Competition Policy Review Draft Report
November 2014

APPEA Submission December 8 2014

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INTRODUCTION

Australia needs a sensible approach to competition policies, laws and institutions.

In all sectors of the economy – not just oil and gas — maintaining access to open and competitive markets is in Australia's best interest. Economic history shows that Australia has prospered when government policies have encouraged an open, competitive economy. On the other hand, living standards have declined when governments have pursued inefficient regulation or protectionist policies.

As APPEA highlighted in it submission to the *Competition Policy Review Issues Paper*, the major challenge to the oil and gas industry's continued growth is maintaining Australia's international competitiveness in the face of growing global competition.

The focus of the Competition Policy Review on regulations and restrictions that impede competition is welcome. Currently some elements of the regulatory framework governing enterprise bargaining inflate labour costs and reduce productivity outcomes on major project construction in Australia. The leverage exercised by parties supplying inputs into projects (both labour and equipment) has an impact through the entire chain of client contractor relationships on major projects. It leads to less competition and higher price outcomes.

Secondly, the Competition Policy Review has reopened the issue of environmental and consumer exemption to the secondary boycott prohibition and invited further comment on this issue.[1]

Globally, and nationally, the oil and gas industry is increasingly the target of campaigners who malign the industry's performance; seek to stop or slow project development; and/or advocate industry divestment[2]. In Australia, the increase in scope and profile of the oil and gas industry has been accompanied by an increase in activity and sophistication of critics or opponents as well as the migration of international issues and funding across borders into the Australian domestic context.

While they are often styled as not for profit organisations existing for the public benefit or to serve a charitable purpose, many of the environmental and consumer NGO's ("NGO's") behind these campaigns are in fact full-time political campaigning organisations. An NGO campaign that deliberately sets out to destroy a corporation's reputation, and thereby inhibit its ability to create wealth, or worse, destroy wealth, is an attack on property rights. It is therefore legitimate to call into question the validity of the continuation of the environmental and consumer exemption to the secondary boycott prohibition.

APPEA therefore welcomes the opportunity to provide the Panel with further information on these two issues which are relevant to the Competition Policy Draft Report:

- Employment-Related matters (Chapter 18) – Major Project construction and Greenfields enterprise agreements.
- The environmental and consumer exemption to the secondary boycott prohibition (Chapter 18.2).

[1] Competition Policy Review (CPR), *Draft Report*, September 2014, page 51.
[2] For example, the ANU recently announced divestment from resource and other companies on the basis that they allegedly cause 'social harm'.

The review of competition policy should complement other government initiatives underway to open the Australian economy to competition and lift competitiveness, including the government's Energy White Paper, the Red Tape Reduction program, and the upcoming Productivity Commission review of Labour Relations.

Major Project Construction and Greenfields Agreements

The current regulatory framework governing enterprise bargaining acts to inflate labour costs and reduce productivity outcomes on major project construction in Australia.

Along with greater certainty on project cost, the regulatory framework needs to promote greater competition between those bidding for the "work". The leverage exercised by parties supplying inputs into projects (both labour and equipment) has an impact through the entire chain of client contractor relationships on major projects. It leads to less competition and higher price outcomes.

As the Competition Policy Draft Report notes:

"The negotiation of employment terms and conditions has always been excluded from most of the competition law provisions of the CCA. This is achieved through section 51(2) (a)…"[3]

While APPEA accepts there are differences between labour markets and product or service markets, this should not be the end of the matter. While negotiation and determination of employment terms and conditions is governed by a separate regulatory regime (the Fair Work Act 2009), it is fair to re-examine the policy basis to ensure that it keeps pace with the needs of a modern Australian economy competing in an increasingly competitive world. As the then Chairman of the Productivity Commission, Gary Banks AO, said in a speech to the 2012 ACCC Regulatory Conference:

> *Industrial relations regulation has generally been regarded as falling outside the purview of competition policy altogether and, secondary boycotts aside, union activities are largely exempt from the anti-competitive conduct provisions of the Competition and Consumer Act. The basis for this has been that labour markets are more complex than product markets and involve a significant human dimension. And these points are correct. But are they good reasons for foregoing scrutiny of whether the benefits of particular restrictions on competition and other regulatory measures in the labour market exceed the costs and, where they do, whether they are the best way of achieving those benefits?*
>
> *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 — and far removed from the 'dark satanic mills' of the early industrial era. 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.*[4]

[3] Competition Policy Report, p. 241.
[4] Banks, G (2012), *Competition Policy's regulatory innovations: quo vadis?* July (available at www.pc.gov.au/speeches/gary-banks/competition-quo-vadis).

