse gas storage project in the world.

Australia's oil and gas industry has underpinned much of Australia's economic prosperity and growth since at least the early 1960s. A recent PwC report, *Value Adding: Australian Oil and Gas Industry*<sup>2</sup>, shows that:

- The oil and gas industry's production profile directly represents around 2 per cent of current GDP, with value-added of approximately \$32 billion in 2012-13.
- At current projected investment levels, the total forward contribution of the combined oil and gas and exploration sectors is projected to double to approximately \$53 billion in 2019-20 and \$67 billion in 2029-30.
- Driving strong value-add from the industry is an increase in gas exports over the next decade. The value of natural gas exports (already Australia's third largest export, after iron ore and coal) is expected to reach around \$60-70 billion by the middle of 2019 and production is expected to double over the next five years.
- In 2030, when production (on the basis of current and forthcoming capacity) and prices are expected to stabilise, the oil and gas industry's total economic contribution is projected to be around 2.6 per cent of the Australian economy.
- After accounting for its inter-linkages with the rest of the economy (companies all over Australia are supply goods and services to the oil and gas industry, and the use of fly-in, fly-out staffing is spreading the benefits of the industry) the sector is projected to be around 3.5 per cent of national output.

Collectively, all of Australia's combined projects will make it the world's largest exporter, with approximately 25 per cent share of the global LNG trade. This represents an extraordinary success, and Australia is well positioned, if it gets the policy and regulatory framework right, to capture further growth, given its substantial gas resources and proximity to Asia, the region with high demand growth and an increasing desire for cleaner energy sources.

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<sup>2</sup> PwC (2014), *Value-adding: Australian Oil and Gas Industry, September 2014*, pages 28-29 (available at [www.appea.com.au/wp-content/uploads/2014/11/PwC-Report-Oil-and-Gas-Industry-Sept-2014-FINAL.pdf](http://www.appea.com.au/wp-content/uploads/2014/11/PwC-Report-Oil-and-Gas-Industry-Sept-2014-FINAL.pdf)).



All of this transformational investment is also producing growth in the high tech service sector that supports operations and maintenance as current projects come on stream, and this will have flow on benefits into the wider economy. The oil and gas industry is a global industry, and these global connections provide Australia with access to the best in technology, science, practice and experience. Technological and commercial innovation is driving significant exploration efforts in deeper waters and onshore with huge potential for the Australian economy and future high skilled jobs.

The global market will however, provide increasing LNG supply competition in Asia, and in this environment it is imperative that Australia has in place a policy and regulatory framework that attracts international investment.

Forecast global demand for LNG is 470 million tonnes per annum by 2030, meaning that more than 200 million tonnes in new capacity will be needed between now and then. To meet this huge demand, there are plans to more than double the number of LNG projects around the world.

Australia is regarded as a high cost location for LNG projects. This is due in part to their location in difficult and remote locations and importantly, through exposure to some of the highest construction and labour costs in the world. Recent analysis<sup>3</sup> has shown that Australian costs for delivering LNG from greenfield projects to Japan, can be up to 30 per cent higher than those in competing countries, such as Canada (West Coast), Mozambique and the US (Gulf of Mexico).

Maintaining its international competitiveness in the face of fierce global competition is the major challenge to the continued growth of Australia's LNG industry. A high cost local environment, a complex domestic regulatory framework and the potential for other countries to capture market opportunities will continue to make it challenging for Australia to capture the next wave of global investment in the industry.

Compounding this, the current downward pressure on oil and gas prices are also impacting project economics. The industry is addressing this scenario by reducing costs and improving productivity, while ensuring the high standards of performance expected by the community are maintained. Companies are focused on reviewing business fundamentals, such as operational and cash flow discipline, improving performance, and pursuing opportunities for collaboration and efficiencies.

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<sup>3</sup> McKinsey & Company (May 2013) *Extending the LNG boom: Improving Australian LNG productivity and competitiveness* (available at [http://www.mckinsey.com/global\\_locations/pacific/australia/en/latest\\_thinking/extending\\_the\\_lng\\_boom](http://www.mckinsey.com/global_locations/pacific/australia/en/latest_thinking/extending_the_lng_boom))





The responsibility to optimise productivity and competitiveness and maintain high standards of safety and environmental performance has always and continues to lay first and foremost with oil and gas companies themselves and the collective industry. However, whilst the industry is working hard to retain for Australia opportunities for LNG growth from potential new greenfields, brownfield and FLNG projects, this must be supported at the Australian Government level by significant and necessary reform to the workplace relations framework.

The Productivity Commission's review of the workplace relations framework provides a once in a generation chance to embark on much-needed reform of a system that is failing the national interest.

Implementing the changes APPEA is recommending in this submission – our 12 Point Plan for Reform – will ensure that the potential for new and existing projects will be realised to the benefit of all Australians, not just a small number of highly paid workers who are able to legitimately use the current legislation to secure short-term financial gain at the expense of long-term, generational opportunities for the many.

The Australian Government's recent *Intergenerational Report: Australia 2055* also highlights the need for government to focus on reforms that will improve the competitiveness of business and provide an environment that enhances productivity and innovation.<sup>4</sup> The examples included in this report, along with those in APPEA's 2014 *'Improving Labour Productivity: a regulatory reform agenda'* Report, reinforce the urgency of the need for reform, with specific reference to the FWA and the workplace relations framework more generally.

The Australian oil and gas industry is seeking major changes to improve and restore balance to the Australian workplace relations framework. This submission provides the rationale for that reform and recommendations for changes to the FWA. The recommended reforms will create greater flexibility but also certainty for industry and investors. The potential rewards for the broader Australian economy are significant, whilst any impacts from APPEA's recommended reforms would apply to a relatively small number of well-paid workers.

In particular, APPEA strongly recommends amending the FWA to allow for the introduction of a new category of Major Project agreement for major capital projects. The introduction of a new Major Project Agreement would mitigate risks to project performance and competitiveness that arise from the risk of protected industrial action during renegotiation of EBAs and the expiry of

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<sup>4</sup> Australian Government (2015), *2015 Intergenerational Report – Australia in 2055* (available at [www.treasury.gov.au](http://www.treasury.gov.au)).



agreements at critical times during project construction. Other recommendations seek to restrict the broad scope of permitted matters over which bargaining can occur, and more significant penalties to discourage the misuse of right of entry provisions and unlawful industrial action, all of which significantly impact operational costs and efficiency.

The oil and gas industry has a history of innovative workplace arrangements, including establishing market leading terms and conditions for its employees and a broad approach to workplace relations. This approach encompasses agreements with individuals and those that involve union parties, and everything in between.

The Australian workplace relations framework of the future should provide far greater scope than currently available and a range of agreement solutions that better reflect the needs and challenges of constructing and operating complex, large-scale mega-projects and that reflect the international competitive environment in which they operate. Investors and project owners cannot have any confidence in a system that encourages the continued ratcheting up of wages and allowances over the life of projects, high levels of industrial disputation and associated costs and reduced productivity. Australia's workplace relations system is negatively impacting on both current and future constructions projects, as well as on-going operations and maintenance.

Now is the time for Australia to address the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. It is critical that labour market policy settings are reviewed to facilitate the industry's ability to capitalise on growing demand for LNG.

**This submission should be read in conjunction with APPEA's 2014 publication, *'Improving Labour Productivity: a regulatory reform agenda'* Report, which presented the case for policy reform to address the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. That report is attached as Appendix 2.**



## SECTION 1 – AUSTRALIAN LNG INDUSTRY AND GLOBAL COMPETITION

The oil and gas industry plays a vital role in Australia's economy, industrial structure and prosperity. It is a highly skilled, productive and technology based sector that delivers significant value-add, employment, and taxation contribution. The sector is experiencing substantial growth, driven by high demand for LNG.

Australia's long history of secure and reliable supply of this commodity has been rewarded with a remarkable growth in LNG supply contracts and investment that will see the country become the single largest producer and supplier in the world by 2018. This phenomenal achievement is one of Australia's greatest, yet little known, economic success stories, with the potential for more to come.

### **The size of the prize<sup>5</sup>**

In 1989, Australia had one operating liquefied natural gas project producing 2.5 million tonnes of LNG per annum. By 2013 that had increased to three operating projects, producing 23.3 million tonnes and averaging one tanker per day leaving Australian shores for Asia.

By 2018, Australia will have 21 LNG trains in ten operating projects producing a total of 85million tonnes per annum, making it the world's largest LNG exporter and a keystone energy supplier to several major Asian nations.

By 2029-30, when production (on the basis of current and forthcoming capacity) and prices are expected to stabilise, the industry's total economic contribution is projected to be around 2.6 per cent of national output or approximately \$67 billion. That is an increase of over 0.5 percentage points in the industry's current contribution to the national economy. Under current capital expenditure projections, the oil and gas sector will employ over 35,000 people by 2029-30.

The strategic imperative for Australia now is to hold onto this number one position and ensure that the industry's operating environment is globally competitive and conducive to further investment. LNG will become the dominant form of gas traded internationally by 2035, and with 70 per cent of that LNG being sold into Australia's key Asia-Pacific markets<sup>3</sup>.

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<sup>5</sup> PwC (2014), *Value-adding: Australian Oil and Gas Industry, September 2014*, pages 28-29 (available at [www.appea.com.au/wp-content/uploads/2014/11/PwC-Report-Oil-and-Gas-Industry-Sept-2014-FINAL.pdf](http://www.appea.com.au/wp-content/uploads/2014/11/PwC-Report-Oil-and-Gas-Industry-Sept-2014-FINAL.pdf)).



This arises because of limited local sources of oil and gas in the Asia Pacific region and a desire to reduce dependence on Middle East oil supplies. Australia is well-placed to take advantage of this growing market, but is constrained by the current framework for workplace relations.

