



MINERALS COUNCIL OF AUSTRALIA

MCA SUBMISSION TO SENATE STANDING COMMITTEE
ON EDUCATION AND EMPLOYMENT INQUIRY INTO THE
FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S
JOBS AND ECONOMIC RECOVERY) BILL 2020

5 FEBRUARY 2021

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1. EXECUTIVE SUMMARY

- Mining is Australia's largest industry directly or indirectly supporting around 1.1 million jobs. In addition, thousands of small businesses, advanced manufacturing firms and service providers in the Mining Equipment Technology and Services (METS) sector rely on the mining industry to support jobs.
- The reforms contained in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill represent an incremental, pragmatic and reasonable approach to reform that will help the minerals industry provide highly skilled, highly paid jobs supporting communities across Australia and national economic recovery.
- Further reform opportunities exist that could to boost investment, innovation, productivity and jobs.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill (the bill) is the culmination of work of the Industrial Relations working group process announced by Prime Minister Morrison on 26 May 2020.¹ The working group process involved industry groups and trade unions working together with government to develop reforms to create jobs as the nation grappled with the COVID-19 pandemic.

The MCA made substantive contributions to the greenfields stream of the working group process, demonstrating with evidence how competitive workplace relations policy settings are one of the keys to encouraging investment in the mining sector.

Investment in new and existing mines creates jobs. The MCA has identified 31 minerals projects at or above the \$500 million threshold that have completed a feasibility study. The combined \$31 billion in investment flowing from these projects could create more than 17,000 construction jobs and 11,000 ongoing operating jobs across Australia.

Allowing greenfields agreements of up to eight years for projects worth \$500 million or more will work to encourage investment in new mining projects by removing the uncertainty of having to renegotiate employment conditions before the project is completed. The option of longer greenfields agreements to nationally significant projects with a capital value between \$250 million and \$500 million will help unlock additional investment and jobs.

Ongoing investment in the mining sector in the coming years will be critical to ensuring Australia emerges from the COVID-19 crisis in a strong position and remains a global leader in minerals exports.

While the reforms in the bill are incremental, opportunities remain to support more dynamic and productive workplaces, including:

- Improving the process for terminating expired enterprise agreements
- Focusing parties to an enterprise agreement on matters directly related to employment
- Permitting highly paid workers to enter into individual agreements.

Overall, the bill represents a reasonable compromise in an area of policy in which agreement is not always easy to find. By providing additional flexibility to the workplace relations system, the bill will help to ensure Australia remains a competitive destination for mining investment, driving job creation at a time when the nation needs it most.

Recommendation

- The MCA recommends Australian Parliament facilitate improvements to workplace relations rules by passing the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill.

¹ Hon Scott Morrison MP, Prime Minister of Australia, [Address to the National Press Club](#), 26 May 2020.

2. THE CONTRIBUTION OF THE AUSTRALIAN MINERALS INDUSTRY

The Australian minerals industry supports jobs, communities and small businesses

The Australian minerals industry makes substantial contributions to exports, wages, jobs and government revenue. The resources sector contributed \$283 billion in 2019-20, 60 per cent of Australia's total exports. In the same year, mining became Australia's largest industry, accounting for 10.4 per cent of real gross domestic product.

Millions of Australians rely on Australian mining for their livelihoods. According to the Australian Bureau of Statistics, the mining industry employed 240,000 people in 2019-20 with modelling by Deloitte Access Economics showing the broader mining and METS sector directly and indirectly supporting around 1.1 million jobs around Australia.²

Resources sector jobs are highly skilled, highly paid, and mostly in regional areas. Average earnings in resources are \$144,000 a year, 58 per cent higher than the average for all industries. The industry also employs more than 8,600 apprentices and trainees and more than 6,600 Indigenous Australians, including in remote areas of the Northern Territory, Queensland and Western Australia.³

Overwhelmingly, mining workers are employed on a permanent, full time basis. Eighty-five per cent of mining workers are permanent employees and 96 per cent are employed full-time. Mining relies on labour hire workers (permanent and casual) and service contractors to maintain operational flexibility, provide access to specialised skills, and ensure operations can respond to upswings in commodity prices or disruptions such as the COVID-19 pandemic. While labour hire workers play an important role in mining businesses, they make up just 11 per cent of the total minerals industry workforce.⁴

Casual workers in the Australian mining sector are highly paid compared to other mining industry workers and workers in most other industries. In 2019 the median weekly earnings for casual employees in the mining sector was \$1,999 – 45 per cent higher than the median for *full-time* employees across all industries (\$1,375). The gap in median weekly pay between permanent and casual employees is smaller in mining (15 per cent) than all other industries. Across the economy overall the gap is 131 per cent.⁵

The Australian mining industry is a world leader in developing and adapting transformative technologies, from automated drills, conveyors and trains to retrofitting diesel engines for battery operation in underground mines. The sophisticated production techniques and skills that mining demands generates opportunities to contribute to mining supply chains for the myriad of innovative small and medium sized businesses that make up the mining equipment, technology and services (METS) sector. These businesses in turn generate jobs, exports, and sustain regional communities.

