



**Submission to Productivity Commission**  
Australia's Workplace Relations Framework  
March 2015

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## **A. Introduction**

1. Glencore welcomes the opportunity to provide constructive input to the Commission public inquiry to examine the performance of the workplace relations framework. The following is a list of matters that Glencore has identified as requiring review based on the Issue Papers released by the Productivity Commission in January 2015:

- Safety Nets (IP 2), in particular, the National Employment Standards (NES);
- The Bargaining Framework (IP 3), in particular, enterprise agreement negotiations and protected industrial action;
- Employee Protections (IP 4), in particular, general protections and unfair dismissal laws; and
- Other WR Issues (IP 5), in particular, transfer of business.

This submission has been drafted in an effort to assist the Productivity Commission to identify practical steps that can be taken to effect meaningful long term reform of Australia's workplace relations framework.

We have focussed primarily on issues impacting our coal business, however, many of the key recommendations are equally relevant to our other commodity business units in Australia.

The commentary in this submission results from our "hands on" experience of working within the current framework and the challenges and difficulties experienced in managing our various businesses.

We would welcome the opportunity to discuss our submission and provide whatever further assistance may be required to the Productivity Commission as part of its deliberations.

### **KEY RECOMMENDATIONS**

Glencore considers the following areas of reform to Australia's current workplace relations framework as being necessary in order to improve productivity in Australian business:

- A. Greater recognition of Modern Awards and their industry relevant enabling provisions when interpreting safety net requirements and NES entitlements (particularly in areas of pay and leave arrangements);
- B. Enhanced flexibility in NES that provides for fair and equitable outcomes when applied to continuous 7 day operating workplaces (in particular, an acknowledgment of impacts of additional rostering benefits and their proper application or non-application to issues of minimum entitlement);
- C. Improved onus of responsibility on employees to meet their employment obligations and enabling rather than inhibiting provisions that allow for reasonable management action to be taken where these obligations are not met (particularly in reference to attendance and personal leave management and the ability to productively and safely utilise employee skills on tasks where contribution is most effective);