The current wave of LNG projects will result in a significant productivity gain as export volumes rise 260% from 23.3 million tonnes per annum to 85 million tonnes per annum for a 60% increase in direct industry employment from approximately 39 000 (2013) to 61 000 (2018). However, this is only the beginning of the productivity opportunity available to the country, and building structural efficiencies into the labour productivity system will reap ongoing benefits for all Australians through the short, medium and long-term.

### **Short-Term (2015-2020)**

As the LNG projects currently under construction transition into operations over the next five years, we will experience some improvement to productivity. This is due in part to increasing production rates and lower numbers of highly skilled workers being required for operations than in the construction phase, but also as a result of the development a local operations and maintenance service sector. Substantial industry investment is already evident in the oil and gas services sector, and includes growth of in-field services, general trades services (for maintenance and turnaround support), high tech field support (e.g. Schlumberger, Halliburton, Oceaneering, GE). There is also considerable industry investment in skills development, aimed at boosting the sectors capability from entry level through to mastery.

As well as the positive impacts these investments will generate by way of improving costs and local content for Australian industry, there are also opportunities to export these services within the Asia Pacific region.

As new services are contracted for new LNG operations and maintenance activities, the same issues that have impacted greenfields project agreements under the FWA during the construction phase will remain. It is critical that agreement negotiations do not act as a deterrent to investment, as the growth of capability and capacity in this local service sector will have a direct impact on the reliability of LNG production, which is a key driver of Asian demand for Australian LNG.



### Medium-Term (2020-2025)

Market estimates predict that the Asia-Pacific market will require approximately 25 million tonnes per annum of additional LNG supplies in the 2020-2025 period. Australia will be seeking to secure a significant part of this new market demand. Depending on price and exchange rates, this represents an additional gross revenue stream in the order of A\$10 billion per annum.<sup>6</sup>

To reach a Final Investment Decision (FID) companies must have secured LNG sales to underpin the massive capital investment in a project, and from that FID point it takes on average another 3 years to construct an LNG project. This means that the international competition for those additional LNG supplies in the 2020-2025 period will need to occur over the next two years.

Energy companies in the US, Canada, Mozambique and Tanzania are now developing or planning to develop LNG projects targeting the large Asian markets and could potentially be major competitors to Australian LNG exports.

New Australian onshore greenfields projects run at a 30 per cent cost disadvantage to competitive international alternatives<sup>7</sup> because of Australia's massive geography, low population and limited infrastructure. They can however remain attractive options as long as Australia does everything it can to keep additional costs down and to deliver as much productivity as possible. Further, brownfield or LNG project expansions are able to leverage off existing infrastructure, and technologically advantaged Floating LNG (FLNG) project options are cost competitive compared to other LNG alternatives.

Figure 2 below compares the major cost components of competing supplies into Japan that could serve the LNG market in Asia Pacific. It shows modelled costs (Sep 2014) for raw gas, liquefaction, infrastructure and freight of LNG from source to Japan. On this basis, new Australian greenfields projects are estimated to deliver LNG into Japan at \$14.6/MMBTU, which is approximately 30 per cent more expensive than competing greenfields projects from US Gulf Coast (\$11.1/MMBTU), West Coast Canada (\$11.1/MMBTU) or East Africa (\$10.7/MMBTU). The good news is that conventional Australian gas expansion projects (brownfield) are cost competitive (\$11.1/MMBTU) with these new supplies.

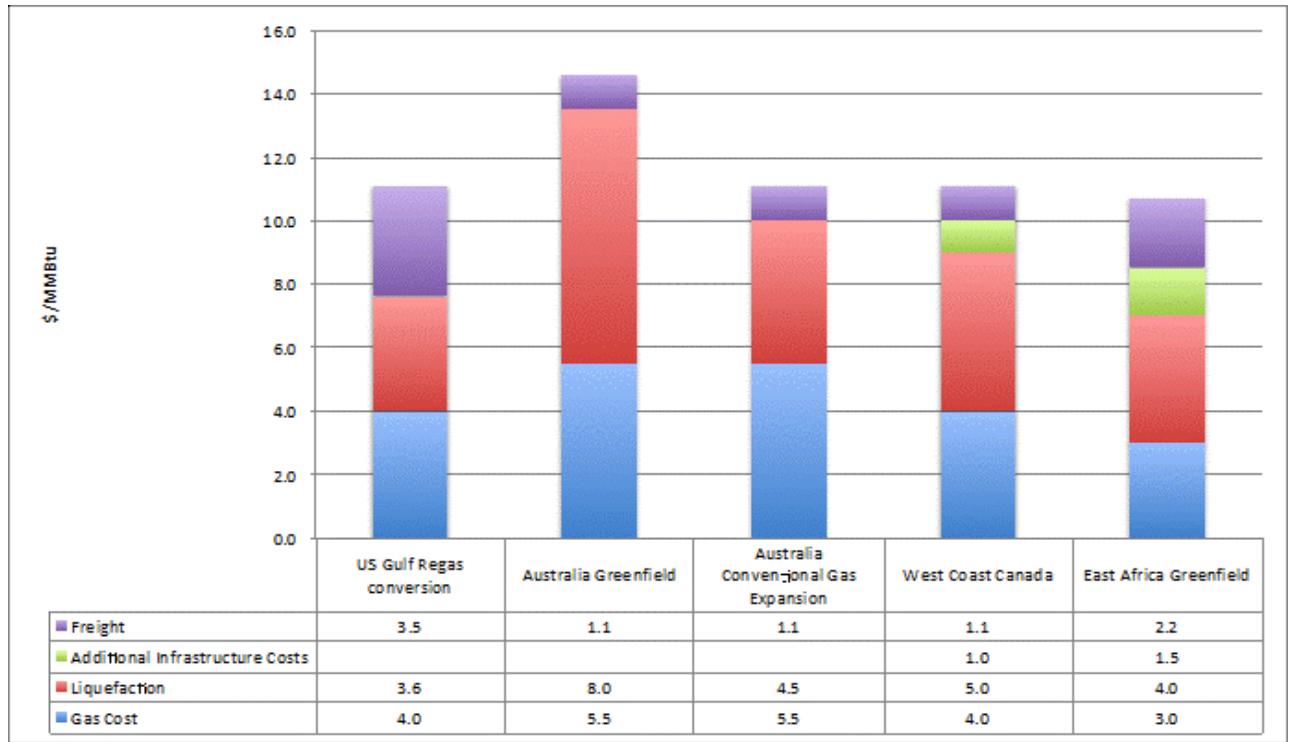
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<sup>6</sup> In AUD. Tonnes per MMBTU converted as per BP.com

<sup>7</sup> McKinsey & Company (2013), *Extending the LNG boom: improving Australian LNG productivity and competitiveness*, pp.1-2



**Figure 2: Comparison of delivered costs of LNG to Japan<sup>8</sup>**



Reforms that boost Australia’s productivity will both attract new projects and also build high level skills in the supply sector. This will also have benefits beyond the oil and gas sector to the broader industrial capability of Australia. An example would be the role of GE in supplying leading turbine technologies, initially to the LNG trains, but ultimately to the broad resources and power utility industries

**Longer-Term (2025+)**

Beyond 2025, the continued expansion of gas demand in the Asia-Pacific region will trigger a demand for new LNG projects, and this level of demand will make more remote gas fields commercially viable and open up the potential for Australia to be competitive in securing new sales volumes. BP’s *Energy Outlook 2035*<sup>9</sup> report predicts that Asia-Pacific LNG demand will

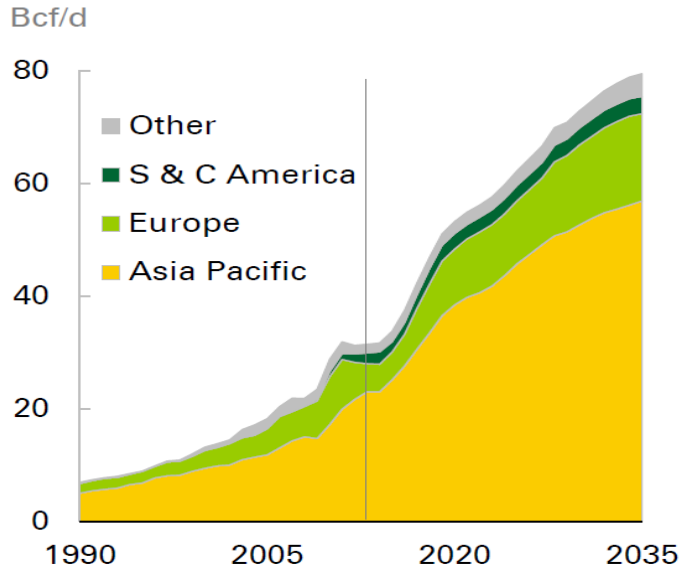
<sup>8</sup> David Ledesma, James Henderson & Nyrie Palmer (September 2014), *The future of Australian LNG Exports: will domestic challenges limit the development of future LNG export capacity?* The Oxford Institute for Energy Studies (OIES), OIES Paper NG90, p.61.

<sup>9</sup> BP, *Energy Outlook 2035* (2015). Available at: <http://www.bp.com/en/global/corporate/about-bp/energy-economics/energy-outlook.html>



increase by more than 80 million tonnes per annum (11 billion cubic feet/day or Bcf/d) between 2025 and 2035.

**Figure 3: Global LNG demand<sup>10</sup>**



While Australia’s massive geography and low population does create a relatively high cost base, and one that will be sustained, and we have to compete against an increasingly diverse and ambitious set of countries involved in selling LNG into the large Asia-Pacific markets, there is a significant opportunity to reform the workplace relations system to yield major growth in a highly productive oil and gas sector. Failure to do so will reduce Australia’s ability to secure the market for this growth.