The Australian minerals industry paid \$25.2 billion in company tax (more than one-quarter of all company tax) and \$14.1 billion in royalties in 2018 19, benefiting all Australians through better services and infrastructure. Over the past 14 years, the minerals industry paid \$281 billion in royalties and company tax – enough to build 11,000 schools or 390 hospitals.⁶

Policy settings that support investment growth and productivity are keys to creating jobs and helping the economy recover

Fiscal and regulatory settings that support a business-led recovery through private sector driven investment growth and improved productivity will be crucial to supporting economic recovery, preserving and creating jobs and sustaining communities. This includes reforms to the workplace relations system.

² Deloitte Access Economics, [Mining and METS: engines of economic growth and prosperity for Australians](#), 29 March 2017.

³ Australian Bureau of Statistics, [Average Weekly Earnings, Australia](#), released 13 August 2020.

⁴ Australian Bureau of Statistics, [Labour Force, Australia, Detailed, Quarterly, October 2020](#), ABS cat. no. 6291.0.55.003, released 26 November 2020; [Characteristics of Employment, Australia, August 2019](#), ABS cat. no. 6333.0, released 9 December 2019. Deloitte Access Economics, [Economic effects of changes to labour hire laws](#), report prepared for the Minerals Council of Australia, MCA, 4 June 2019, p. 35.

⁵ Australian Bureau of Statistics, [Characteristics of Employment, Australia, August 2019](#), ABS cat. no. 6333.0, released 9 December 2019.

⁶ Deloitte Access Economics, [Estimates of royalties and company tax accrued in 2018-19](#), report prepared for Minerals Council of Australia, 1 May 2020.

3. CONSIDERATION OF THE BILL

The bill proposes important reforms to the Fair Work Act 2009 (Cth) (the FW Act). If the bill is passed, the FW Act will be amended with respect to casual employees, greenfields agreements, enterprise bargaining and compliance and enforcement mechanisms. Overall, the reform package will help ensure that Australian mining keeps providing highly paid, highly skilled and secure jobs across Australia.

Casual employees

The MCA supports the insertion of the new definition casual employment in the Fair Work Act and the clarification of entitlements owing to casuals in national employment standards.

Under the proposed definition a person will be a casual employee if they accept an offer of employment 'on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person'.

For the purpose of determining whether a 'firm advance commitment' has been given by the employer, regard must be had only to the following:

- Whether the employer can elect to offer work and whether the person can elect to accept or reject work
- Whether the person will work only as required
- Whether the employment is described as casual employment
- Whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Importantly, the bill makes it clear that a regular pattern of hours is not in itself an indication of a 'firm advanced commitment'.

The focus on what was agreed at the time of the employee's engagement is reasonable and practical. It will contribute to greater certainty for both employers and employees on the nature of the relationship between them, reducing costly and time-consuming disputes.

In addition to inserting a statutory definition of causal employment the bill provides pathways for casual employees to convert to permanent employment:

- The bill requires employers to offer part-time or full-time employment to a person who has been employed as a casual employee for 12 months, where the employee has worked a regular pattern of hours on an ongoing basis for 6 months.
- The bill permits an employer to refuse a casual conversion request on reasonable grounds, including that it is known or foreseeable that the casual employee's hours of work will be significantly reduced, or the person's position will cease to exist, within the next 12 months. (This is consistent with model conversion clauses in most awards).
- The bill provides a residual right to request conversion for casual employees who have been employed for 12 months and worked a regular pattern of hours with the employer for the previous 6 months. This is only available where the employer has not given a notice to make or refuse an offer to convert within the last 6 months.

The MCA considers that these reforms are a positive development adding clarity to the rights and obligations of employers and employees.

Agreement making

The bill supports accelerated approval of enterprise agreements that are supported by a majority of employees by requiring the Fair Work Commission to either approve an enterprise agreement application within 21 days or notify the parties of reasons why it was not able to do so in that time.

Additionally, the bill introduces considerations the Fair Work Commission must have regard to when assessing enterprise agreements against modern awards:

- only take into account patterns or kinds of work, or types of employment, that are currently engaged in or are reasonably foreseeable, not those that are hypothetical or not reasonably foreseeable;
- have regard to the overall benefits (including non-monetary benefits) employees would receive under the agreement compared to a relevant modern award; and
- have regard to any views relating to whether the agreement passes the better off over all test expressed by employers and employees and their bargaining representatives.

The bill will temporarily permit the Fair Work Commission to approve an agreement which may not pass the better-off-over-all test taking into account a range of factors including the public interest and the impact of COVID-19 on the enterprise.