It is essential to ask the same question of the provisions of the *Fair Work Act 2009* (FW Act). The impacts on productivity and competitiveness for major projects are such that a reconsideration and reassessment of the FW Act is required. After all, productivity gains provide the only sustainable source of higher wages and job security for employees.

THE ISSUES

Several problematic provisions in the FW Act contribute to higher project costs and productivity issues. They may be divided into issues related to setting terms and conditions (the front-end) and issues once the agreement has been negotiated (the back-end).

Front-end issues include the effective monopoly position unions have been granted in setting the price of labour, as well as the pattern of short-term project exigencies that drive outcomes for terms and conditions that may ultimately threaten long-term project sustainability. Back-end issues include risks to project performance and competitiveness that arise despite one or more enterprise agreements being in place.

The front-end issues on major construction sites are largely a reflection of the greenfields agreement provisions within the FW Act.[5]

A greenfields agreement is a type of enterprise agreement between the project (typically the head contractor) and employee organisations (unions). Its purpose is to provide projects with greater "certainty" around terms and conditions and allows 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 in previous reviews of the legislation. For example, the former Government's own commissioned review into the FW Act reached the following conclusion:

> *However, 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*.[6]

The Coalition Government has 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 FW Act. As the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* notes:

> *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*.[7]

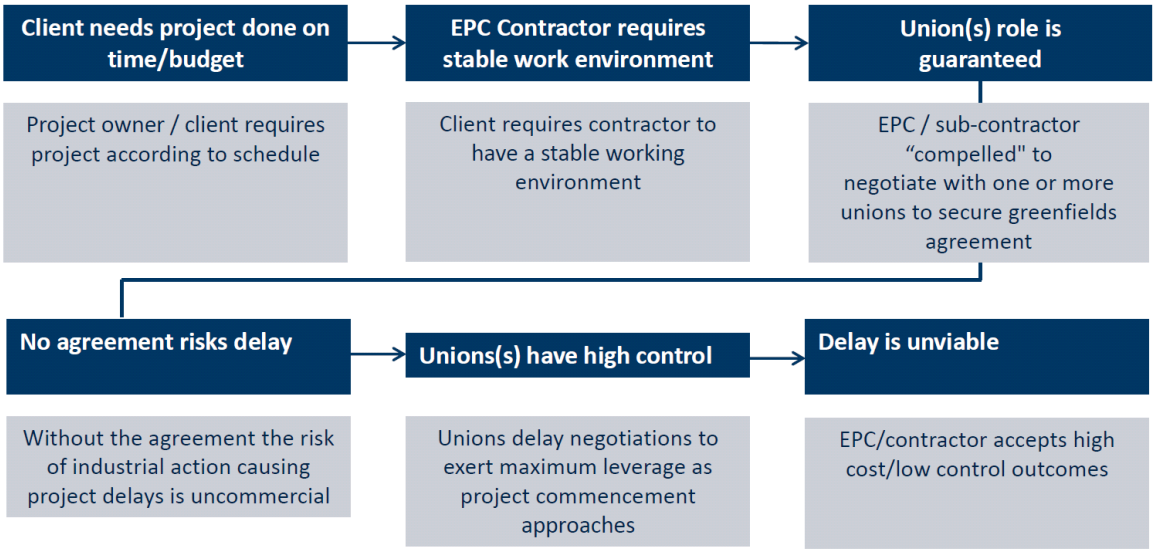
[5] *Fair Work Act 2009* (Cth) s 172(4).
[6] Fair Work Act Review (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, 2 August, p. 171 (available at www.employment.gov.au/fair-work-act-review).
[7] Explanatory Memorandum to the *Fair Work Amendment Bill 2014*, p. ix.

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. The Department modelled the impact of delays on project cash flows, measured by present net value. It 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 total delay cost reduction of $23 million a year spread across five projects.[8]

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. Furthermore, once an agreement is in place, productivity is impaired by a range of factors that are described below.