“A workplace relations system that drives investment to other countries is in nobody’s interest...”  
(Hon Martin Ferguson, AM)<sup>11</sup>

The frequency and intent of labour disputes and third party intrusion in day-to-day operational decisions and the business response to competitive change experienced in Australia is far in excess of international markets. Most importantly, this is so in comparison to the North American markets of Canada and the United States, which have the potential to directly compete with Australia for the LNG prize of supplying LNG to the Asia-Pacific nations.

<sup>10</sup> BP, *Energy Outlook 2035* (2015). Available at: <http://www.bp.com/en/global/corporate/about-bp/energy-economics/energy-outlook.html>

<sup>11</sup> Hon Martin Ferguson AM, (2014), *Competitiveness of the Australian gas industry*, Speech to CEDA Perth (28 February 2014).



## SECTION 2 – REGULATORY IMPACTS ON PRODUCTIVITY AND COMPETITION

As outlined above, the major challenge to the industry's continued growth is maintaining Australia's international competitiveness in the face of growing global competition and price uncertainty. If Australia is to continue to build on its LNG industry it needs to reverse its recent productivity performance, and work to reduce costs for Australian LNG projects which have risen dramatically.

There are obviously a range of measures that are being undertaken by companies themselves to reduce costs and improve productivity, and especially during the current low oil price environment. However, to support these individual corporate initiatives, the Australian oil and gas industry collectively and firmly believes that labour relations reform must be placed at the centre of the national productivity agenda.

### **The Fair Work Act is not operating in accordance with its object**

The object of the FWA (under S3) is to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by a range of more specific means. Unfortunately, in the experience of many operators and contractors in the oil and gas industry, this has not been the case; there has, in fact, been an *imbalance* in the framework.

This imbalance has not only been in the favour of unions who represent a mere 12 per cent of the Australian workforce, but has encouraged conflict, unnecessarily drawn out agreement making, minimised the level of competition for contracts and resulted in unsustainable terms and conditions. Unless it is addressed – urgently – this imbalance threatens the likelihood of future new projects and the competitiveness of existing ones.

The recent Competition Policy Report appropriately noted that the negotiation of employment terms and conditions had always been excluded from most of the competition law provision of the *Competition and Consumer Act 2010*.<sup>12</sup> While acknowledging the differences between labour markets and product or service markets, it is reasonable to question why competition policy has sought to strike down anti-competitive arrangements in product markets while simultaneously workplace relations policy has effectively enshrined collective bargaining and union monopoly at the centre of the workplace relations framework.

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<sup>12</sup> Competition Policy Review, *Draft Report*, September 2014, p.241.





Then Chairman of the Productivity Commission, Gary Banks AO, noted in a speech to the 2012 ACCC Regulatory Conference that workplace relations regulation has generally fallen outside the purview of competition policy and that, aside from secondary boycotts, union activities are largely exempt from the anti-competitive conduct provisions of the *Competition and Consumer Act 2010*.<sup>13</sup> Acknowledging that labour markets are more complex than product markets, he then questioned if this was a sufficient reason for foregoing scrutiny of whether regulatory measures in the labour market exceed costs and, where they do, whether they are in fact the best way of achieving those benefits. He noted that:

*This question is significant because of the pervasiveness of these regulations across the economy and their influence on the ability of enterprises to innovate and adapt to market opportunities and pressures. Also, the industrial landscape today is considerably evolved from what it was a few decades ago... Competition among firms is much greater, most production is technologically more sophisticated and 'human capital' is generally seen as key to competitive performance. Moreover, general social safety nets and government support mechanisms have become well developed.*<sup>14</sup>

**The same questions must be asked of the provision of the Fair Work Act because of the impact it has on productivity and competitiveness for major projects.**

Opening up specific arrangements sanctioned by the FWA will enhance competitiveness and attract more investment, which will ultimately create more jobs. Productivity gains provide the only sustainable source of higher wages and job security for employees.

## THE ISSUES

There are aspects of the FWA that are directly contributing to higher project costs and reduced productivity. APPEA's submission addresses these aspects in three sections.

- **Learning the lessons from LNG greenfields agreements to date**
- **Facilitating balanced, flexible and more competitive agreements**
- **Stable, fair and less adversarial workplace relations**

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<sup>13</sup> Banks, G (2012), *Competition Policy's regulatory innovations: quo vadis?* July (available at [www.pc.gov.au/speeches/gary-banks/competition-quo-vadis](http://www.pc.gov.au/speeches/gary-banks/competition-quo-vadis)).

<sup>14</sup> *Ibid.*



The main focus of the submission is on the negative impacts on productivity created by the current agreement process, major project agreements and the need to more appropriately reflect and respond to project economic circumstances. Some further recommendations are designed to introduce greater fairness and stability and support. The Australian Mines and Metals Association's (AMMA) submission provides more practical detail on the issues themselves.

## LEARNING THE LESSONS FROM LNG GREENFIELDS AGREEMENTS TO DATE

1. Establish a new category of agreement (Major Project Agreement) under the Fair Work Act that is applicable for the life of major projects or extend term of enterprise agreements to 6 years for major projects

### Recommendation 1:

- 1.1 Establish a new category of agreement – Major Project Agreement – under the Fair Work Act that applies specifically to major projects.
- 1.2 If unable to establish a new category as above, then amend s.186 and s.211 of the Fair Work Act to extend the term of enterprise agreements to 6 years that would apply to major projects, and insert a suitable definition of what constitutes a major project. This would allow enterprise agreements to last through the entire life of the construction phase of major projects such as LNG projects.
- 1.3 A suitable definition of what constitutes a major project could be drawn from the former Bureau of Resource and Energy Economics (BREE, now within the Office of the Chief Economist, Department of Industry and Science) where major capital projects are defined as projects with more than \$50 million in capital expenditure.
- 1.4 Amend the objects of the Act and the agreement-making part to more clearly reflect commercial interests.
- 1.5 A 3 month negotiation period with unions, failing which, a Fair Work Commission arbitration at the option of the employer.
- 1.6 The arbitration must take into account the particular circumstances and needs of the employer and the project, with these considerations weighted equally with prevailing paying conditions for work in similar circumstances.
- 1.7 Restrictions on agreement content (see Recommendation 2 below).

APPEA is recommending the introduction a new Major Project Agreement that would mitigate risks to project performance and competitiveness that arise from the risk of protected industrial action during the renegotiation of enterprise agreements and the expiry of agreements at critical times during project construction. Major Project Agreements will also serve to ensure they do not contain unreasonable restrictions on project construction performance and operations. They will



also increase the potential for terms and conditions that better reflect the demand for labour and, as such, is priced in accordance with the same skills in other sections of the economy.

Without establishing Major Project Agreements, it is difficult to maintain continuity of employment conditions through the entire construction phase for major projects such as LNG projects, unless there is a simple extension of the nominal life to 6 years. The current provisions set a maximum of 4 years without any reference to particular projects. In the absence of a new category of Major Project Agreement, APPEA recommends that the FWA should be amended to extend the life of enterprise agreements to 6 years for major projects such as LNG projects.

The recommendations above aim to increase the potential for terms and conditions to be reached that better reflect the specific risks associated with large, complex and remote greenfield engineering projects. The recent Australian LNG projects are some of the most complex engineering construction projects in the world.

The current system effectively demands that agreements are made with unions and, to a large extent, on union terms. So while the purpose of a greenfields agreement is to provide projects with greater certainty around terms and conditions and allow estimates to be made of projected labour costs as part of determining project viability/profitability, a number of issues associated with these provisions have been identified.

These issues have also been identified in previous reviews of the legislation and by both sides of government. For example, the former Government's commissioned review into the FWA reached the following conclusion:

*... based on the evidence we have received in submissions and consultations, and a review of the data associated with greenfields agreements ... we consider that there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia.<sup>15</sup>*

The Coalition Government has also acknowledged that there are significant issues associated with greenfields negotiations in both its pre-election policy and its proposed first tranche of amendments to the FWA. As the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* notes:

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<sup>15</sup> Fair Work Act Review (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, 2 August, p. 171 (available at [www.employment.gov.au/fair-work-act-review](http://www.employment.gov.au/fair-work-act-review)).



*Greenfields bargaining practices mean that the commencement of projects can be delayed or possibly abandoned. Alternatively, employers may be forced to agree to claims that are economically unsustainable ... An employer may proceed with a new project without a greenfields agreement in place and negotiate an enterprise agreement when employees commence working on the project. This alternative ... may result in protected industrial action early in the life of the enterprise, leading to scheduling and cost blowouts.<sup>16</sup>*

The potential impacts of project delays associated with the process for making greenfields agreements has been the subject of a study by the Department of Employment.<sup>17</sup> The Department modelled the impact of delays on project cash flows, measured by present net value, and concluded that:

- Each year on average 16 major resource and energy projects with a total investment of around \$700 million move from the 'Feasibility' to 'Committed' stages, and around 10 of these are new projects requiring greenfields agreements.
- On average, around 40 greenfields agreements are in operation at each major project.
- For such a project, shortening delays due to greenfields negotiations by two months would save \$4.6 million in net present value.
- Given current numbers of projects and working from a conservative estimate that half of all projects are delayed by greenfields negotiations, this equates to a total delay cost reduction of \$23 million per annum spread across five projects.

While the impact of project delays is significant enough, the real impacts are enduring high cost wage outcomes and productivity issues that persist through the life of the agreement. Once that agreement is in place, productivity is impaired by a range of factors that are described below.

