

29 March 2015

Workplace Relations Framework
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Productivity Commission Inquiry into the Workplace Relations Framework

BHP Billiton is pleased to contribute to the Productivity Commission's inquiry on the Australian workplace relations framework. As you will note from our submission we have included a range of views on near and longer term opportunities to enhance Australia's workplace relations framework.

We believe that a series of balanced amendments to the workplace relations framework is warranted in the near term, and we have discussed these in some detail in our submission. We believe that the amendments that we are advocating for would help establish a framework that better fosters an environment in which employees and employers can collaboratively tackle the big productivity and competitiveness challenges facing industry and the nation.

Our desire is for an environment that is good for employees and employers. Absent reform, our view is that the many positive aspects of the Framework will continue to be overshadowed by complex administrative overhead, imbalance in some key provisions and an approach to dispute resolution that results in an unnecessarily high cost to both industry and employees. These serve to impede Australia's ability to reach its full economic potential and, we believe, ultimately the aggregate well-being of employees. The principles that have shaped our suggested reform areas are:

- *Safe and engaging workplaces* - Employees have a right to a safe and productive work environment that supports ongoing training and development in fulfilling jobs.
- *Internationally competitive* - Businesses must have access to employment arrangements that enable them to adapt to the external environment in which they compete, making jobs more secure.
- *Diverse and inclusive* - Policy and legislation should support diversity of thought, gender, experience, ethnicity and sexual orientation that will deliver superior capability.
- *Reward aligned to performance* - While ensuring a fair and reasonable minimum, businesses must be able to better align the reward of employees with better business outcomes (both what and how).

- *Simplicity* - Policy and legislation should drive towards a simplified system of both processes and agreements that enhance the levels of collaboration and cooperation between employers and employees (current and future).

In the longer term, further reform will be necessary to enhance the framework to ensure that it keeps pace with evolving workplace practices and that it facilitates greater workforce participation across gender, ethnicity, age and region, regardless of industry. BHP Billiton looks forward to continuing our engagement in this important area of policy debate, and we would be pleased to discuss our submission further with the Commission.

Tony Cudmore
President, Corporate Affairs



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resourcing the future



Australian Workplace Relations Framework

Submission to the Productivity Commission, March 2015

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Introduction

Australia's resources industry has significant advantages that provide the foundation that should enable Australia to capture the opportunity inherent in continued growth in global resources demand – decades of mining experience, a highly skilled workforce, a track record of innovation, proximity to Asian markets, world-class ore bodies and extensive existing infrastructure. However, these elements alone will not be enough in a market where the global competition for investment is fierce and competitors are moving rapidly to increase productivity.

It is within this context that BHP Billiton is pleased to contribute to the Productivity Commission's analysis of opportunities to improve the workplace relations framework in Australia, as an area critical to enhancing the international competitiveness of Australia's resources industry, and the Australian economy in general.

BHP Billiton is a leading global resources company and proudly a major Australian employer. Its purpose is to create long-term shareholder value through the discovery, acquisition, development and marketing of natural resources, by owning and operating large, long-life, low-cost, expandable, upstream assets diversified by commodity, geography and market. It does this with a consistent focus on protecting the health and safety of its people and the communities in which it operates.

The resources we produce support economic growth and development around the world. As a large supplier in global commodity markets, BHP Billiton welcomes the opportunity to share its views on how the workplace relations framework contributes to both Australia's competitiveness as an investment destination, and BHP Billiton's competitiveness in global markets. Of the approximately US\$25 billion that BHP Billiton directly contributed to the Australian economy in FY2014, about US\$4 billion was via employee benefits and expenses.

As at 30 June 2014 BHP Billiton had approximately 123,800 employees and contractors working at 130 locations in 26 countries. In Australia, BHP Billiton directly employs approximately 23,000 employees and indirectly engages approximately 34,000 contractor employees in its operations. BHP Billiton has 35 operations across five businesses of Aluminium, Manganese, and Nickel, Copper, Coal, Iron Ore and Petroleum and Potash in Australia. BHP Billiton is currently pursuing a proposed demerger to simplify its portfolio of assets. Subject to shareholder and regulatory approvals, the proposed demerger will create an independent global metals and mining company called South32 with a selection of BHP Billiton's high-quality aluminium, coal, manganese, nickel and silver assets.

BHP Billiton supports the right of its employees to have the representative of their choice, including labour unions – in FY2014, 54% of employees were covered by collective arrangements.

BHP Billiton invests in major industrial infrastructure and equipment that is able to operate 24 hours per day, 365 days per year. Achieving a safe and productive return on this significant investment is enabled by an appropriate workplace relations framework. In turn, the successful conduct of its operations allows BHP Billiton to contribute strongly to the Australian economy and the communities in which it operates.

When the workplace relations framework is unclear, inappropriately applied, or unbalanced it can inhibit the coming together of employers and employees to tackle common challenges and opportunities, including the need to remain globally competitive in terms of productivity improvement. This misalignment can have significant implications for employees, employers, and society generally. Some of these impacts have been outlined as examples in this submission. BHP Billiton supports a balanced approach to addressing these issues through a number of legislative amendments to the existing workplace relations framework.