The Front-end problem: 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 Act. This power plus relatively easy recourse to protected industrial action by unions facilitates the exercise of maximum negotiating power during the negotiation process.

[8] Ibid, pp. xiii-xvi.

LEGISLATIVE DRIVERS

Source: Seyfarth Shaw Australia (2014).

Requirement to make a Greenfield agreement with one or more union

Greenfields 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 (unpalatable) alternative is for an employer to commence the project without an agreement in place, risking the prospect of industrial action in support of bargaining for a new agreement.

An agreement with one (or more) unions is the only option available to an employer seeking a greenfields agreement. Even when an agreement is made, a different union that is not bound by the 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 FWC 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 FW Act 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 FWC, or by using industrial action as leverage. While the agreement is ultimately made with employees, the FW Act 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 (EFA's). 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.[9] In addition, the Australian Workplace Agreement – an individual agreement with statutory force – was introduced.

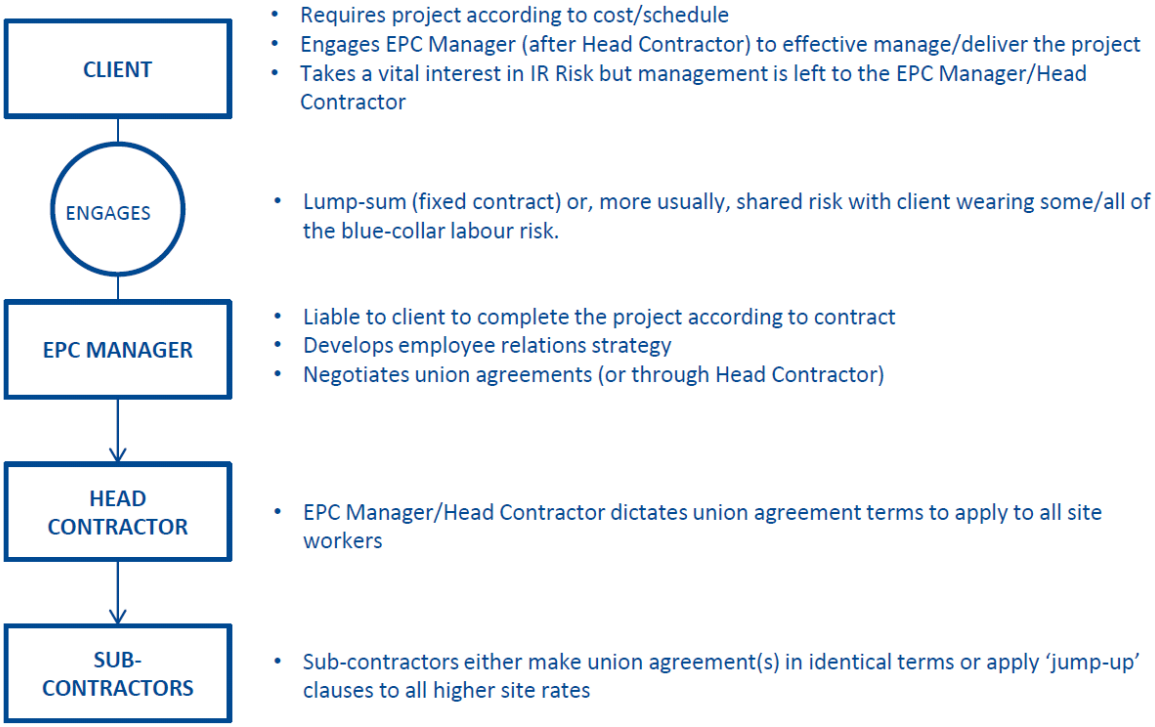
[9] S 170 LK *Workplace Relations Act 1996* (the non-union bargaining stream).

The FW 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.[10] Further, as of 1 January 2013, the FW Act explicitly provides that an enterprise agreement's coverage clause may not allow employees to 'opt out', and that enterprise agreements cannot be made with one employee.[11]

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 require (or effectively require) the terms negotiated at the top of the chain to apply throughout. The impacts are shown below.

ANATOMY OF A TYPICAL MAJOR PROJECT



Source: Seyfarth Shaw Australia (2014).

It is unviable for a project owner (client) to allow project works to start without an in-term enterprise agreement.