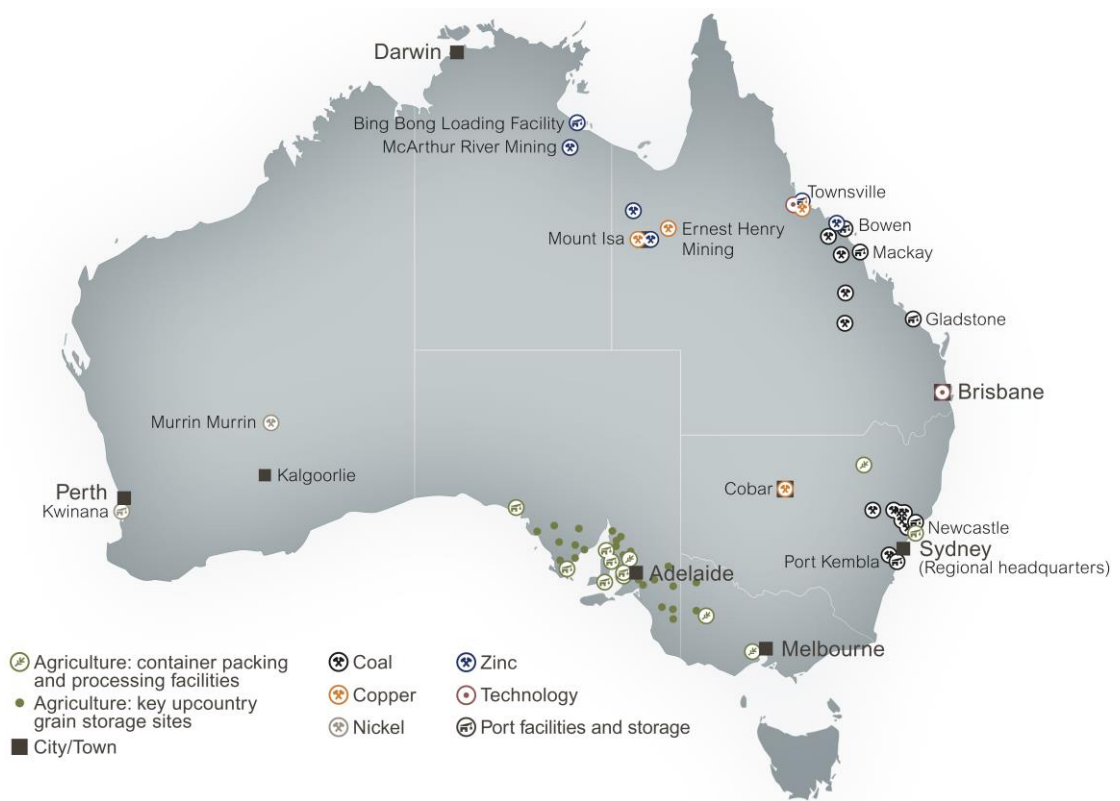
- D. Restoring genuine choice for individual employees to determine in agreement with their employer how their employment relationship will be governed (in particular, the type of legally binding industrial instrument to be applied for establishing the terms and conditions of employment be extended to present a more equitable offering of both collective and individual arrangement options);
- E. Bargaining outcomes that provide an efficient and timely process for determining employee benefits and maintaining relevant protections, but do not by design diminish managerial decision-making and prerogative in efforts to deliver a productive and sustainable workplace environment (in particular, do not impede discretion on the type of labour and how it is lawfully utilised as well as flexible work practices);
- F. Improvement to the provisions that relate to Protected Action being taken by either employee(s) or an employer that enables appropriate safeguards for business continuity and workplace productivity (in particular, issues of notification and commitment to take action; times at which action can or cannot be taken; as well as affording the employer the same right to initiate action rather than being limited to response action);
- G. Further refinement of general protections provisions that remove ambiguity that exists around “workplace rights” and to create an appropriate environment and balance between upholding these rights while not detracting from a productive workplace through repetition in defending vexatious or ill-considered claims (in particular, stronger disincentive to pursue claims that have minimal prospect of being determined in favour of the complainant);
- H. Appropriate limits on the scope and application of transfer of business rules as well as redeployment requirement in the case of genuine redundancies (in particular, sufficient flexibility in the application of these areas of the law to ‘enable’ rather than stifle workplace level productivity. This includes ensuring appropriate local managerial control and reasonable direction on structural matters and merit issues of how work is undertaken, who will undertake the work, and what benefits are available commensurate with the impact of the prevailing economic and business climate).

## **B. Glencore’s business**

2. Glencore is one of the world’s largest diversified natural resource companies with a global network across 50 countries supporting over 150 mining and metallurgical sites, offshore oil production assets, farms and agricultural facilities employing approximately 181,000 people, including contractors.

Glencore has operated in Australia for more than 15 years and is an important part of the Glencore global business. We are a significant Australian employer with around 18,000 people working at operations and facilities that include: grain, coal, copper, nickel and zinc.

**Figure 1. Map of Glencore assets in Australia**



Glencore is one of the leading exporters of Australian grain. In Australia, our agricultural products business comprises marketing and a network of storage and handling assets. Our grain business employs up to 3,000 people in Australia.

We provide our grower and commercial customers with a range of services, including receival, quality assessment, storage, warehousing, grain assembly, freight, port storage, throughput and ship loading services to meet domestic and international end user requirements.

We also farm, manage and own broad acre cropping land in south east Australia.