The suggested areas of focus for reform in this submission should be read in combination. Addressing individual elements without fully assessing the interaction between those elements of the framework is likely to reduce the effectiveness of the outcomes. The submission highlights by way of example how the interaction of multiple provisions in the current framework can produce a destructive industrial relations environment over a prolonged period of time for an enterprise.

BHP Billiton's approach to workplace relations

BHP Billiton believes the most safe and productive workplaces are built on mutual respect, open and transparent communication, and through fostering an environment for employee development. BHP Billiton's views on workplace relations are founded on five principles:

1. *Safe and engaging workplaces* - Employees have a right to a safe and productive work environment that supports ongoing training and development in fulfilling jobs.

2. *Internationally competitive* - Businesses must have access to employment arrangements that enable them to adapt to the external environment in which they compete, making jobs more secure.
3. *Diverse and inclusive* - Policy and legislation should support diversity of thought, gender, experience, ethnicity and sexual orientation that will deliver superior capability.
4. *Reward aligned to performance* - While ensuring a fair and reasonable minimum, businesses must be able to better align the reward of employees with better business outcomes (both what and how).
5. *Simplicity* - Policy and legislation should drive towards a simplified system of both processes and agreements that enhance the levels of collaboration and cooperation between employers and employees (current and future).

The workplace relations framework and competitiveness

The workplace relations framework has the potential to enable even safer, higher performing and globally competitive Australian workplaces.

A well-functioning workplace relations framework is central to Australia being at the leading edge of global innovation and competitiveness. This is key to achieving sustainable long-term economic growth, growing employment, and improved living standards. An ideal framework will meet its legislative objectives efficiently, while supporting safe and more productive workplaces.

The 2015 Intergenerational Report highlights the demographic headwinds faced by Australia, with the number of working age people for every person aged 65 and above declining from 4.5 people today to 2.7 people by 2055. Notwithstanding current softness in the labour market, this highlights that in the longer term Australia is likely to face the challenge of too few workers rather than too many. It will be important that the future workplace relations framework facilitates greater inclusion of groups currently under-represented in the workforce, and enhances the productivity of those already participating. The absence of a workplace relations framework that fosters employers and employees coming together to collectively tackle the challenge of becoming more productive will result in a gradual but consistent erosion of Australia's competitive position amongst global economies.

Having a productive and engaged workforce is critical for Australia, including Australian resources companies like BHP Billiton that trade and invest in a global environment. For Australian resource operations, prices are determined globally but costs are largely determined locally, including by the local workplace relations framework – with relative international competitiveness affecting the nation's economic prosperity, host communities, employment, shareholder returns, and investment decisions.

Initiatives to increase competitiveness and innovate will be led by individual employers and employees, and be boosted by supportive policy settings. In this context, the Productivity Commission's inquiry can enhance Australia's capacity to increase productivity whilst building a diverse, productive and equitable employment environment.

Improving the workplace relations framework now and into the future

The focus for the Productivity Commission, and for this submission, is on improving Australia's economic outcomes by enhancing productivity. Enhancing productivity advantages all workplace participants – employers and employees – and the extent to which long-run productivity is promoted should form the measurement basis of a successful workplace relations framework.

The Productivity Commission's review should drive greater national consensus on the workplace relations framework of the future, with a focus on firstly removing unintended consequences within the current framework and then maximising the stability of the framework over time. This will better enable businesses to make long-term decisions to invest, employ and innovate in Australia, improve Australia's reputation as a reliable supplier of goods, services and technology to the global markets that procure Australian goods and services, and support the Australian economy.

BHP Billiton believes the basis of this consensus should be balanced reforms to address a number of specific Fair Work Act provisions that unnecessarily inhibit employees and employers coming together to increase international competitiveness, and which mitigate against a strong Australian economy. Reform should be focussed on:

- Implementing current amendments to the Fair Work Act which are before the Parliament on right of entry provisions and agreement provisions for 'greenfield' sites;
- Ensuring that the Fair Work Act restricts enterprise agreement content to terms of employment only and not operational matters that limit productivity improvements;

- Truly supporting an employee's choice of representation and equally enabling both non-union and union streams of enterprise bargaining;
- Providing greater access to relief for employers where industrial action is taken and ensuring that protected industrial action is only available as a last resort; and
- Amending the Fair Work Act provisions about adverse action to restore the limit on such claims to matters of victimisation due to union membership status or activity.

In addition to these specific measures which can be implemented in the short term, BHP Billiton would encourage the Productivity Commission to facilitate a discussion on what is required to ensure the regulatory framework evolves to keep pace with other jurisdictions and ensures enhanced employment outcomes for the Australian nation in the longer term. This submission provides BHP Billiton's views on some of the trends that are likely to shape workplaces into the future and the reform directions that should be contemplated in response to these trends.

Proposed Improvements to the workplace relations framework

BHP Billiton acknowledges that the bulk of the productivity challenge lies at the feet of employers together with their employees. Legislation and workplace instruments will either foster or inhibit the coming together of employers and employees on this collective challenge.

The workplace relations framework in Australia includes the *Fair Work Act 2009* and a range of other federal and state legislation. The primary focus of this submission is the Fair Work Act as it is the central legislation governing workplace relations in Australia.

Above all else, the workplace relations framework should facilitate a safe, engaging and productive workplace for employers and employees alike, regardless of their affiliation. In this light, BHP Billiton proposes the following changes to the current workplace relations framework.