In practice, the client through the EPC manager or head contractor requires an enterprise agreement to be in place which will cover much of the civil/mechanical and constructions 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

[10] Ibid s 3(c).
[11] Ibid ss. 172(6), 194(ba).

is removed (to the extent that the workplace arrangements provide a point of competitive tension). 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 know of the pressure on clients to commence project works. Any delay in reaching terms results in lengthy negotiations with a looming commencement date. This provides a critical additional point of leverage.

Case study: BHP Billiton and the Kipper-Tuna and Turrum projects
BHP Billiton is a co-venturer with Esso Australia in a long-standing oil and gas production venture in Bass Strait. The Kipper-Tuna and Turrum projects are current major expansion projects in this joint venture. The projects require the building and deployment of expensive special-purpose vessels and facilities that are sourced outside Australia. These structures' inflexible sailing schedules to Australia are easily discernible to Australian construction unions. The deployment of many other vessels and operations turned on the timely delivery and deployment of these special-purpose vessels and facilities. The Australian construction unions took advantage of this situation to hold out for unreasonable demands for wages and the employment of favoured individuals, banking that the operator would ultimately have no practical alternative but to submit.[12]

The Productivity Commission in its recent Draft Report on *Public Infrastructure* analysed this issue in the context of the broader public infrastructure building construction industry.[13] The Commission found:

> *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.*

Agreement content is too broad

The current broad "permitted matters" construct has enabled unions to require employers to agree to union 'control' clauses – such as those limiting the capacity to sub-contract work. These clauses may have an adverse and powerful impact on the employer's capacity to manage thereby impacting productivity. They include matters such as limitations on contracting-out, enhanced rights on entry, union control over inductions and the rights of delegates to training and paid time on union matters. Such limitations would generally not be permitted in the dealings between companies.

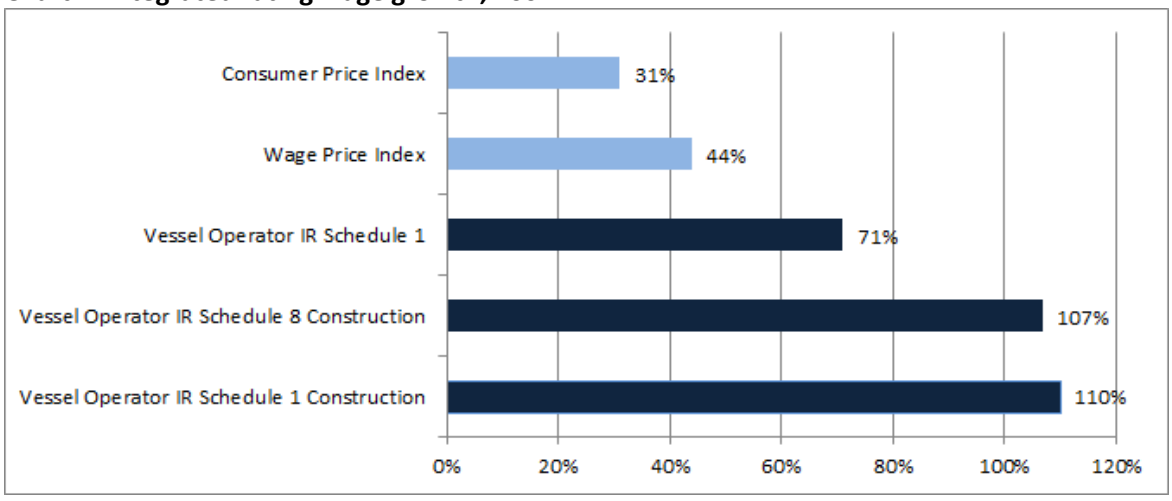
The potential for protected industrial action is enhanced by virtue of there being more matters which are the subject of bargaining.

[12] BHP Billiton (2012), *Submission to the Fair Work Act Review*, 17 February, p 30. See also pp. 31-33 (available at submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/BHPBilliton.pdf).
[13] Productivity Commission (2014), *Public Infrastructure, Draft Report: Volume 2*, 13 March, p. 438 (available at www.pc.gov.au/projects/inquiry/infrastructure/draft).