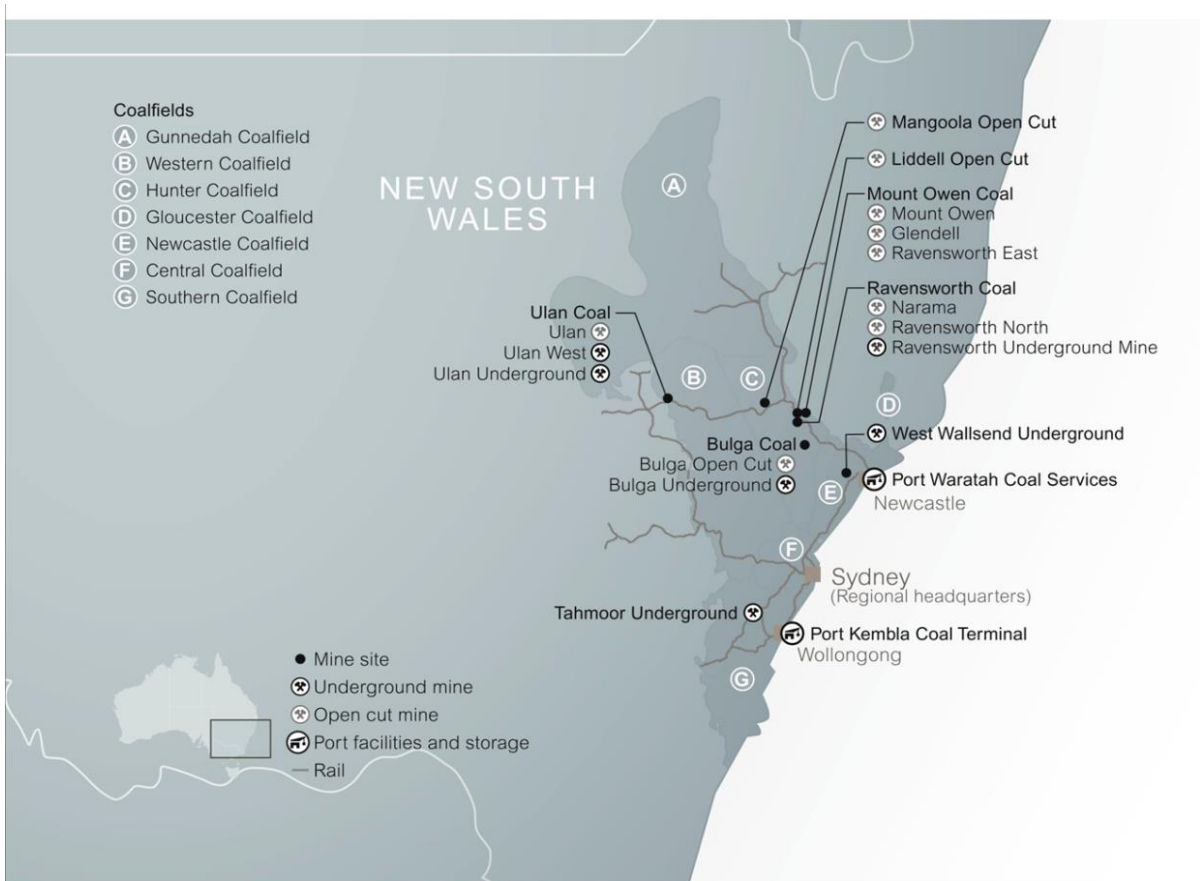
Glencore’s global coal business in Australia has 19 operating underground and open cut mines, and 12 Coal Handling and Preparation Plants (CHPPs) spread across Queensland and New South Wales.

We have 7 operational mines and 4 CHPPs in the Bowen Basin in central Queensland and a further 12 mines in the Southern, Western and Northern districts of NSW and 8 CHPPs. We also operate the Abbot Point Port facility just north of Bowen in Queensland.

Our coal business employs almost 6,000 permanent employees in Australia. Just over 60% of those employees are employed under 22 separate Enterprise Agreements (EA’s) with the remainder employed under common law / individual contracts.

Our Australian coal business exported 92 million tonnes of coal in 2014.