Restore the balance on rights of entry

The Fair Work Act has removed the previously required connection between a union's statutory rights of entry, and its status as a union covered by an award/agreement in that workplace. Statutory right of entry is now provided for if one or more employees are eligible for union membership. BHP Billiton has experienced a significant increase in right of entry visits in some of its workplaces due to this clause. Material on this was reported on by the Fair Work Act Review Panel in *Towards more productive and equitable workplaces* (June 2012),¹ and this issue persists today.

In addition, the Fair Work Act has created an environment where unions do not need an invitation to enter site. Membership drives and competing initiatives between different unions should not be enabled by a statutory right of entry. In order to legally refuse entry to union representatives, management needs to understand union eligibility (often intricate membership rules) across its sites. It is unreasonable to expect all levels of operational management to understand all unions' membership rules. In addition, escorting union officials around the site on an unplanned right of entry distracts operational management from their primary accountability - the health, safety and productivity of employees - and creates an unnecessary cost burden to employers.

BHP Billiton believes union statutory rights of entry should be limited to:

- Being party to an agreement on the site;
- A request from members for representation;
- Health and safety grounds (per legislative requirements), or with permission from operational management.

BHP Billiton notes the Government's work to remedy this situation in the Fair Work Amendment Bill 2014 currently before Parliament, and supports the timely passage of this Bill.

¹ See paragraph 8.3 on page 192ff, and table 8.1 on page 193, which focuses on BHP Billiton's Worsley Alumina plant from 2007 to 2011.

Right of Entry Issues – Caval Ridge Mine

Legislative Provision

The Fair Work Amendment Act 2013 made significant changes to the right of entry provisions. These included ensuring that where agreement could not be reached between employers and employee representatives on a suitable location for discussions and interviews, union representatives would have the right to enter any area where one or more persons normally takes their meal breaks.

Consequence

As a result of these changes, in September 2014, the CFMEU sought statutory right of entry to hold uninvited discussions with employees working on draglines at the BMA Caval Ridge mine. The CFMEU was offered by the Company an alternative venue close by, but instead chose to take the matter to the Fair Work Commission (FWC) to press its claim to meet in the dragline cabin itself.



Dragline operations - Caval Ridge Mine, BMA

Business Impact

Draglines are the largest piece of mining equipment BHP Billiton operates. Draglines are located at various points along an operation of 10 to 20 kilometres in length. Draglines need to cease operation to enable personnel to safely embark and disembark from the machine. These machines are as tall as a 15-storey building, cost in excess of A\$200 million to purchase and over A\$7 million a year to run, move 210 tonnes of waste in each bucket, and uncover over 500 tonnes of mineable coal every hour. Stopping them is highly disruptive and unnecessarily impacts both the productivity and profitability of operations.

Driving union representatives from the mine entry to draglines not only distracts supervisors from their core duty of planning and leading the safe and productive work of our operations, but also exposes both them and the union officials to additional risks in terms of interaction with other pieces of plant and equipment. Six months later, this dispute remains unresolved. The escalation of this matter to the FWC itself required further management time to prepare defence of BHP Billiton's position.

Remove union veto power over 'greenfields' agreements

Reasonable certainty of returns is a strong driver of investment in Australian projects, as it is globally. The workplace relations framework can positively influence investment decisions by providing greater certainty on initial employment terms free of unreasonable industrial conflict, providing clarity on project economics, and creating a more positive general investment environment. This is especially true for projects in capital intensive, long-life industries such as the resources industry where construction timeframes take many years.

Under the current legislative framework a greenfields agreement is required prior to project commencement and before any employees are engaged. If no agreement is in place at the commencement of construction, the project faces the risk of protected industrial action being taken in pursuit of an agreement. There is no effective alternative to making a greenfields agreement with a union or unions – this guaranteed involvement (and effective monopoly) of unions is a relatively recent introduction to the workplace relations framework. Further, there is no time limit after which an agreement can be submitted to the relevant authorities for a determination to enable work to commence.

The lack of time-limits and recourse places the project proponent in a vulnerable bargaining position. In relation to greenfields agreements, the four year limit on an agreement is out of step with typical construction durations, exposing employers to a second bargaining position during construction.

To improve the investment climate for Australian construction projects, and improve global competitiveness, BHP Billiton recommends:

- Greenfields arrangements should be able to be negotiated with one or more eligible unions within a three month bargaining window. If the process is frustrated, the employer should have recourse to the FWC for rapid approval of its proposal provided the proposal meets an appropriate no disadvantage test.
- A greenfields agreement should be permitted for a more reasonable timeframe – five years and sometimes longer is required for some major projects to not be left in an extremely vulnerable position in the middle of project development. This will enable critical investment decisions to be made with appropriate certainty, while at the same time ensuring fair protection for the initial workforce.

Some progress towards mitigating the situation is noted in the *Fair Work Amendment Bill 2014* before Parliament. BHP Billiton encourages the timely passage of the greenfields provisions in that Bill. If passed, it will greatly assist in situations like that experienced in Bass Strait Oil & Gas because it would allow an employer with a reasonable proposal to have an agreement approved provided that it had made genuine efforts to engage relevant unions. It would give an employer, about to make a major investment, security in respect of employment terms even where a union was seeking to leverage the employer's vulnerability mid-construction to hold out for conditions above reasonable and usual standards. Unlike the situation under the Fair Work Act, the employer would be able to present for approval the terms of its proposed agreement even though the union had ultimately not been prepared to agree. The FWC would assess whether the terms proposed are appropriate and should be accepted. This will enhance investment certainty and attractiveness in Australia, whilst ensuring employees can rely upon the security of a 'no disadvantage' test.