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

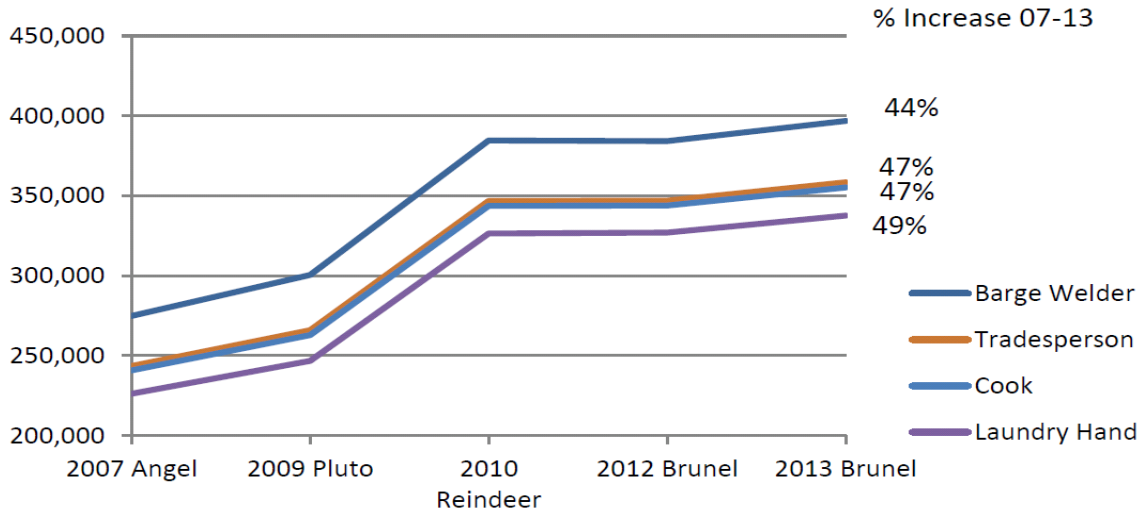
Unions use the benchmark set on a previous project as the starting point for negotiations over the next agreement. This inflates project construction cost beyond what would otherwise be needed to meet the demand for labour. That benchmark may include not only a generous base rate of pay, but other favourable 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.
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 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.

Chart 1. Integrated rating wage growth, 2002-12



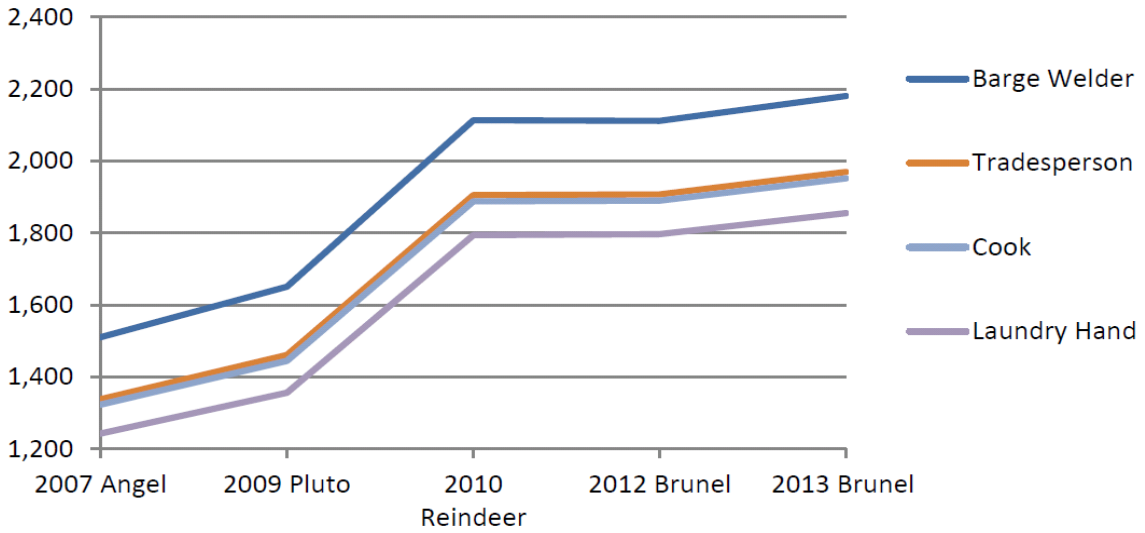
Source: Deloitte Access Economics (2013).
Note: IR is an abbreviation of integrated rating

Chart 2. Offshore construction annual salary, including superannuation ($)



Source: Association of Mines and Metals (2013).