Improving the approval process for enterprise agreements – including by accelerating agreements supported by a majority of employees and stipulating how the Fair Work Commission should apply the better-off-overall test – means more consistent approval times for similar agreements, more certainty for employers and faster creation of jobs and wage increases in exchange for productivity gains.

Greenfields agreements

Australia's mining competitors in the United States and Canada have access to enterprise agreements covering the life of a project; yet in Australia all enterprise agreements – including greenfields agreements – are currently limited to four years. In a global investment market where projects compete for capital, this introduces industrial uncertainty for Australian project proposals from the early stages of the investment assessment process.

The bill will amend the Fair Work Act to allow greenfields agreements of up to eight years for projects worth \$500 million or more. This will encourage investment in new mining projects by removing the uncertainty of having to renegotiate employment conditions before the project is completed. In addition, the bill creates an option of longer greenfields agreements to nationally significant projects with a capital value between \$250 million and \$500 million.

The reforms are important for projects that involve underground mining, minerals processing or more complex project plans, which may take more than four years to proceed from construction to execution to completion.

The MCA has identified 31 minerals projects at or above the \$500 million threshold that have completed a feasibility study. The combined \$31 billion in investment flowing from these projects could create more than 17,000 construction jobs and 11,000 ongoing operating jobs across Australia.

Allowing greenfields agreements of up to eight years for projects worth \$500 million or more will encourage investment in new mining projects by removing the uncertainty of having to renegotiate employment conditions mid-stream.

4. OPPORTUNITIES FOR FURTHER REFORM

The MCA recognises that the bill represents an incremental improvement to the existing workplace relations framework based on reasonable compromise. However, the government should pursue further modest workplace reforms.

Additional workplace relations reform opportunities that could be pursued to boost investment, innovation, productivity and jobs, include:

- Improving the process for terminating expired enterprise agreements
- Removing the capacity for protected industrial action to be taken over matters not directly related to the employment relationship
- Permitting highly paid workers to enter into individual agreements

Terminating expired agreements

Many enterprise agreements in the minerals industry contain historic clauses that hinder workplace productivity and innovation. Employers who have successfully applied to terminate enterprise agreements have done so largely to remove outdated, irrelevant and restrictive clauses. However, employers cannot easily terminate an expired enterprise agreement because:

- The Fair Work Commission must be satisfied that termination would be appropriate for all parties and not contrary to the public interest
- Contested terminations entail an extensive and expensive legal process
- Successful applications to terminate have generally required undertakings from the employer that preserve many pre-termination terms and conditions.

The 'evergreen' nature of enterprise agreements also allows unions who are party to a number of single-enterprise agreements with the same employer to wait until all those agreements expire and coordinate protected industrial action. Protected industrial action that is conducted across enterprises can be used to prosecute objectives that do not relate to the particular agreements themselves, thus undermining the productivity and income benefits of enterprise-level bargaining.⁷

Permitted content

The Fair Work Act expanded the range of permitted content in enterprise agreements from 'matters relating to' the employment relationship to 'matters pertaining to' the employment relationship – including matters pertaining to employers and trade unions. Consequently, more content must be bargained over, more issues can form the basis of protected industrial action, and more content is then able to be included in enterprise agreements which may then be subject to dispute resolution procedures under those agreements.

In the minerals industry, it is not uncommon to see clauses in enterprise agreements that restrict the fundamental right of an employer to manage its own business, or which have little to do with the employer-employee relationship. For example, these clauses can require employers to:

- Consult with unions on changes to regular rosters or ordinary hours of work
- Restrict retrenchment to a 'last-in, first-out' policy
- Restrict or prohibit the use of contractors or labour hire workers
- Provide employee representatives with the names and commencement dates of new employees
- Provide paid leave for employees to attend to union business.

⁷ See Glencore, [Submission to the Productivity Commission: Australian Workplace Relations Framework](#), March 2015, p. 14.

Consistent with the Productivity Commission, the MCA supports removing the availability of protected industrial action for matters not directly related to the employment relationship.⁸ This would improve workplace efficiency by ensuring that:

- Negotiations are not stifled by claims that constrain an employer's ability to manage the workforce and work flow
- The bargaining process has a clear employment focus and protected industrial action cannot be misused for ulterior purposes.

Permitting highly paid workers to make individual agreements

Every employee, business and industry cannot and should not be expected to flourish under the same workplace rules. Workers earning above the high-income threshold for unfair dismissals (currently \$148,700) should be permitted to opt out of an enterprise agreement and enter into individual agreements.

The MCA's view is that workers earning above the high-income threshold for unfair dismissals (currently \$148,700) should be permitted to opt out of an enterprise agreement and enter into individual agreements.

⁸ Cf. the Productivity Commission, [Workplace Relations Framework: Inquiry Report, Volume 2](#), Canberra, 21 December 2015, pp. 683, 820.