Bass Strait Oil and Gas – Impact of delays due to EA negotiations

Legislative Provision

Currently, the Fair Work Act greenfields provisions have limited avenues of recourse for an employer should they be unable to negotiate an agreement with collective bargaining representatives, or facilitate the commencement of work without an agreement, opening up the potential for protected industrial action.

Consequence

The greenfields provisions affect major expansion projects like the Kipper-Tuna and Turrum (KTT) projects in Bass Strait, in which BHP Billiton is a co-venturer with Esso Australia. The KTT projects are the largest domestic gas development on the eastern seaboard (on which production is expected to commence in 2016). The KTT projects involved construction and commissioning of 70 kilometres of pipeline, a jacket and four topside modules. All of the construction work was done by a workforce operating and living on a special purpose construction barge.

Construction was ready to commence in mid to late 2010. The workforce was employed by McDermott and Brunel. Esso did not wish to allow it to commence without an in-term enterprise agreement, necessarily a greenfields agreement as it was a new project with no existing workforce. It would have been possible to hire employees without first getting a greenfields agreement but doing so would have left this US\$4.5 billion (100% basis) project immediately vulnerable to protected industrial action. This would have been an extraordinary and highly risky approach. At this stage, previous legislative provisions that facilitated hiring under a non-union greenfields agreement or AWA had disappeared with the passage of the Fair Work Act. The only real alternative was to get a union greenfields agreement in place and hire under the security of its terms. With significant amounts having already been expended and production and engineering commitments made into the future, abandoning the project would have had significant commercial and financial impacts.



The three construction unions were the AWU, AMWU and CEPU. They knew the criticality of getting a greenfields agreement, plus the commercial and logistical pressure on the project to mobilise as planned.

Business Impact

The three construction unions placed demands for significant increases in allowances and remuneration including:

- A hard-lying allowance, later replaced by an income transition payment, of \$101.12 per day, in addition to living away from home allowance of \$99.11 per day.
- Three annual pay increases of 6% and allowance increases on a generous base in excess of \$130,000 per year for entry level roles.
- Advantageous roster arrangements and redundancy terms (even if not required after just one roster period).

In addition, the unions insisted that nominated labour be employed – that is, it was a pre-condition for the union greenfields agreements that particular union nominated people be employed on the job, restricting the employer's choice of employee. Due to the unavoidable commercial pressures, these terms were all conceded impacting project schedule and cost performance.

Restrict enterprise agreement content to terms of employment only and not operational matters

The limitation of industrial instruments to the employment relationship has been a longstanding feature of workplace relations legislation. The Fair Work Act expanded the coverage of enterprise agreements to potentially include the relationship between an employer and employees; the relationship between an employer/s and a union/s; and matters about how the agreement will operate. This extends the matters which are in-scope for bargaining, and therefore the potential for protected industrial action.

The scope and application of enterprise agreements can be vastly simplified by excluding matters which are of purely institutional concern to unions and their officers or delegates from the agreement. BHP Billiton's ability to apply global best practice to its Australian operations, without restriction or administrative burden, would be enhanced by removing this recent expansion of the Fair Work Act's scope.

For example, enterprise agreements, which are between employees and the employer, should not contain provisions designed to regulate the relationship between employees and unions, which then need to be observed by employers at risk of penalty. These provisions include activities that can result in distraction of employees from the work for which they are employed, which would have an immediate and direct impact by imposing greater cost and loss of productive hours.

This recent expansion in matters covered by the Fair Work Act should be reversed. The legitimate sphere of enterprise agreements is entitlements for employees in respect of their wages and their conditions of employment (e.g. annual leave, notice periods, policies). When combined with the availability of protected industrial action under current legislative provisions, there is potential for workplace disruption on the basis of matters fundamentally unrelated to these matters. It can be difficult to draw a line between legitimate and illegitimate content for agreements. Recognising this, the legislation should have overriding provisions aimed at facilitating productivity enhancements and which permit changes during the life of an enterprise agreement.

BHP Billiton Coal - Examples of inappropriate content in Enterprise Agreements (EAs)

Legislative Provision

The changes in the Fair Work Act to the matters which are now allowable within EAs give negotiating parties the opportunity to bring operational and other issues outside of the scope of the employment relationship into EAs. The imbalanced power of negotiating parties is then reinforced by the availability of protected action to employees for non-material issues.

Consequence

There are numerous examples in BHP Billiton's Queensland and NSW Coal business of operational issues outside the scope of employment being brought into EAs. Employers, such as BHP Billiton, face the threat of protected industrial action for the inclusion of clauses permitted under legislation that impede management's ability to operate, and increase the potential for disputes.

'Last-in-first-out'

The most recent EA at Mt Arthur Coal, signed in 2011, restricts retrenchment to a 'last-in-first-out' policy. This is inconsistent with an employer's right to decide who they employ, and impacts an employer's ability to ensure the best possible people (e.g. from a merit, skills, culture or diversity perspective) are applied to the task at hand.