Figure 2. Map of Glencore coal assets in Australia



## C. Safety Net: National Employment Standards

*What, if any, particular features of the NES should be changed? (IP 2, pg 10)*

3. In general terms most of Glencore's Australian businesses operate across seven days of the week and 24 hours of the day. The operation of the NES does not adequately take into account the practicalities of these types of operations and appears to be better aligned around the basic Monday to Friday employee work week. This results in several interpretation issues when NES entitlements are applied to employment of shift workers on seven day rosters.
4. In contrast, the Australian black coal industry has a modern award, the Australian Black Coal Mining Industry Award (**BCMI Award**) which over time has been simplified and modernised with input from industry stakeholders, and in general terms reflects the needs of the industry, including the necessity to operate across seven days of the week on continuous rosters. Unfortunately, the NES and the BCMI Award conflict in several areas.
5. Given the lack of alignment between the NES and our industry (and, at times, the BCMI Award), Glencore considers that there should be greater scope for parties in enterprise-level negotiation to modify the effect of the NES (thus retaining the emphasis on bargaining at the enterprise level) and/or allow the NES entitlements to be read subject to industry-specific provisions of the BCMI Award or a relevant Industry or Enterprise Award.
6. One means of ensuring such anomalies are avoided is to give primacy to the Enterprise Agreement on the fundamental understanding that the better off overall test (BOOT) must be applied against both the relevant Award and the NES.
7. An alternative approach is to rely on the modern parent industry award, where such awards exist, and in those circumstances an Enterprise Agreement could be measured against the relevant industry or Enterprise Award and the NES should not apply.
8. The requirement to read the NES and EA together has the effect of creating uncertainty and enabling employee claims to be made which seek to take away commitments and work practices that have already been negotiated and paid for in the context of enterprise bargaining. The primacy of what is negotiated in an EA, underpinned by the "better off overall" safety net, is consistent with the emphasis on enterprise bargaining in the objects of the FW Act, and a more flexible workplace relations system.<sup>1</sup>
9. The key areas of uncertainty arising under the NES for Glencore operations are outlined below.

### *Annual leave and public holidays in a 24/7 operation*

10. The interaction between the public holiday requirements in the NES, and the taking of annual leave in a 24/7 operation, creates uncertainty, and change is required to ensure a fair outcome.

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<sup>1</sup> Section 55.

11. In a 24/7 operation, if an employee takes leave on a day that he or she would have been rostered, a day's leave ought to be deducted even where that day is a public holiday. This reflects the fact that in this operating environment certain employees commit to, and are paid for, working on public holidays. As such, to be absent on that rostered public holiday, the employee should be required to take annual leave.
12. In some operations, the working of the public holiday is factored into the employees' annualised salaries with the effect that employees are paid triple time for the day, even when taken as annual leave. Glencore is currently involved in legal proceedings commenced against one of our coal operations alleging that the approach of deducting annual leave on this basis (which was agreed to during enterprise-level bargaining) is inconsistent with the NES. It is an issue that has also arisen in the context of enterprise negotiations at another coal operation.

### *Payment of annual leave upon termination*

13. The NES provides that annual leave is paid on termination of employment at the same rates "as if it were taken". There is uncertainty about whether this means "taken" under the NES which provides for payment of annual leave at a base rate of pay. In contrast, annual leave taken during employment in the industry is typically inclusive of loading, shift allowances, weekend penalties, rostered overtime and bonus, whereas on termination of employment it is paid at the base rate of pay.

The BCMI Award reflects the industry standard of payment of annual leave when taken at a significantly higher rate up to 2.5 times Base rate of Pay (including the relevant allowances, penalties, etc. above) than when it is paid on termination of employment (the base rate of pay). The inconsistency between the NES and BCMI Award creates uncertainty and exposes our business to significant additional liability. It is appropriate for the industry standard, as reflected in the BCMI Award to be preferred.

### *Personal/carer's leave*

14. Glencore actively supports employees who are genuinely ill and/or require carer's leave. However it is a source of frustration that the current provisions of the Fair Work Act are easy to negatively exploit and there is very little an employer can do to effectively manage poor attendance.
15. Absenteeism through the non-genuine use of personal/carer's leave is a significant problem in our business and directly impacts on the productive capacity of each of our business units.

This has a negative impact on productivity, as important elements of the production and maintenance cycles are less effective and efficient when a team is short-handed or, in the worst case, casual absenteeism can mean the work must be left for another shift or the opportunity is missed altogether.

16. Relevantly, the BCMI Award provides for the equivalent of three weeks of personal leave on commencement of employment and each subsequent anniversary of the employees commencement. As such, in general terms this entitlement provides an additional one week of personal leave over and above



recognised community standards. It is appropriate that this be accessed in a fair and genuine manner. Where there is a pattern of undocumented sick leave or otherwise unsatisfactory use of this entitlement, employers should have a clear authority to investigate the matter and take disciplinary action (discussed further in below).