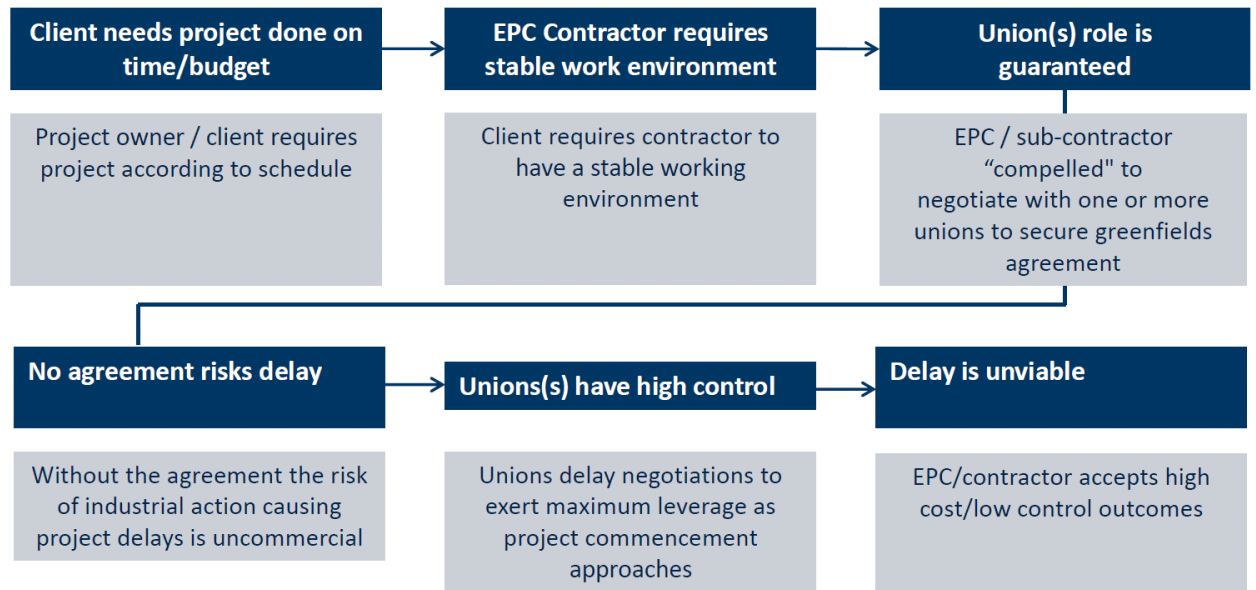
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<sup>16</sup> Explanatory Memorandum to the *Fair Work Amendment Bill 2014*, p. ix

<sup>17</sup> *Ibid.*, pp. xiii-xvi.



**Figure 4: Extended and Unbalanced Agreement Processes Introduce Delay and Cost**



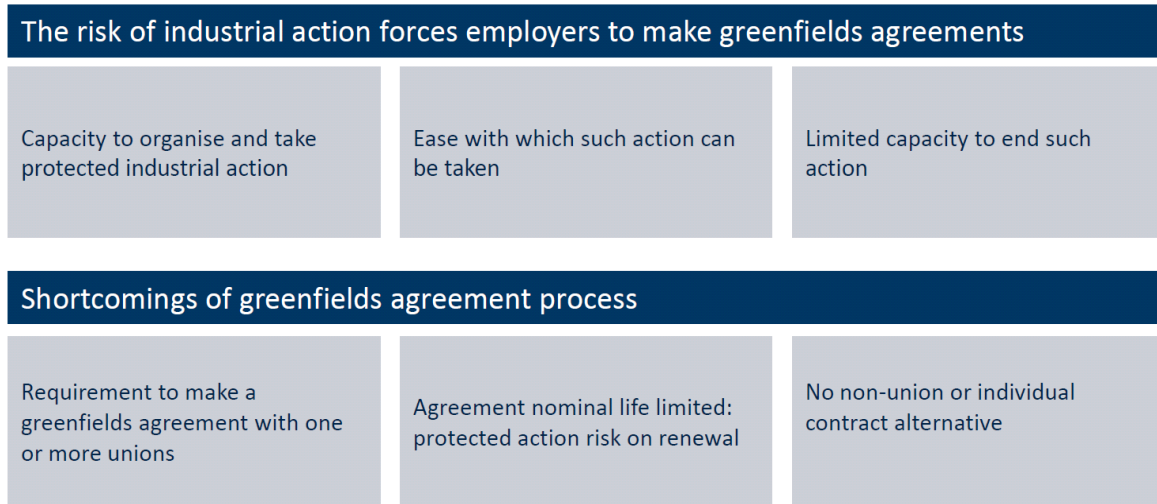
Source: Seyfarth Shaw Australia (2014).

A combination of factors drives high cost/low control outcomes – from the pressures on the project owner to commence construction in a timely way to meet schedule/market commitments through to the need for the Head Contractor or Engineering and Procurement Contractor (EPC) to have a stable industrial environment in order to meet contractual obligations.

At the heart of the issue though, is the effective “monopoly” power conferred to employee organisations (unions) to negotiate greenfields agreements under the FWA. This power plus relatively easy recourse to protected industrial action by unions facilitates the exercise of maximum negotiating power during the negotiation process.



**Figure 5: Legislative Drivers**



Source: Seyfarth Shaw Australia (2014).

**Requirement to make a greenfields agreement with one or more union**

Greenfield agreements need to be made *prior* to project commencement – with one or more unions but before any employees are engaged on the site. This is the only real option under the legislation. The only alternative is for an employer to commence the project without an agreement in place, thereby risking the industrial action in support of bargaining for a new agreement and work being disrupted or brought to a stop at huge cost to the employer.

Even when an agreement is struck with one or more union(s), a different union that is not bound by that agreement might seek to subsequently assert a role for itself on the project. The combination of the right of entry laws, which allow unions on site having regard to their coverage of potential members under their rules, together with the limited capacity to resolve demarcation disputes through a Fair Work Commission process, fosters this practice.

There is no effective alternative to the requirement to make a greenfields agreement with a union or unions. In the case of ordinary single- or multi-employer agreements, once an employer commences bargaining with its employees, the FWA automatically makes the relevant unions the bargaining representatives for their members. Unions can also force employers to bargain by obtaining a majority support declaration and then bargaining orders from the Fair Work Commission, or by using industrial action as leverage. While the agreement is ultimately made with employees, the FWA effectively guarantees the place of unions in the process.

The guaranteed involvement of unions in the agreement-making process is a relatively recent development. As far back as the *Industrial Relations Reform Act 1993*, introduced by the Keating Government, there have been provisions for negotiation of non-union collective agreements. The 1993 Act provided for non-union agreements in the form of Enterprise Flexibility Agreements.

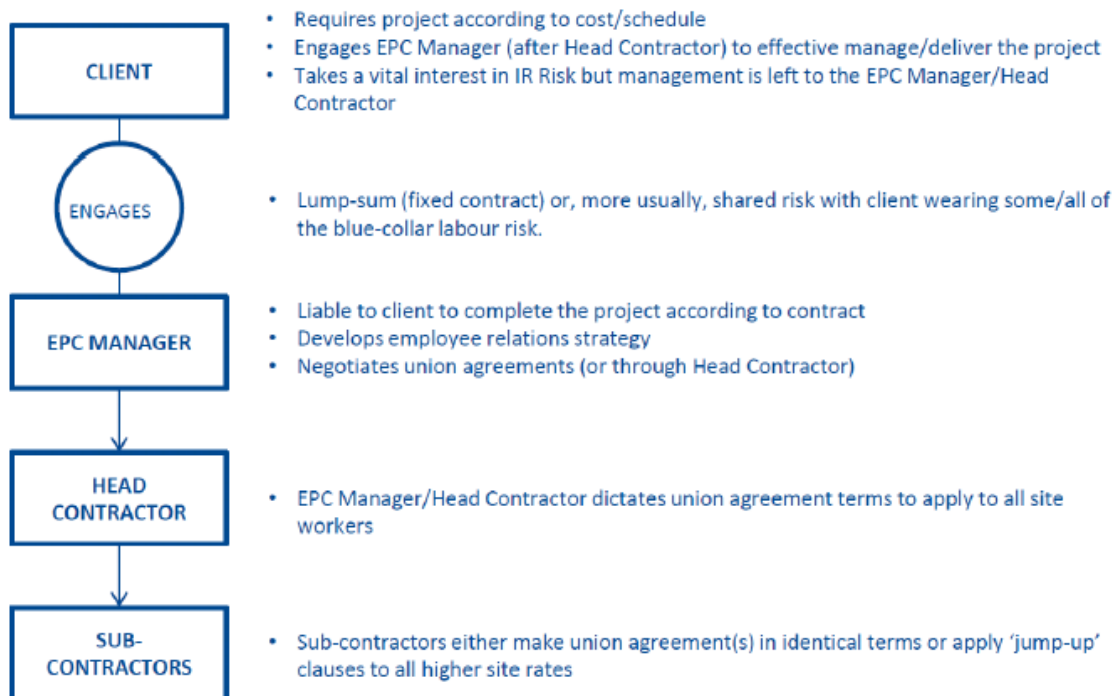


Subsequently, the *Workplace Relations Act 1996* was put into effect under the Howard Government. One of its objectives was to strengthen the non-union bargaining stream. Non-union agreements became subject to the same compliance tests as union agreements,<sup>18</sup> and the Australian Workplace Agreement – an individual agreement with statutory force – was introduced.

### ***Flow-on impacts on client-contractor relationships***

The leverage unions enjoy at the bargaining table has implications for the entire chain of client-contractor relationships. It means that the critical players in the contract chain effectively require the terms negotiated at the top of the chain to apply throughout. The impacts are shown below.

**Figure 6: Anatomy of a typical major oil and gas project**



Source: *Seyfarth Shaw Australia (2014)*

It is unviable for a project owner to allow project works to start without an enterprise agreement in place.