New employee information requirements

At the Port Kembla Coal Terminal the Limited Enterprise Agreement signed in 2012 requires employee representatives to be informed of the name and commencement date of new employees. Whilst seemingly minor this requirement creates administrative burden for employers, and potential privacy concerns for new employees covered by the agreement.

Use of contractors

The Appin Mine's latest EA, signed in 2011, specifies that BHP Billiton will not replace employees who resign or retire with contractors and sets a minimum threshold for wage conditions for any contractors that are used. This limits employers from making operational decisions on the appropriate mix of employment, and inhibits competitiveness by creating a floor on labour rates which may be in excess of the market rate for employment.



Business Impact

The inclusion of prescriptive operational requirements in EAs restrict the ability of BHP Billiton to make commercial decisions to operate its assets more efficiently in the best interests of shareholders and the competitiveness of the Australian resources industry.

Choice of representation

BHP Billiton strives to achieve direct employee engagement through open, honest and timely employee communications and by encouraging employee involvement and personal development. BHP Billiton provides its employees with competitive remuneration and attractive conditions of employment, including seeking to align rewards with the key drivers of operational success.

Under the Fair Work Act, a collective enterprise agreement is made with employees but gives a highly preferred position for a union within the workplace as the default bargaining representative regardless of the actual level of workforce representation. That status is lost by the union only if each employee in the workplace appoints another bargaining representative. A union with merely one member at the workplace (regardless of their financial status) can require that the agreement cover it as though the union was, in effect, a party. These changes have strengthened the ability of unions to become a participant in EA negotiations, even at sites where they have minimal coverage of the workforce.

The workplace relations framework should genuinely permit a non-union stream of enterprise bargaining without uninvited interference by others, together with a union stream where one or more unions is genuinely relevant as a result of active employee choice.

Macedon Operations – Union status in EA negotiations

Legislative Provision

Under the Fair Work Act a collective enterprise agreement is made with employees but gives a highly preferred position for a union within the workplace as the default bargaining representative. That status is lost by the union only if each employee in the workplace appoints another bargaining representative.

Consequence

BHP Billiton's Macedon domestic gas project in Onslow supplies gas into the Western Australia wholesale market.

An Employment Agreement between BHP Billiton Petroleum and four of its employees for this project was signed in 2012. The employees were all eligible to be covered by a union but, during negotiations, three of the employees appointed themselves, in writing, as their own bargaining representatives.

The fourth employee did not appoint any bargaining representative and had ceased paying union fees some time prior to becoming an employee of BHP Billiton Petroleum. His intention was no longer to be a member of the union in question; however, he had not taken any action other than ceasing payment of membership dues to give effect to this intention.

Despite no previous contact with employees or BHP Billiton Petroleum, the union applied to Fair Work Australia to be covered by the Agreement on the ground that it was a default bargaining representative. Fair Work Australia approved the Agreement (as it was obliged to do under the Fair Work Act) and at the same time noted the coverage of the union pursuant to section 183 of the Fair Work Act.

Business Impact

Despite an absence of the employee having expressed a desire for union representation in the agreement, the union's association with the agreement gives it various powers, for example, to apply for the agreement's variation or termination. Not only does this impinge on the freedom of choice for employees, in creating uncertainty around future exercise of these powers, it has the potential to impinge on the existing employer-employee relationship and divert management time from efforts to operate the asset efficiently in a competitive market.

Restoring balance to protected industrial action

Three key areas have been identified where the balance of the availability and impact of protected industrial action can be improved:

- The implementation threshold as interpreted by the FWC for attempting to 'reach an agreement' has, in practice, been very low, resulting in protected action ballot orders being prematurely granted;
- Selective work bans and their relative cost to employer and employees; and
- Inadequate options for affected third parties to prevent damaging protected industrial action.

BHP Billiton has observed that protected action ballot orders are sought and obtained as a preliminary step in enterprise bargaining, regardless of intention to take protected action or whether a negotiation impasse has genuinely arisen. For example, in the recent BMA (BHP Billiton's Queensland Coal joint venture) enterprise agreement negotiations, the CFMEU, AMWU and CEPU each obtained protected action ballot orders and commenced taking protected industrial action as soon as the nominal expiry date of the prior agreement was reached. This occurred despite the parties being engaged in apparently useful negotiations with further negotiations scheduled. It occurred without the unions needing to articulate the particular claims in support of which the action was taken. The negotiations concluded after 22 months of industrial action, contributing to the coal mining industry losing 155.8 days of work per 1000 employees in the September 2011 quarter, 286.9 days per 1000 employees in the March 2012 quarter, the loss of royalties in excess of \$50 million to the Queensland government², and significant impacts to BHP Billiton shareholders, as well as those of the joint venture partner, one of Australia's most significant overseas investors.

Protected industrial action may currently take the form of a strike or a selective work ban. The situation loses balance, however, if the industrial action is a selective work ban. It enables considerable damage to the employer's operation (for example, shutting down a critical production process only) but does not result in any significant economic impact on employees imposing the ban. Additionally, there is a lack of balance if protected industrial action is threatened (via notice of intention), but not completed. This can result in employer actions (e.g. idling equipment, executing contingency plans) to mitigate the impact, for no reason – causing unnecessary economic harm without impacting employees' wages.