17. The provisions of the NES that require an employer to transfer an employee to a safe job should apply the terms and conditions, including as to rate of pay and relevant penalties, loadings, etc. of the job worked, as opposed to the job before the transfer. At the very least, the roster benefits and conditions (if any) should be commensurate with the roster being performed following the transfer.

#### ***Flexible Work Arrangements - General***

18. We note that the Fair Work Act legislation has enabled a number of “family friendly” provisions. Subsequent legislative amendments have developed these further, in particular the ability for an employee (under certain circumstances) to request flexible work arrangements, a provision that previously was limited to return to work following (up to) 12 or 24 months of parental leave.
19. From 1 July 2013, the ability for employees to request flexible work arrangements has extended to include flexible work arrangement following parental leave up until children reach school age; access by employees who are 55 years of age or older; employees experiencing domestic violence; employees with disabilities.
20. Most reasonable organisations are generally willing to deal case by case where practical in response to particular circumstances affecting an individual.

While the intent of these additional provisions is not problematic the availability of multiple triggers for an employee to make this type of request of an employer for consideration and response has the potential to tie up business in the burden of responding to an ever increasing list of applications.

21. Operational issues that relate to collective rostering, on-site transport, continuity of tasks not readily able to be shared with others; importance of constant point of contact on particular issues; all feed into an objective assessment of reasonable business grounds that will more often than not, be detrimental to business should it feel obligated to implement a flexible work pattern that is different to its preferred arrangement. This preferred arrangement is the substantive position the employee has in most cases formally agreed and accepted in good faith as being their employment terms including expected work pattern.

Glencore is concerned with the emerging trend of increasing onus on an employer to accommodate an individual’s personal affairs by tailoring employment arrangements around the way work is performed.

#### **D. The Bargaining Framework**

##### ***Permitted matters***

*The Commission seeks views from stakeholders about what aspects of the employee/union-employer relationship should be permitted matters under enterprise agreements, and how it would be practically possible to address in legislation any deficiencies from either the employer, employee or union perspective.*

22. In the course of our business dealings we have acquired businesses that have enterprise agreements (EAs) in place that contain significant restrictions which limit management capacity to effectively manage the new business without protracted and costly industrial disputation.
23. The issue of permitted content in EAs needs to be addressed. In particular, it is not appropriate for employees to be able to bargain for (and potentially take protected industrial action in relation to) claims that inhibit managerial decision-making about contractors and labour hire (including requiring employees receive the same pay as Company employees), union rights in the workplace (including attendance at induction or in disciplinary matters) and similar matters. The effect of these claims is to impede managerial prerogative and productivity, and is not necessary to protect employees.<sup>2</sup>
24. Where during the bargaining process an employer can clearly demonstrate or identify restrictions, such as restrictions on the allocation of labour, demarcation or other barriers to improving productivity, there needs to be a mechanism to prevent such matters from dragging negotiations out, or leading to protected industrial action or otherwise negatively impacting on the bargaining outcome.

If matters such as those identified above were not permitted matters, growing business and improving productivity via acquisition would become more seamless and less problematic.

25. The required content of an EA now includes an obligation to consult on changes to regular rosters or ordinary hours of work.<sup>3</sup> This requires consideration of individual impact (eg. family or caring responsibilities) and is not an appropriate extension of consultation terms. This recent regulation adds a completely unnecessary burden on our business.
26. The black coal industry operates continuously across seven days of the week and fifty two weeks of the year where fluctuations in the Australian dollar and international supply factors have enormous bearing on production demands. The obvious need to either ramp up or scale down coal production in such a market, with appropriate notice, has been recognised and accommodated in the BCMI Award since 1988.

While Glencore's preference is to consult on a collective basis, under regulations we are required to formally consult with employees and their union(s). This is unnecessary and creates the potential for organisations to either delay such change or use this process as leverage for other concessions that could directly affect operational effectiveness and productivity.

27. There is no need for enterprise agreements to be required to include this content. Formal consultation on rosters and hours, if required at all in industries historically operating on a continuous basis and with established industry awards dealing with the issue, should be confined to the affected employees as a group.