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<sup>18</sup> S 170 LK *Workplace Relations Act 1996* (the non-union bargaining stream).



In practice, the project owner, through the EPC manager or head contractor, requires an enterprise agreement to be in place which will cover much of the civil/mechanical and construction works. However, major projects typically have a variety of sub-contractors who may in turn have their own agreements in place. Those sub-contractors will effectively be required to adopt the terms of the project greenfields agreement. As a result, an element of sub-contractor competition for the works is removed. Were a sub-contractor to use an existing agreement with terms less beneficial than other agreements on the project, that sub-contractor could be expected to be subject to significant union pressure and the prospect of industrial action.

Unions are well aware of the pressure on project owners to commence project works. Any delay in reaching terms results in lengthy negotiations with a looming commencement date. Given the high costs and tight timeframes, this gives unions considerable power at the bargaining table without equal responsibility for the consequences on productivity or project performance.

The Productivity Commission in its recent Final Report on *Public Infrastructure* analysed this issue in the context of the broader public infrastructure building construction industry.<sup>19</sup> The Commission found that:

*Most recently, there has been concern that head contractors and unions find it expedient to secure certainty through negotiation of greenfields agreements incorporating excessive wages and conditions before tenders. A major issue is that such agreements have limited the capacity of subcontractors to form their own enterprise agreements with their own employees, and that such agreements have set the standard for subsequent agreements, inflating costs.*

#### **Unions set the price of labour using previous 'best of kind' deals as the minimum benchmark**

Unions use the benchmark set on a previous project as the starting point for negotiations over the next agreement. This inflates project construction cost beyond what would otherwise be needed to meet the demand for labour. That benchmark may include not only a generous base rate of pay, but other favourable working conditions such as hours of work and the project 'allowance'. Very few input costs for major projects, other than the 'price' of labour, exhibit this type of rigidity.

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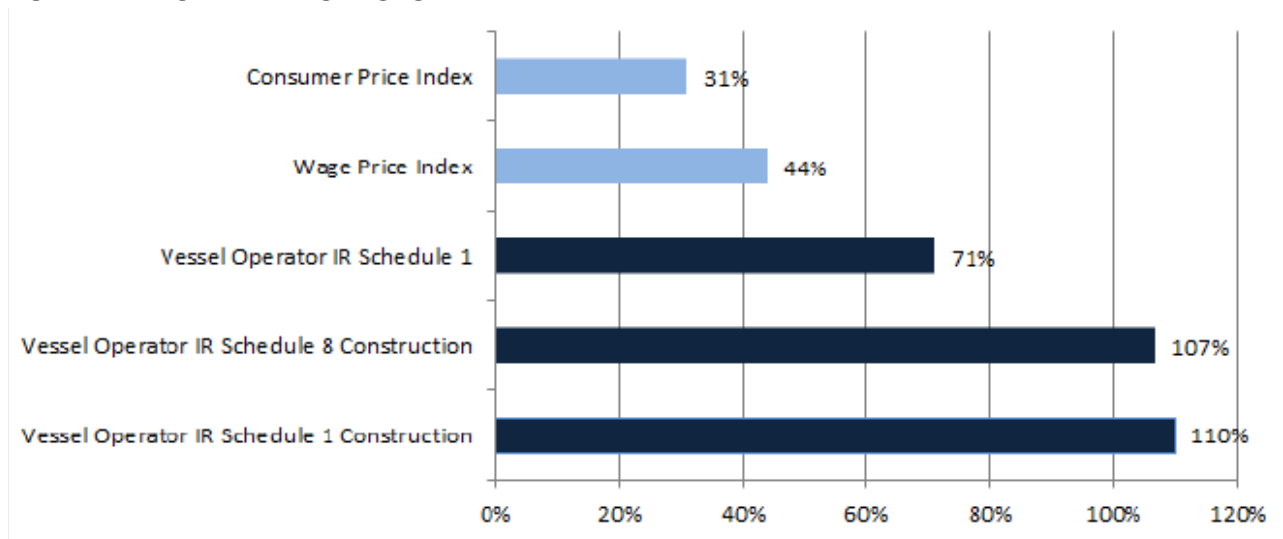
<sup>19</sup> Productivity Commission (2014), *Public Infrastructure*, Inquiry Report Vol 2, No 71, May 2014, pp.532. Available at: [http://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/3bc066af-dfd9-45d4-921f-7ee1cdeed7a7/upload\\_pdf/infrastructure-volume2.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/3bc066af-dfd9-45d4-921f-7ee1cdeed7a7%22](http://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/3bc066af-dfd9-45d4-921f-7ee1cdeed7a7/upload_pdf/infrastructure-volume2.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/3bc066af-dfd9-45d4-921f-7ee1cdeed7a7%22)





To some extent, the price may reflect certain regional considerations and particular demands that arise from workers working (and living) in remote localities. However, it is also fair to say that the terms and conditions reached are often well in excess of those needed to secure a sufficient supply of labour – reflecting the power imbalance in the negotiation between unions and those responsible for agreeing to the terms and conditions. The following graphs clearly demonstrate the point:

**Figure 7: Integrated rating wage growth, 2002-2012<sup>20</sup>**



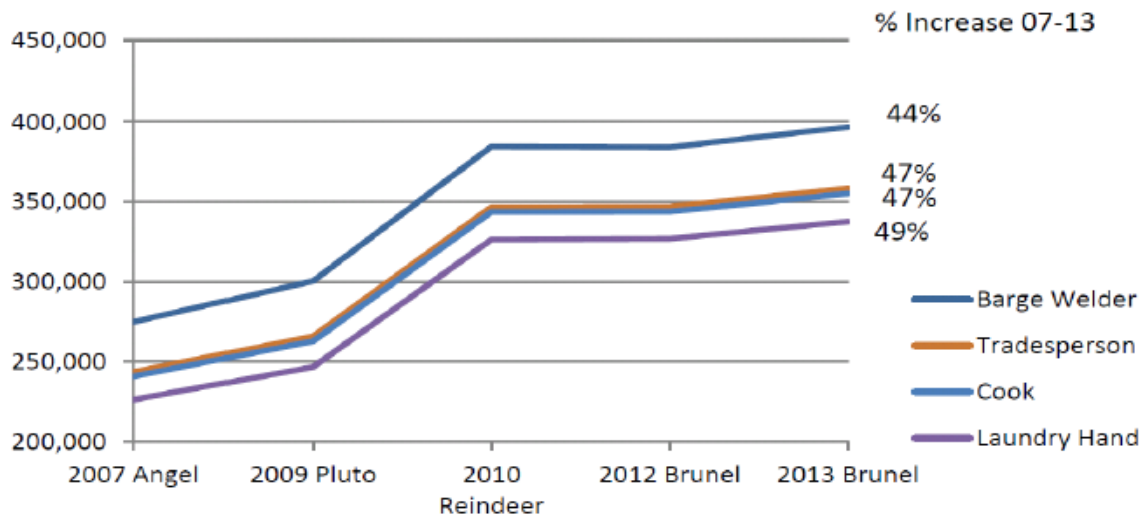
Source: Deloitte Access Economics (2013)  
IR = Integrated Rating

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<sup>20</sup> Deloitte Access Economics (2013), *Analysis of the offshore oil and gas marine support sector*, p.20

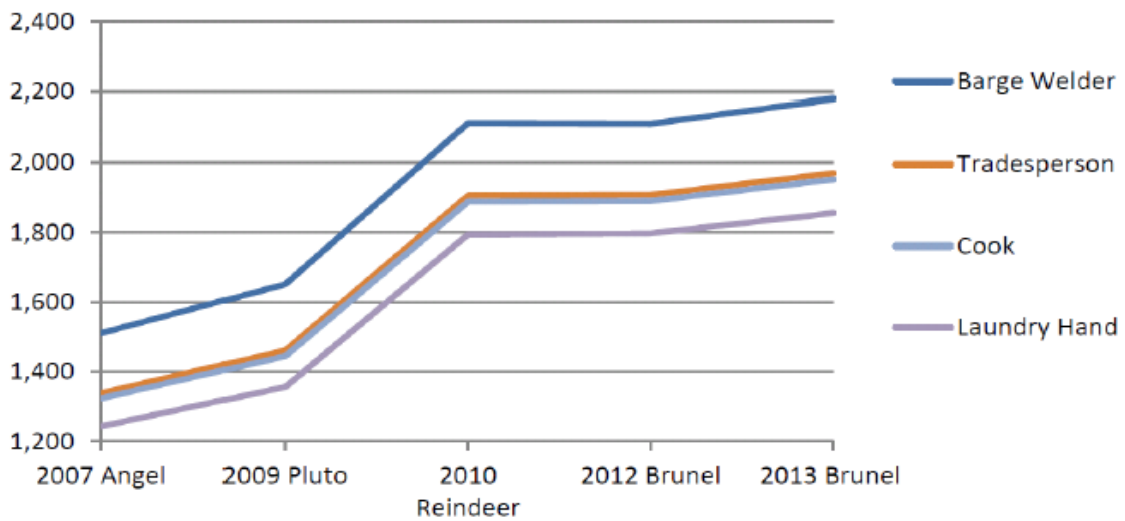


**Figure 8: Offshore construction annual salary, including superannuation (\$)**



Source: Australian Mines & Metals Association (2013)<sup>21</sup>

**Figure 9: Offshore construction day rate, including superannuation (\$)**



Source: Australian Mines & Metals Association (2013)<sup>22</sup>

<sup>21</sup> AMMA (2013) Offshore Construction Salaries. Available at: [www.amma.org.au/assets/Policy/Papers/2014\\_02\\_06\\_Offshore\\_Construction\\_Salary\\_Graph2007\\_2013%201.pdf](http://www.amma.org.au/assets/Policy/Papers/2014_02_06_Offshore_Construction_Salary_Graph2007_2013%201.pdf)

<sup>22</sup> *Ibid.*



### **Limited nominal life of agreement**

Enterprise agreements (including greenfields agreements) have a “nominal life”, being a maximum of four years from their approval by the Fair Work Commission. The life is “nominal” in the sense that once the expiry date is passed, the agreement continues to exist. This is so until it is terminated (in rare circumstances), or more usually, replaced by another agreement.<sup>23</sup> Critically, the passing of the nominal life means protected industrial action can be taken in support of a new (replacement) agreement. The risk is that this may coincide with a critical point in the project life, being the near-completion phase.