² ABS, Industrial Disputes, Australia, Catalogue No. 6321.0.55.001 & industry estimates.

West Australian Iron Ore – Port Hedland Dispute

Legislative Provision

Previously, under the Fair Work Act third parties to any dispute were unable to make an application to the FWC or Federal Government for action to be suspended or terminated until that action has commenced.

Consequence

Port Hedland, the world's largest bulk export port, is one of the most important port facilities in Australia handling most of the iron ore exported from Western Australia. All vessels coming to Port Hedland are assisted by third party contracted tug operations. Teekay is the operator of the towage services in Port Hedland and employer of the crews who work on the tugs. Teekay performs these functions under a contract with BHP Billiton Iron Ore.

Teekay commenced EA negotiations with the three unions representing employees on their boats in 2014 (the unions were the Australian Maritime Officers Union (AMOU) representing the Masters; the Australian Institute of Marine and Power Engineers (AIMPE) representing the Engineers; and, the Maritime Union of Australia (MUA) representing the deckhands.

Early on in the negotiation process the MUA commenced the process of seeking a Protected Action Ballot Order (PABO). This is despite Teekay having offered significant concessions to its original requests for greater flexibility from its workforce. The deckhands who were being represented by the MUA are paid around A\$140,000 per annum and work an even time roster of 4 weeks on, 4 weeks off.

AIMPE also held a vote on industrial action and then gave notice of action even though it would have occurred outside of a previous PABO period, which had expired. AIMPE withdrew the notice of action at a late stage.

Business Impact

Although not a party to the negotiations BHP Billiton would obviously have been severely impacted by any strike action at the port. Suspended operations at the port were estimated to cost suppliers who ship out of Port Hedland around A\$100 million a day. In addition, the State and Federal Government stood to lose tens of millions of dollars a day in royalties and corporate tax revenue. Mining companies like BHP Billiton are not able to make up lost volume of this nature, and governments cannot recover these lost royalties and taxes.

The Federal Employment Minister tabled a regulation amending the Fair Work Act to ensure that third parties (including State Governments) could make an application to the FWC to stop any protected action (on the basis of it causing significant damage to the Australian economy or an important part of it) once the union has given notice of protected action (rather than after the protected action has started) under section 424 of the Fair Work Act.

This was a very valuable solution for a specific problem. However, the provisions of the Fair Work Act should be examined to ensure that situations such as Port Hedland are resolved in a more constructive and timely manner.

If protected action is to remain as a measure available to employees in enterprise bargaining the following reforms should be considered:

- Protected industrial action be only available where an employer has agreed to bargain or, if not, a majority support determination has been made, and where the FWC is satisfied that an impasse in negotiations has been reached.
- Protected industrial action should be limited to strikes by employees or a lockout, responsive or otherwise, by the employer. There should be no place for selective work bans.
- Upon the conclusion of a defined bargaining period and with appropriate notice (for example, 12 weeks) it should be possible for an employer to terminate an expired previous enterprise agreement. The employer could be required to maintain base pay rates, but would be enabled to move away from inefficient work practices and non-productivity related payments or allowances, subject to maintaining conditions in the NES and modern award.
- Reducing access to protected industrial action to persons who exceed an earnings threshold such as the high income threshold applicable to unfair dismissals.
- Preventing unions that engage in repeatedly giving notice of protected action and withdrawing it from giving further protected action notices for a specified period (e.g. 90 days), unless the FWC has certified that the withdrawal was reasonable based on appropriate tests or the employer has specifically agreed to the withdrawal.
- An affected third party should have standing to seek termination of or other intervention in industrial action subject to a high threshold of tangible anticipated or actual damage to the third party's business. The intervention might be, for example, to require some permanent limitation on the industrial action able to be taken or a requirement that much greater notice of intended industrial action be given to persons affected.

The secondary boycott provisions have stood the test of time and should be retained.

Limit adverse action claims

There has been an expansion of the freedom of association provisions by the enactment of Part XA of the *Workplace Relations Act 1996* and subsequently by Part 3-1 of the Fair Work Act. The provisions as now operating interfere with ordinary operational decision making and performance management processes. It is important that the provisions be returned to their historical purposes. Particular problems with the Fair Work Act as currently worded include:

- *Interference with management decision making* – adverse action claims are being used to interfere unreasonably with ordinary management decision making and performance management processes. This is exacerbated by the fact that the Fair Work Act has made available injunctive relief for a union or employee claiming that an industrial instrument is not being observed.
- *Broad definition of 'workplace right'* – the provisions enable an employee to seek an injunction or penalty against an employer because an employer's action is alleged to be (in part) because of the fact the employee can legally complain in relation to their employment. The provisions do not require a connection of the protected right to complain with any legislated complaint or inquiry mechanism. This goes further than is necessary for the legitimate task of outlawing victimisation, and fosters unmeritorious claims adding both burden and cost.
- *Adverse action and entitlement to benefit of an industrial instrument* – the Fair Work Act removed the 'sole or dominant purpose' test used to assess whether it was unlawful to take adverse action wholly or partly because a person is entitled to the benefit of an industrial instrument. It is unacceptable that an employer making an ordinary investment, operational or other such management decision should be required to defend its decision because, even in part, it was concerned about labour costs or some other such feature of the applicable industrial instruments.