Chart 3. Offshore construction day rate, including superannuation ($)



Source: Association of Mines and Metals (2013).

Agreement nominal life limited

Enterprise agreements (including greenfields agreements) have a "nominal life", being a maximum of four years from their approval by the FWC. 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.[14] 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.

Back-end issues

Once the agreement is in place, resort to industrial action is generally prevented by the legislation. However, several key issues have ramifications for productivity and cost structures on a major project despite the major greenfields agreement(s) being in place:

- The re-negotiation of expired Greenfields agreements (or other agreements relating directly to project construction) giving rise to the risk of protected industrial action.
- The re-negotiation of agreements of ancillary service providers giving rise to the risk of protected industrial action.
- The broad scope of 'permitted matters' over which bargaining can take place.
- The exploitation of union Right of Entry.
- The risk and impact of unprotected industrial action.

[14] *Fair Work Act 2009* (Cth) s 54.

Conclusion

Anti-competitive restrictions in the labour arena, as elsewhere, can be difficult to justify on public interest grounds. Opening up particular arrangements sanctioned by the FW Act would enhance competitiveness and attract more investment, which would ultimately create more jobs.

The proposition advanced under Section 3(c) of the FW Act to the effect that statutory individual agreements "can never be part of a fair workplace relations system" is open to question in a modern, globally competitive economy. Many workers in Australia now have a mix of collective and individual agreement arrangements. In the oil and gas industry as well as the broader mining sector, a number of operating projects have arrangements with employees based on individual agreements which provide attractive salaries and working conditions. Other projects have more traditional collective arrangements with unions and the employer as parties to the agreement.

Ultimately, facilitation of a broader range of choices through a mix of collective and individual agreement option is required.

In summary, the priority matters for change are:

- Removal of the effective "monopoly power conferred to employee organisations (unions) to negotiate Greenfields agreements under the FW Act
- Availability of a range of industrial instruments to meet the needs of the business - both collective and individual and with union and non-union streams
- Enterprise agreement content should prescribe terms of employment only, not operational matters that can limit productivity improvements
- Protected industrial action should only be available as last resort and employers should have greater access to relief where industrial action is taken.

Secondary boycott exemption

The Competition Policy Review has reopened the issue of the environmental and consumer exemption to the *Competition and Consumer Act 2010* secondary boycott prohibition and invited further comment on this issue.[15]

In APPEA's view, an NGO campaign that deliberately sets out to destroy a corporation's reputation, and thereby inhibit its ability to create wealth, or worse, destroy wealth, is an attack on property rights.

Globally, and nationally, the oil and gas industry is increasingly the target of campaigners who malign the industry's performance; seek to stop or slow project development; and/or advocate industry divestment[16]. In Australia, the increase in scope and profile of the oil and gas industry has been accompanied by an increase in activity and sophistication of critics or opponents as well as the migration of international issues and funding across borders into the Australian domestic context.

[15] Competition Policy Review (CPR), *Draft Report*, September 2014, page 51.
[16] For example, the ANU recently announced divestment from resource and other companies on the basis that they allegedly cause 'social harm'.

Rather than political campaigning organisations, many environmental and consumer NGO's ("NGO's") are regarded as not for profit organisations existing for the public benefit or to serve a charitable purpose. As well as the environmental and consumer exemption to the secondary boycott prohibition, this affords them various taxation benefits – income tax exemption, GST concessions, FBT exemption. Many are also afforded DGR (Deductible Gift Recipient) status making donations to the organisation or a fund of the organization, tax deductible. In so far as they receive public privileges, NGO's should be held accountable for their actions.