The net effect is that the labour market for building major oil and gas projects is not responsive to external economic conditions or changes in the labour market. Wages and conditions agreed during the broader resources boom are locked in as the starting point for any further negotiations for further projects. The floor of the price of labour is fixed without regard for conditions in the wider employment market or the need for Australia to be globally competitive in attracting further capital investment – whether for brownfields expansions or new greenfields developments.

The need to negate these anti-market measures is obvious if the oil and gas industry is to compete globally. APPEA’s recommendations around the establishment of Major Project Agreements will make significant inroads into addressing the imbalance currently built into the system and provide investors and project developers with more confidence about their workforce costs over the course of the project.

## FACILITATING BALANCED, FLEXIBLE AND MORE COMPETITIVE AGREEMENTS

### 2. Limit the scope of matters over which bargaining can take place and upon which agreement can be reached

#### **Recommendation 2:**

- 2.1 “Matters pertaining” be directly related to the relationship between an employer and employees
- 2.2 Remove matters pertaining to a relationship between an employer and a union

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<sup>23</sup> Fair Work Act 2009 (Cth) s 54.



The scope of matters over which bargaining can take place and upon which agreements can ultimately be reached impacts two significant critical areas:

- The potential for union-driven claims that place control over employer's capacity to manage.
- The capacity to take protected industrial action.

The provisions have enabled unions to insist that contractors agree to certain "control" clauses, which are aimed at protecting the position of the union. These clauses include job security clauses that limit the capacity of project operators to sub-contract work or restrict the use of foreign workers, contracted and non-union personnel. Control over recruitment practices, the perpetuation of a 'closed shop' in the workplace and a high degree of influence over the manner in which projects are managed is the unfortunate result. Other significant consequences are restriction on the flexibility with which firms can operate, reduced competitiveness and the further exacerbation of an already high cost environment, all of which are impediments to productivity.

The current legislation relates to "matters pertaining to the relationship between an employer... and that employer's employees" (s.172(1)(a)) and matters pertaining to the relationship between the employer... and the employee organisation..." (s.172(1)(b)).

Putting aside the extension of matters to an employer and union (which is a function of the current Act), the "matters pertaining" provision has been the subject of much disputation.

Nowhere has this been more apparent than in respect of clauses aimed at impacting the right of an employer to engage labour hire employees or contractors. It seems that although terms that contain a general prohibition on an employer engaging third party labour *are not* permitted, those that "sufficiently relate to employees' job security" *are* permitted. This distinction is somewhat tenuous and open to interpretation.<sup>24</sup> This is very clearly highlighted in the following example from the oil and gas sector.

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<sup>24</sup> See *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 4457.



### Case Study: Esso Australia PABO<sup>25</sup>

In February 2015, the Fair Work Commission ruled that three trade unions were 'genuinely trying to reach an agreement' and therefore could organise protected industrial action, despite the employer's strong argument that a 'job security' claim was a smokescreen for non-permitted matters.

Heard before a Full Bench of the Fair Work Commission, Esso Australia was appealing the protected action ballot order (PABO) granted to the CEPU, AMWU and the AWU, in negotiations toward new agreements for upstream oil and gas employees in Victoria.

Throughout the proceedings, Esso consistently argued that the unions were seeking claims for non-permitted matter under s172 of the FWA. This involved a union-drafted contractor clause, common across all four agreements, which sought to control not only the engagement of contractors but also to impose Esso terms and conditions on any approved contractor's employment conditions.

The employer argued that due to the unlawfulness of this claim, the unions were not 'genuinely trying to reach an agreement' as required for a PABO under s443 of the Act.

In the initial hearing for the PABO, Fair Work Commission ruled that because the unions had revised their claims to refer instead to 'job security' clauses, the matter was in fact permitted in enterprise bargaining.

On appeal before the Full Bench, Esso Australia contended that while the trade unions had amended their logs of claims, the revised versions 'remained the same in substance', thus continued to pursue the non-permitted matter under a different guise.

The Full Bench ruled in favour of the unions, finding that the unions had been genuinely trying to reach an agreement when its logs of claims were revised to focus on job security in place of contractor restrictions.

The decision to grant the PABO was upheld.

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<sup>25</sup> AMMA (2015), FWC ruling sees strike threshold further relaxed, media release, 17 February 2015. Available at: <http://www.amma.org.au/help/mining-reform/mining-publications/fwc-ruling-sees-strike-threshold-relaxed/>



### 3. Outlaw forced pattern bargaining (pyramid contract arrangements)

#### **Recommendation 3:**

- 3.1 The Productivity Commission inquire into the:
- incidence and impact of pyramid contract arrangements
  - lawfulness of such arrangements
  - drivers of such arrangements
  - extent to which the regulatory environment is effectively a cause of such arrangements

Pattern bargaining was an issue that was identified in *Public Infrastructure: Productivity Commission Inquiry Report, Vol 1*<sup>26</sup> which observed that head contractors find it expedient to put in place employment arrangements with limited capacity for subcontractors to form their own enterprise agreements, thereby inflating costs:

*“While it is doubtful that head contractors seek harmony ‘at any cost’, they may be subject to pressure to strike deals that can be inimical to flexibility of work arrangements on sites or to diffuse elements of an enterprise agreement across wider workforce.”*<sup>27</sup>

As APPEA’s previous Improving Labour Productivity report notes, “...the leverage unions enjoy at the bargaining table has implications for the entire chain of client-contact relationships”<sup>28</sup>. This is because, in practice, the critical players in the contract chain effectively require the terms negotiated at the top of the chain to apply throughout.<sup>29</sup> The adverse impact on competition is obvious.

To some extent this does achieve some level of industrial harmony. However, while it may make sense for employees working side by side performing the same work to earn the same rate of pay, this does not explain the drive for commonality at the *highest* common denominator. It does not explain, for example, why an employee performing transport work should be paid an “uplift” to match what are essentially construction-related rates of pay on an LNG construction site.

If these arrangements are directed to ensuring “harmony” then the current framework must be examined to understand why the system denies the opportunity for competition in the setting of terms and conditions for labour on a major project.

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<sup>26</sup> *Public Infrastructure: Productivity Commission Inquiry Report No.71, Volume 2, p 533*

<sup>27</sup> *Ibid.*, p.533.

<sup>28</sup> APPEA *Improving Labour Productivity: A Regulatory Reform Agenda (2014)*, p.13

<sup>29</sup> *Ibid.*, p.13



#### 4. Scope for individual options and opt-outs

##### **Recommendation 4:**

- 4.1 The capacity to make a statutory individual contract on terms no less favourable when viewed as a whole against the Award.
- 4.2 The capacity for the employee covered by a collective agreement to opt out of the collective agreement and onto a statutory individual contract.
- 4.3 The inability for employees on statutory individual contracts to take protected industrial action.

The Fair Work Act does not provide for any statutory individual agreements. Indeed, one of the seven overall objects of the Act is to prevent the existence of such instruments. The relevant object asserts that these instruments can never be part of a fair workplace relations system.<sup>30</sup> As of 1 January 2013, the Fair Work Act explicitly provided that an enterprise agreement's coverage clause may not allow employees to 'opt out', and that enterprise agreements cannot be made with one employee.<sup>31</sup>

The inability of an employer to directly approach individuals for the purposes of making an agreement represents a restriction of choice that Australia should no longer tolerate. The impact of this incapacity to reach individual arrangements is underscored by the following examples:

- An employer and an employee wish to enter into an individual agreement varying hours of work but are restricted by the inability to do so under the enterprise agreement.
- Members of a working group are happy to change their roster arrangements but are unable to do so because of restrictions in the enterprise agreement.

The prevailing philosophy assumes that, in every case, a collective bargain is optimal. However, the collective bargain is reached with union representatives who are often divorced from and disinterested in the interests of the employer or employee. The absence of any legislative drivers that might encourage a fairer and more balanced approach to bargaining, between the parties who will directly be affected, means that union behaviour that does not promote this cannot be criticised.

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<sup>30</sup> *Ibid.*, s 3(C)

<sup>31</sup> *Ibid.*, ss. 172(6), 194(ba).



The case against statutory individual contracts is founded in no small part by the pejorative “Return to WorkChoices” mantra, even though Australian Workplace Agreements (AWA’s) were in place from 1996 to 2006 .i.e. before WorkChoices.

It was the capacity to make Australian Workplace Agreements without regard to penalties, which was the fundamental difference between a pre and post WorkChoices. Thus, the issue is really one of how any safety net should be measured.

APPEA sees no difficulty with a statutory individual contract which, when viewed as a whole, and taking into account monetary and non-monetary benefits, leaves an employee no worse off over all. It is not in the interests of employers to offer substandard arrangements (when viewed as a whole) because to do so, simply encourages those employees towards “the collective”.