Adverse action provisions should be limited primarily to protection against victimisation of a person who chooses to belong / not belong to a union and to undertake / not undertake a union role. This was the historical experience under section 5 of the *Conciliation and Arbitration Act 1904* and section 334 of the *Industrial Relations Act 1988* as originally enacted.

Adverse action impacting managerial rights – BHP Billiton Mitsubishi Alliance

Individual employee – poor performer

Management sought to improve the performance of an employee against the standard performance requirements for the relevant position level because of a view that the employee had been performing poorly. However, the employee claimed that actions to address his performance were occurring because he was a member of the CFMEU and a bargaining representative. The matter is currently before the Federal Court. An everyday management action to address performance concerns results in a complex, costly, time consuming Federal Court Action. The adverse action provisions in the legislation need to be narrowed so that they do not interfere with ordinary management actions and redirected towards their primary purpose in avoiding victimisation of union members.

Mr. Henk Doevendans case

During the negotiations for the BMA Enterprise Agreement 2012, protected industrial action in the form of stoppages of work was taken by employees at the various mine sites. A protest was organised at the entrance to the Saraji Mine by the Saraji Mine Lodge of the CFMEU. Mr. Henk Doevendans was the Vice President of the Saraji Mine Lodge at that time and attended a number of the protests that occurred at the entrance to the Saraji Mine. The Company found that Mr Doevendans engaged in serious negative behaviour contrary to the workplace conduct policies that apply to all BHP Billiton employees and contractors. Mr Doevendans was dismissed. It then had to defend itself in a prosecution for allegedly dismissing Mr Doevendans because of his union role. Nine judges in total have considered the matter in the Federal Court and the High Court. They split five to four in favour of the Company's position. Whilst the process found in favour of the company's dismissal of Mr. Doevendans on the grounds that his behaviour was a serious violation of its policies, the narrow margin of this finding somewhat illustrates the difficulty and risk created by the legislation when managing through a situation which could give rise to an adverse action claim. Management decisions must be made by employers and their supervisors in a practical environment where the rules are clear and easily understood.

Interaction between elements of the framework

As much as the impediments in the current framework inhibit productivity, the individual impacts can be compounded by the interaction between them. If Australia is to create an environment where employers and employees work to build and maintain globally competitive businesses, these impediments need to be addressed together. BHP Billiton's experience with the BMA EA negotiations in 2011-12 provides an example of how the various elements interacted to produce an unnecessarily destructive industrial relations environment for almost two years.

BHP Billiton Mitsubishi Alliance dispute

In November 2010, BMA commenced negotiations with a single bargaining unit comprising the CFMEU, CEPU and AMWU. Those unions nominated officials and delegates to participate in the task. The previous agreement expired in May 2011. The agreement covered seven mines – Goonyella Riverside, Peak Downs, Saraji, Norwich Park, Gregory, Crinum and Blackwater.

BMA would have liked to have proposed mine-specific enterprise agreements for a number of the mines to focus the needs, opportunities and working arrangements in each mine to the terms and conditions best suited to their operations. Some of these mines have since ceased operation. The proposed scope was anticipated to be opposed by the unions given historical negotiations insisting on one agreement since 2001. Due to the lack of emphasis on sustainability of a business in the Fair Work Act, BMA's assessment was that there was little prospect of persuading the FWC to adopt BMA's preferred scope through a contested scope order. Accordingly, the scope of the enterprise agreement defaulted to be on a whole-of-business basis across all the mines rather than having specific enterprise agreements for different mines. **Legislation on scope of industrial agreements should provide for the employer to determine the scope of agreements, subject to a reasonable check in the FWC.**

A series of bargaining meetings were conducted in the first half of 2011. However, as May 2011 approached, one union commenced a "Grim Reaper" pamphlet campaign counting down to protected industrial action availability, despite bargaining progress and further meetings being scheduled. After the nominal expiry date of the agreement, protected industrial action commenced, suggesting that industrial action was a bargaining tactic, rather than a means of breaking an impasse. **Legal immunity for protected industrial action impedes on the economic and legal rights of employers and third parties, and should be restricted to use after an impasse in bargaining only.**

The main form of industrial action faced was rolling strikes, sometimes for less than a shift and sometimes for a series of shifts. Strikes would be timed to maximise damage to the business while retaining, so far as the unions could manage it, access to overtime for employees. Employees undertaking the strikes were partially funded by their unions through a strike pay system. In addition, the economic impact of industrial action was enhanced by threatening action with the prescribed three days' notice, but withdrawing the notice at the last minute.

The statutory purpose of the notice of intention to take industrial action is to enable employers to minimise economic damage – BMA ceased plant and equipment, supplier deliveries and service providers in line with these notices. The late withdrawal of notices or failure to carry through became a weapon in itself, and created significant loss and damage for BMA with no direct impact on employee earnings. **Given the broad scope and legal immunity, the economic impacts of industrial action are unbalanced.**

After 22 months the parties submitted to a process of private mediation and an agreement was reached. Negotiations centred on the content of the agreement that was unrelated to wages or conditions of employment. The unions were pursuing an array of work practice matters. Unions also sought to back-out flexible provisions agreed in previous agreements in exchange for higher increase in underlying wages. These included performance management processes, changes to roster arrangements, making overtime voluntary only, employee investigations, use and payment of contractors, use of staff labour, an equal voice in deciding who should be trained and when, consultation rights in any change areas under contemplation even though no decision had been made, and equal involvement in selection for redundancy. Additionally, the unions were pressing for various privileges associated with their representation of and communication with members. **Protected industrial action should not be available to pursue work practice matters or preferred union content, it should be only for matters relating to workplace productivity, and the terms and conditions for skills being applied.**