As the Competition Policy Draft Report notes, the primary concern of industry with regard to the secondary boycott exemption is that environmental groups may damage a supplier in the market through a public campaign targeting the supplier that may be based on false or misleading information. Where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), a question arises whether that activity should be encompassed by the secondary boycott prohibition.[17]

Competition and Consumer Act 2010

> *Section 45d Secondary boycotts for the purpose of causing substantial loss or damage*
> *(1) A person must not, in concert with a second person, engage in conduct [that] would have or be likely to have the effect, of causing substantial loss or damage to … business.*

Sect 45DD Situations in which boycotts permitted

> *(3) A person does not contravene, and is not involved in a contravention … by engaging in conduct if:*
> *(a) The dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection...*

In 1976, the Swanson Committee prepared a report the Government on the operation and effect of the Trade Practices Act. Relevantly, it observed:

> *If an organisation or group of persons for its own reasons deliberatively interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute.*[18]

Unfortunately, there is little legal scrutiny applied to the actions of NGO's who seek to interfere with or damage the property rights of businesses through political campaigning activities – with authorities passing off these activities as juvenile pranks. The NSW Supreme Court decision in *R v Moylan* in 2014, for example, found Jonathon Moylan guilty of offences against Whitehaven Coal under s 1041E(1) *Corporations Act 2001* (NSW).[19]

Moylan distributed a fake statement to the media purportedly from the ANZ bank in 2013, which said the bank was withdrawing $1.2 billion in funding from the Maules Creek mine project, in north-west New South Wales. The false information was published by some media outlets and caused a temporary $314 million drop in Whitehaven Coal's market value before a trading halt was put in place, and the hoax was revealed. Moylan disseminated information he knew was false. He was sentenced to imprisonment for one year and eight months, but was immediately released on a good behaviour bond of $1000.

[17] Competition Policy Review (CPR), *Draft Report*. September 2014, pages 50-51.
[18] Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs*, page 85 paragraph 10.16, quoted in Competition Policy Review, *Draft Report*. September 2014, page 242.
[19] R v Moylan [2014] NSWSC 944.

Moylan had a track record in this regard.[20] He worked with Greenpeace and the Wilderness Society and his activities focused on large companies involved in mining, and on government action that was allowing mining to occur.

In a signed apology read to the court, Mr Moylan said: *'Those who traded on that day have every right to feel deceived as a result of my actions.'* Moylan's barrister, Robert Sutherland SC, argued the media, not Moylan, was to blame for the fall in Whitehaven Coal's share price. Crown prosecutor David Staehli SC told the court he was not seeking a custodial sentence. Mr Staehli said Moylan was not seeking a financial advantage, and that made the case unique.[21] The judge remarked that the *'offender's referees speak highly of his integrity, and his passion and concern for social justice including for refugees and the indigenous community.'*[22]

It seems that the judge, prosecutor and defence counsel were seeking to excuse Moylan's actions. Since when do 'the media' or 'passion and concern' or 'not seeking financial advantage' excuse destroying others' property?

Conclusion

In addition to the unavailability of a cause of action for the secondary boycott, businesses face a difficult hurdle to show that the actions of environmental activist groups satisfy the trade and commerce requirement necessary to establish a breach of section 18 of the CCA by engaging in misleading or deceptive conduct. This combination of factors leads to a lack of recourse for business and allows some environmental activist groups to operate with effective impunity.

APPEA endorses the approach suggested by the Australian Forestry Products Association (AFPA) in its submission to the Competition Policy Review, that is, that the overarching exemption should be removed allowing for case-by-case applications for exemptions to be assessed by the ACCC. As AFPA pointed out, this procedure already works in the context of exclusive dealing and could strike a more appropriate balance between legitimate protest mechanisms, competition aims and protection of property rights.[23]

It would also require greater accountability on NGO's for the effects of their actions – a fair requirement given the public privileges they already enjoy.

[20] Moylan has been charged with a number of protest type offences as follows:
- 2009 convicted of resisting or hindering police, and for entering enclosed lands.
- 2010 convicted for going onto, into or remaining or in running lines.
- 2010 convicted of entering enclosed lands without lawful excuse.
- 2011 convicted of going onto, into, or remaining on or in running lines.
- 2011 convicted of entering enclosed lands without a lawful excuse
- 2011 convicted of entering enclosed lands without a lawful excuse and of hiding tools, clothes or property to unlawfully influence a person.

[21] Claire Aird and Kathryn Magann, ABC News, 'ANZ hoaxer Jonathan Moylan, who sent fake press release about Whitehaven Coal, unlikely to go to jail.' 11 July 2014.
[22] R v Moylan [2014] NSWSC 944.
[23] Australian Forest Products Association, *Submission to CPR*, 10 June 2014.