Ultimately, employees need to be attracted to the individual contract offered, and the Australian oil and gas workforce is one of the most highly paid in the world.<sup>32</sup> The current Fair Work Act provisions for ‘Individual Flexibility Arrangements’ does not provide the level of flexibility and competition required, as they mandate that the employee must be ‘better off overall’ than under the Enterprise Agreement, and in practice are very rarely utilised.

Providing the individual contract option would enable a degree of competition in the labour market not currently present. For example, where there is a collective negotiation, an employer could offer an individual contract to employees who would be then free to accept or reject it. The current system effectively holds all parties captive to “the collective”, even though that collective is not necessarily controlled by a majority of employees. The example below clearly demonstrates this fact.

#### **Unions not representative**

The 2014 Queensland LNG construction dispute highlighted the chasm which can exist between unions and employees. The contractor was constructing six LNG trains for three clients on Curtis Island, Central Queensland. The Fair Work Commission endorsed a CFMEU application to take protected industrial action against the contractor, potentially impacting 11,000 workers. The CFMEU represented only 1.35 per cent or 148 of these 11,000 workers, and caused ten months of negotiation for an agreement that had majority support. Unions cannot automatically be assumed to be representative of the majority of employees.<sup>33</sup>

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<sup>32</sup> Hays Oil & Gas (2013), *Oil and Gas Global Salary Guide 2013*. Available at [www.hays.com](http://www.hays.com)

<sup>33</sup> M. Pattison-Sowden, ‘Bechtel staff set to strike at Curtis Island’, *Gladstone Observer*, 19 July 2014.





## 5. New options for collective agreement making

### **Recommendation 5:**

- 5.1 Greater ability to make agreements directly with employees.
- 5.2 The capacity to make collective agreements with employees with a fairly chosen requirement which takes into account discriminatory factors but is not as limited, as is currently the case.

New options for collective agreements are needed to deliver greater flexibility in agreement making to increase the potential for competition.

Although the current system sees collective agreements made with employees, they are in reality made with unions and then presented for employee approval. An employer may put an agreement directly to the workforce for approval without union endorsement (subject to compliance with the good faith bargaining requirements). However, majority support is difficult to achieve where a union has sufficient control over the membership. Even in such a circumstance, there may well be a number of employees who wish to make the agreement.

The current law dictates that the body of employees who will be subject to an agreement must be “fairly chosen”. This takes into account whether the group is “geographically, operationally or organisationally distinct”, but this construct is fairly limited and in terms of flexible agreement making does not take into account other factors that might also improve ‘fairness’ or flexibility.

## 6. Amend the object of the Fair Work Act to make clear the interests of productivity and efficiency, and take these into account when arbitrating bargaining disputes

### **Recommendation 6:**

- 6.1 The current FWA ‘objects’ should be amended to have one object that includes clearly and upfront an emphasis on the interests of productivity, efficiency, the prosperity of the enterprise and the nation.
- 6.2 The factors which the Fair Work Commission must take into account when arbitrating the outstanding matters in bargaining place weight on productivity, efficiency, business improvement, the particular circumstances of the employer and matters relating to the performance of a major project (where relevant).
- 6.3 Related to this, the factors must take into account the extent to which a union in bargaining has countenanced and offered solutions aimed at genuinely meeting the interests of the enterprise insofar as they relate to these factors.



As discussed throughout this submission, it is imperative that Australia has a workplace relations system that is able to take into account equally the issues of productivity and efficiency, as well as the broader economic interests of Australia. These need to be clearly stated, clearly defined and be embedded in the arbitration decision-making process

Although terminating bargaining with arbitration is relatively uncommon, there have been a number of decisions under the current law and its predecessor demonstrating the Fair Work Commission's approach to arbitrations. The factors which the Fair Work Commission must take into account in deciding terms in a workplace determination and their application in practice seeks to strike a balance between the interests of the parties. Those factors need to place greater weight on matters which ultimately impact the productivity and competitiveness, and therefore, national prosperity. Unfortunately, only one factor directly bears upon "productivity" and this has been interpreted narrowly by a Full Bench of the Fair Work Commission:

*"... Schweppes incorrectly equates productivity with the average cost of labour per unit, which, properly understood, is a measure of normal unit labour costs. In our view productivity, as used in the Act, refers to the conventional economic meaning of the quantity of output relative to the quantity of inputs. It is quite different in concept to the price of output and price of inputs, including the price of labour."<sup>34</sup>*

This narrow interpretation is notable because the objects of the Act itself and the objects of Part 2-4 (which deals with bargaining) refers to the promotion of "productivity and economic growth for Australia's future economic prosperity" and "achieving productivity and fairness through and emphasis on enterprise level collective bargaining" and a "fair framework that delivers collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that delivery productivity benefits".

Section 275(e) is the only provision relating to bargaining where the Fair Work Commission has any actual role to play to influence productivity. This is the only provision that might influence the approach of the parties when it comes to productivity during bargaining, but its influence can only be limited because it arises only where there is the prospect of bargaining being terminated. The Fair Work Commission's interpretation of productivity (drawing upon the Productivity Commission's definition and that of the Commonwealth Treasury) gives this legislative role very

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<sup>34</sup> *Fair Work Australia v Schweppes Australia Pty Ltd; United Voice* [2012] FWA 7858 PN42-43



limited scope to address the industry's concerns about productivity in the context of the Fair Work Act.

Any effective bargaining framework should contain mechanisms that place pressure on parties to reach agreement on terms which are mutually satisfactory. While not suggesting that arbitration ought to be inevitable, there is, however, some potential for a regulatory body such as the Fair Work Commission to arbitrate bargaining disputes. Any resort to arbitration should have limitations, but these must be more relaxed than is currently the case.

#### 7. Greater capacity to terminate current agreements

##### **Recommendation 7:**

- 7.1 The right to terminate an enterprise agreement following its expiry where bargaining has reached an impasse and a business can demonstrate that it is faced with provisions which unreasonably impact its operations.
- 7.2 The outcome of a termination can be directed towards all or more usually, part of an agreement i.e. particular clauses which are having the requisite deleterious impact.
- 7.3 The right to terminate an agreement not to be available where the union can demonstrate that it has offered a rational compromise which meets the interests of the employer.
- 7.4 The right to terminate an agreement not to be available where the employer has failed to bargain in good faith.

The capacity to terminate an existing enterprise agreement is very limited. An employer is therefore often stuck with binding terms and obligations that may have been appropriate for the past, but are no longer suitable for the present, let alone the future.

Agreements nominally expire but continue until replaced or terminated. The limited ability to terminate such agreements provides unions with a powerful source of leverage. There is no need or stimulus to compromise because the worst case for a union is the maintenance of status quo.

The current law enables the termination of a nominally expired agreement, if it is not contrary to the public interest, but taking into account all the circumstances, including the views of the parties and their respective circumstances.



Despite a legislative provision which (seemingly) seeks to strike a balance, the interpretation given to it places greatest weight on the interest of the employees. There is a reluctance of the Fair Work Commission to terminate agreements where evidence is admitted that employees oppose the termination.<sup>35</sup>

APPEA does not suggest that enterprise agreements would be capable of termination on a whim. However, where a business can demonstrate that it is faced with provisions which unreasonably impact its operations and where bargaining is exhausted, the right should exist in some form. Ultimately, the legislative solution must encourage more bargaining for mutual gain.

## MAINTAINING STABLE, FAIR AND LESS ADVERSARIAL WORKPLACE RELATIONS

### 8. Raise the bar to take protected industrial action

#### **Recommendation 8:**

- 8.1 The union must demonstrate that it has been bargaining in good faith.
- 8.2 Claims must not be “manifestly unreasonable”.
- 8.3 All parties must demonstrate concerted steps to reach agreement.
- 8.4 Protected industrial action should not be possible unless there has been a period of 6 months of negotiation.
- 8.5 Notices of protected action must be more specific than is currently tolerated

The risk of protected industrial action relates directly to the renewal of agreements dedicated to project construction, as well as those relating to the provision of ancillary services. Thus, ancillary services, such as tug boat operators, caterers and the transport of goods can all directly impact a major project.<sup>36</sup> The advent of enterprise bargaining in the early 1990s provided employers and employees with the opportunity for mutual gain through legislative bargaining, enabling a move away from centralised wage fixation and dispute resolution.

However, the capacity to effectively secure productivity gains combined with the leverage which unions can assert for the taking of protected industrial action has created another source of

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<sup>35</sup> *Tahmoor Coal Pty Ltd v CFMEU* [2010] FWA 6468 at [58].

<sup>36</sup> See page 18 of APPEA's *Improving Labour Productivity* report at Attachment 2.



power imbalance that is no longer viable. This power imbalance sees major project players capitulate to high demands, rather than face significant losses associated with a single stoppage.

#### **Gladstone Negotiations**

In July and August of 2014 the Construction, Forestry, Mining & Energy Union threatened industrial action at the three LNG projects being built near Gladstone, Queensland.

This was made possible because an enterprise agreement was due to expire prior to project completion and a new one had to be negotiated. After lengthy negotiations an agreement was reached, but this required huge pay increases. The stoppages were both legal and disruptive and the outcome had a significant impact on projects that were already facing cost pressures.

To avoid impact on project schedules, the contractor was forced to offer a 13% pay rise to some of the best paid tradesmen in Queensland, with electricians already earning \$160,000 per annum.<sup>37</sup>

The counter argument to this analysis is to the effect that at the end of the day, the market decides. This, however, ignores the longer-term consequences of the current legislation.

If the Australian oil and gas industry is to grow by encouraging investment in developing new and/or expanding existing projects, there must be mechanisms that prevent situations where employers are effectively forced into yielding to demands or risk sanctioned industrial action. Bargaining disputes must be more easily resolved by reaching terms and conditions that are appropriate to the market and to the circumstances of the project.