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<sup>2</sup> Section 172(1) can be amended to remove references to matters relating to unions covered by the agreement. Regulations should also be made to remove uncertainty.

<sup>3</sup> Section 205

### **Requirement to consider productivity improvements**

*The Commission seeks feedback on practical options in this area, and why they are needed within the current bargaining process. In particular, why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of the enterprise? (IP 3, pg 6)*

28. There are inadequate incentives for employee bargaining representatives to engage with the employer about labour productivity and cost effectiveness, despite the delivery of productivity benefits being at the core of enterprise bargaining.
29. There is no requirement in the FW Act for the parties to turn their mind to cost effective labour productivity when bargaining for an EA. Rather, in many cases, EAs tend to be entered into simply to avoid industrial action or the threat of industrial action.
30. The EA approval process should require consideration of whether productivity matters have been discussed as part of the bargaining process, and whether the EA will improve productivity at the workplace. This is consistent with the recommendations following the review of the FW Act contained in towards more productive and equitable workplaces: An evaluation of the Fair Work Regulation (FW Review).<sup>4</sup> This also reflects that the one object of the bargaining framework is to achieve enterprise agreements that deliver productivity benefits.<sup>5</sup>

### **Individual flexibility and common law contracts**

*How should a WR system address the desire by some employers and employees for flexibility in the workplace?*

*What protections need to be in place for employees and employers in creating bespoke agreements?*

*Why are employers apparently reluctant to use IFAs (in both enterprise agreements and individual arrangements that seek to override an award)?*

*Should there be restrictions on the matters that parties can trade off in forming individually-tailored agreements, and if so, why? (IP 3, pg 9)*

31. Based on our experience individual flexibility arrangements (IFAs) are currently of limited use and rarely provide meaningful flexibility for either party. They do not achieve their legislative purpose of delivering flexibility for employers and employees. The changes proposed by the Fair Work Amendment Bill 2014 (FW Amendment Bill) while an improvement, do not sufficiently address the current deficiencies. Accordingly, consideration should be given to making IFAs more workable, or otherwise enabling individual contracts (or AWA equivalents) to apply to vary or exclude EAs, and modern awards.

<sup>4</sup> Amend section 187 to include productivity improvements as one of the matters FWC must be satisfied of at the approval stage.

<sup>5</sup> Section 171

32. Glencore supports extending the IFA regime to enable the relevant instrument to cover a broader range of matters (including NES entitlements) and to make them subject to longer termination periods. This latter point is consistent with the recommendations following the FW Review. The proposed amendments in the FW Amendment Bill do not address the need for IFAs to extend to any matters that are in the relevant enterprise agreement.<sup>6</sup>

*The Commission is also interested in understanding:*

- *The extent to which the common law provides a legal ‘safety net’ for employees and employers if there are flaws or omissions in statutory employment law;*
- *Whether there should be greater (or lesser) reliance on individual arrangements, and why should this be so (IP 3, pg 16)*

33. An addition to the option outlined in paragraph [32] above is to provide for statutory individual employment agreement for high income earners. This provides employees and employers with genuine choice, while maintaining objectively generous employment standards. These statutory agreements could for example be subject to an ongoing “better off overall test”, possibly against an otherwise applicable EA. The FW Act presently acknowledges the appropriateness of a specific arrangement for high income earners by allowing for them to agree the underlying award not apply. However, this does not offer the flexibility needed as compared to an EA, nor protection from protected industrial action.

34. The most effective means of providing choice and flexibility to employers and employees is by introducing legally binding statutory individual agreements. The only insurance against protected industrial action under the current legislation is via an enterprise agreement.

In many cases this means negotiating terms and conditions with unions. Unions are using the bargaining power the legislation provides them and they take advantage of an employer’s inability to effectively bargain directly with individual employees. Glencore has been involved in protracted industrial disputes at operations where there was no genuine membership base or presence in the workplace

### ***Deficiencies in good faith bargaining***

*To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified? What would be the effects of any changes? (IP 3, pg 7)*

35. The good faith bargaining framework (GFB) should be reviewed in light of a number of commonly raised deficiencies and the view that it adds an unnecessary layer of complexity to bargaining. In particular, the framework promotes “form over substance” and bargaining participants are constrained from productive negotiations. Glencore supports a number of changes to these arrangements.