The only measure made available by the Fair Work Act to deal with the industrial action being faced and the opportunistic approach to withdrawal of strike notices was to lock employees out with further damage being suffered by employees, their communities and employers. There were no measures available within the FWC to force a modification of the unions' approach. There was no way for the business to petition to have illegitimate tactics prohibited. **Given there are no impacts from withdrawing protected industrial action, and the range of permissible matters in an agreement is so broad, legislation needs to provide for a suspension in the right to take industrial action if withdrawals are not agreed to by the employer.**

Future considerations for Australia's workplace relations framework

In addition to recommending the specific reforms to the current workplace relations framework outlined so far, the Productivity Commission should also provide a foundation for exploring the extent to which the workplace relations framework will need to evolve in coming decades in response to changes in the nature of work and in order to capture the opportunity for fuller and more effective participation by the evolving workforce.

Workplaces must evolve significantly in coming decades, including through:

- Greater diversity, with a more level playing field for a higher percentage of female workers and older workers to participate. This is simply the right thing to do, and is aligned with Australia's demographic outlook.
- Greater use of technology to augment work and greater reliance on automation of many work processes to support the work of employees. This is a trend already playing out across many industries, including BHP Billiton's. For example, BHP Billiton Iron Ore remotely coordinates, schedules and controls its Pilbara-based mine, fixed plant, train and port operations from Perth, and is currently trialling autonomous trucks at its Jumblebar mining hub.
- Changes in the roles required (e.g. through innovation or changes to work practices), the nature of work and how it is performed, with workplace structures increasingly based on collaboration and teamwork with less hierarchical supervision.

These trends will be supported by an examination of longstanding features of the workplace relations framework. As Australia transitions towards a greater share of knowledge work, it may be appropriate to shift the emphasis of remuneration to more strongly reward employees for outcomes, rather than time spent at work. This will apply even to some roles in traditional industries, such as mining, subject to an appropriate and fair set of minimum requirements that are appropriate to the circumstances. Performance-based outputs may not be the only means of determining employment conditions, but the workplace relations framework needs to both conceptualise and enable this in the future for industries and occupations where this can enhance competitiveness and outcomes for Australia's overall workforce.

Ultimately, debate over a broader range of choices in the mix of collective and individual agreement options is required. The future framework should facilitate freedom of choice by permitting a range of industrial instruments, in line with the specific needs and preferences of different workforces.

The increasingly dynamic workplace of the future will also require an even greater emphasis on ensuring that agreements do not include diversity constraining work practices (e.g. rosters, or recruitment/development processes where unconscious bias impacts equal opportunity employment) or other elements that impede flexibility, or the ability to act collaboratively in a global competitive environment. Examples of areas include artificial demarcation of roles, or extensive consultation prior to operational changes that are unrelated to health and safety issues.

By addressing these items in the longer term reform agenda, Australia can enable increased workforce participation, enhanced participation by women in resources and other sectors, and more fulfilling jobs that better leverage the skills and experience of the workforce to enhance Australia's international competitiveness.

Conclusion

The proposed improvements to the workplace relations framework contained in this submission would contribute to Australia having safer and higher performing workplaces. By enacting these changes, BHP Billiton believes the workplaces will not only be more productive for employers, but will be better places to work for employees as they experience higher collaboration, open and inclusive cultures, and well led teams of people making a difference in their chosen fields.

There will be a range of views in the community on the scope of reform that is required and the Productivity Commission's review should facilitate a constructive discussion to ensure Australia's workplace relations framework evolves to keep pace with its competitors and offers enhanced employment outcomes for its population over coming decades.

BHP Billiton supports specific reforms to address Fair Work Act provisions that unnecessarily impede business and employment stability and fulfilment, and efforts to increase international competitiveness. This is of course critical for Australian resources companies like BHP Billiton that trade and invest in a global environment, but it is also a priority for the long-term health of the Australian economy. The first priority should be to simply implement current amendments to the Fair Work Act which are before the Parliament on right of entry and agreement provisions for 'greenfield' sites. In addition, further specific reforms should be undertaken to:

- Ensure that the Fair Work Act restricts enterprise agreement content to terms of employment only and not operational matters that limit productivity improvements;
- Truly supporting an employee's choice of representation and equally enabling both non-union and union streams of enterprise bargaining;
- Provide greater access to relief for employers where industrial action is taken and ensuring that protected industrial action is only available as a last resort; and
- Amend the Fair Work Act provisions about adverse action to restore the limit on such claims to matters of victimisation due to union membership status or activity.

While the challenges of creating fulfilling workplaces and increasing international competitiveness ultimately come down to the ability for individual employers and employees to come together in a collaborative way, the policy settings in the workplace relations framework can create an environment that either enhances or inhibits the fostering of such relationships. Implementing reforms within the current workplace relations framework is a sustainable way for Australia to support consistent long-term economic growth and to place Australia's resources industry in a strong position for continuing success in meeting global resources demand.