The current law does require certain administrative steps to be satisfied before protected industrial action can be taken. The only hurdle for satisfying the first step, being the protected action ballot, is the requirement to be “genuinely trying to reach an agreement” (s.443 (1)(b))<sup>38</sup>. Interpretation of this provision has been consistent over time, i.e. the meeting of this requirement is very easily satisfied, with the vast majority of applications being successful.

Another easily-met requirement is the notice of industrial action. While the identification of the industrial action to be taken in the formal notice calls for a degree of precision, it is often

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<sup>37</sup> J. McCarthy, Queensland LNG projects heading towards industrial brawl, *The Courier Mail*, 3 July 2014.

<sup>38</sup> See page 10 of APPEA's *Improving Labour Productivity* report at Attachment 2.



insufficient in identifying exactly what will occur. This stems from the test applied for this purpose:

*“...in considering whether the notice meets the requirement to specify the industrial action, it is necessary to have regard to the purpose of the notice requirement and the relevant circumstances, in particular the nature of the employer's undertaking. As to purpose, there is little doubt that the purpose of the notice requirement is to give the employer the opportunity to respond to the action by making relevant preparations. The response may involve making arrangements to deal with unavailability of labour, including making appropriate arrangements in relation to customers, suppliers and other contractors. Whether the notice is adequate may depend on the nature of the employer's operations including their size, the number of employees, the number of locations, the time at which the action is to occur and the employees potentially taking the industrial action.”<sup>39</sup>*

While this test envisages the provision of enough information for an employer to put in place contingencies and to properly assess its bargaining risk, it falls short of letting the employer know what exactly will occur. Often there is a range of possible circumstances which might arise from the notice. An example follows, extracted from an actual notice:

*“Two (2) stoppages of the performance of work for a period of one (1) hour, which may be consecutive, to occur between the hours of 12.00 am and 11.59 pm on 1 January 2015.”*

This proposed action as contained in the notice does not tell the employer:

- specifically when the action will occur;
- whether the action taken will be taken in consecutive periods (or not); or
- if two stoppages are taken by one group, whether another group of employees can also take two stoppages.

The uncertainty becomes all the more acute and disruptive for any employer with a large workforce operating two or three shifts per day, and potentially in a 24 hour operation.

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<sup>39</sup> *Telstra Corporation Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWA 1698 at [12].



## 9. Lower the bar to end protected industrial action

### Recommendation 9:

- 9.1 The capacity for bargaining to be terminated and matters in dispute arbitrated where project construction or operations are impacted to a degree which compromises project delivery or inflates cost by more than an insignificant degree.
- 9.2 The option for the employer to have the bargaining terminated in the event of threatened or actual industrial action which causes damage to the business (something more than 'inconvenience' but short of 'significant').
- 9.3 The option for a union to have the bargaining terminated where it has not initiated any industrial action.
- 9.4 The requirement of any employer or union seeking to end the bargaining and resort to arbitration to have made real efforts to secure an agreement, i.e. something more than bargaining in good faith.

The power imbalance in the current enterprise bargaining framework arises not only because of the ease of which protected industrial action can be taken, but also because of the very limited circumstances in which that action can be terminated by the Fair Work Commission, which can suspend or terminate industrial action where it is, or is threatening to:

- cause significant economic harm to both the employer and employees involved, but only where the dispute and industrial action are already protracted and there is no prospect of resolution in the reasonably foreseeable future<sup>40</sup>; or
- endanger the life, personal safety or health or welfare of the population or of part of it, or else cause significant damage to the Australian economy or an important part of it.<sup>41</sup>

A case study that describes the Full Bench of the Commission finding that \$3.5 million per day did *not* constitute 'significant economic harm', is described in APPEA's *Improving Labour Productivity* report (Appendix 2).<sup>42</sup>

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<sup>40</sup> *Fair Work Act 2009* s 423.

<sup>41</sup> *Ibid.*, s 424.

<sup>42</sup> Woodside (2012), *Submission to the Fair Work Act Review Panel*, 17 February, pp. 5-6 cited in APPEA (2012), pp. 27-28



The Fair Work Commission can also suspend (but not terminate) industrial action where:

- it considers that it would be beneficial for the bargaining parties to have a “cooling off” period;<sup>43</sup> or
- the action is both adversely affecting the employer or employees involved, *and* causing significant harm to a third party.<sup>44</sup>

In the case of suspending industrial action which is causing significant harm to a third party, the Fair Work Commission’s interpretation of “significant” as amounting to “exceptional circumstances” makes the resort to the provision extremely rare<sup>45</sup>.

While the capacity to terminate bargaining is currently grounded in rare public interest cases, the potential for bargaining disputes to be resolved in a one-sided fashion means the long term public interest of inflated wage outcomes and restrictions in the capacity to compete are ignored.

The major challenges confronting the Australian energy industry referred to in Section 1 of this submission demand additional mechanisms to resolve bargaining disputes and enable the reaching of terms and conditions appropriate to the market.

10. Impose greater penalties for unlawful industrial action, together with the capacity to seek injunctive relief

**Recommendation 10:**

- 10.1 The imposition of a pecuniary penalty (together with the capacity to seek injunctive relief).
- 10.2 The capacity of a regulator e.g. Fair Work Ombudsman to prosecute such causes of action.

A system which limits the taking of protected industrial action needs to ensure that there is limited ‘leakage’ into unlawful industrial action.

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<sup>43</sup> *Ibid.*, s 425.

<sup>44</sup> *Ibid.*, ss 426. See *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360, where a Full Bench of FWA held

<sup>45</sup> See, for example, *CFMEU v Woodside Burrup Pty Ltd and Kentz E&C Pty Ltd* [2010] FWAFB 6021, 6 August 2010





Unlawful industrial action is capable of remedy only in common law courts where a tort has to be proved in order to secure damages. In practice, a damages claim is expensive and slow to mount and is invariably “traded away” as part of a compromise to a deal.

The most effective deterrent against unlawful industrial action is the threat of a pecuniary penalty against parties who organise such action and those who take it. This was the case under the *Building and Construction Industry Improvement Act 2005*<sup>46</sup>.

Here APPEA refers the Productivity Commission to AMMA’s submission for a more detailed analysis of this issue.

#### 11. Greater controls over right of entry

##### **Recommendation 11:**

- 11.1 Right of entry laws must be better regulated and better recognise the rights of the occupier.
- 11.2 The seeking and renewal of right of entry permits should be open to public scrutiny.
- 11.3 The “fit and proper” test must be tightened.
- 11.4 A cap should be placed on the number of times a person can apply for a right of entry.

Right of entry provisions have been exploited by a number of unions to gain access to projects to recruit new members or address demarcation issues under the guise of investigating safety concerns. This comes as a significant cost to contractors and, ultimately, operating companies.

APPEA’s Improving Labour Productivity report provides an example of the processes required to administer a single right of entry request and highlights one construction contractor who recorded 519 requests for sites across the country in one 12 month period.<sup>47</sup>

Union officials have the right to enter premises if they hold a valid and current right of entry permit issued by the Fair Work Commission. The permit is intended to allow the official to investigate suspected breaches of the Act and other instruments, meet with employees and/or exercise rights under occupational health and safety laws. In practice, however, the current right of entry provisions allow access to sites to individuals from any union that “has the right to

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<sup>46</sup> The Act provided the maximum civil penalty of \$100,000 per contravention for unlawful industrial action.

<sup>47</sup> APPEA (2014), *Improving Labour Productivity: a regulatory reform agenda*, pp. 20 - 21



represent the industrial interests of members of potential members”, regardless of whether it has members on that site or is a party to the existing enterprise agreement in place at that site. This is a major deficiency within the current FW Act, whereby unions that are not signatories to the EBA have an ability to interfere with the employment arrangements of the project.

## 12. Improved anti-picketing and secondary boycott laws

### **Recommendation 12:**

- 12.1 A national anti-picketing law which improves speed for legal redress and provides for a breach amenable to a penalty for involvement by unions, their officials, and other individuals.
- 12.2 The Fair Work Commission be able to sanction picketing by way of order.
- 12.3 An employer be able to apply to Fair Work Commission to terminate the bargaining process, or, in the case of an in-term agreement, terminate the agreement in the event of picketing conduct.
- 12.4 The secondary boycott law be reviewed to enable it to be applied more readily where a union applies coercive pressure to e.g. a supplier with the target being e.g. the client.

Unlawful picketing and secondary boycott activity are two potent weapons which can be applied to pressure project stakeholders into compromise.<sup>48</sup>

The legal proceedings which are required to seek redress for unlawful picketing and secondary boycott activity are slow and cumbersome. In the case of secondary boycott conduct, there are difficult aspects to prove relating to the acting “in concert” and purposive requirements, as these go to the objects in the minds of the parties engaging in conduct in concert.

In the case of unlawful picketing, seeking adequate orders is often challenging given the general reluctance of the court to make orders against unnamed (or unidentifiable) picketers who are often encouraged by a union to attend activities but who otherwise have no connection with any relevant party.

As with the position in respect on unlawful industrial action, a system which provides greater balance when it comes to the setting of terms and conditions of employment will ensure that threats that are applied outside of the system can be more easily sanctioned.

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<sup>48</sup> See page 29 of APPEA's Improving Labour Productivity Report for a case study in respect of picketing.



## CONCLUSION

The stakes are high in realising the current and potential benefits that the oil and gas industry can bring to the Australian community. Global demand for energy is increasing, but so too is Australia's competition.

A high cost local environment and the emergence of new and potential LNG rivals has increased the level of competition Australia faces as it seeks to win market share and attract investment.

It is now more important than ever for Australia to address the costs and productivity challenges affecting current and future waves of investment in the oil and gas industry. It is vital that the Australian Government play its part and provide much needed reform to our workplace relations framework.