36. The uncapped numbers of employee bargaining representatives can be problematic and impractical. In some instances, this has resulted in large

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<sup>6</sup> Section 203.

numbers of employee representatives at the bargaining table, individuals representing themselves, and individuals pursuing single issues or grievances with management. This impedes effective bargaining.

An employer should have some discretion to limit attendance to ensure a practical number of employee representatives participate in the bargaining process. We have experienced situations where the union bargaining representative insists on matching the number of union representatives participating in the bargaining with individual (non-union) employee bargaining representatives.

37. Similarly, the default status of the union as a bargaining representative puts the union at the negotiating table and facilitates the exertion of a more dominant and often disproportionate role to bargaining. It discourages individual employee engagement by requiring the member to take active steps to remove the union as default representative insofar as that individual is concerned. The onus should be reversed so that the process of bargaining is premised on a 3<sup>rd</sup> party (such as a union or employer association) 'not' being a direct bargaining participant unless their involvement is actively sought by either a majority of the employees that are to be covered by the Agreement, or the relevant employer of those employees.
38. In workplaces with strong union representation, it also puts unreasonable pressure on any non-union bargaining representatives who want to either represent themselves or other employees. GFB requirements mean that such employees must consider and respond to union claims as well as bargaining directly with their employer.

In practice, we have seen that this process allows experienced union officials to put individual non-union representatives under pressure and to critically scrutinise any proposals or response from these representatives. An individual non-union bargaining representative should not be required to 'bargain' with unions but rather their only obligation should be to bargain and respond directly with their employer.

39. The requirement for bargaining meetings at "reasonable times" can potentially be exploited by unions, or is otherwise unclear, where there is no point in meeting. It detracts from productive operational matters. Where an impasse in negotiations has been reached, the ongoing requirement to meet should be only applied where the parties offer a genuine change in position.
40. The majority support determination process can be exploited by unions using seemingly transparent approval processes to exert influence on employees to vote in favour.

At one Glencore operation, employees complained to management that they felt pressured into signing a petition in support of negotiating an enterprise agreement. This occurred in a situation where the company had conducted a secret ballot of employees that confirmed opposition to negotiating an enterprise agreement, but within a month of the secret ballot the union had organised a signed petition that provided the opposite result to the secret ballot. The Fair Work Commission (FWC) held that the petition was more recent and enforced the majority support determination.

Demonstrating majority support should be required via secret ballot and not through the union preferred process of a signed petition. There is limited capacity for an employer to verify the information put forward in support of applications, and too much scope to pressure employees. There is also no capacity to determine whether support for negotiating an enterprise agreement changes over time ie. once a MSD is made, there is no capacity to withdraw from the negotiations even where employee support for them has lapsed.

### ***Termination of enterprise agreements***

41. A major impediment to productivity is the 'evergreen' nature of enterprise agreements. The FWC must currently be satisfied that it is appropriate and not contrary to the public interest for an expired EA to terminate. The public interest test has little work to do, but FWC gives it prominence and in practice will not terminate an enterprise agreement where bargaining for a replacement agreement is underway (as is inevitable).

In the current economic climate and within our own business there are numerous examples of bargaining being dragged out well beyond the nominal expiry date as the existing enterprise agreement is entrenched and so there is no risk to employees associated with prolonged negotiations. This thwarts changes to the agreement that will improve productivity and flexibility, and pressures employers to accept a less effective agreement in favour of resolving the bargaining dispute and putting an end to seemingly endless and fruitless negotiations and the continued exposure to protected industrial action.

42. Consideration should be given to whether it would be more reasonable for there to be a presumption in favour of termination of EAs after it has passed its nominal expiry date, eg. where it can be demonstrated that the agreement is having an adverse effect on the flexibility/competitiveness of the employer or, where reasonable efforts to reach a new agreement have failed (impasse reached).
43. The most efficient and effective approach would be to reintroduce an equivalent to s170MHA from the former Act, where such an inclusion in an enterprise agreement removed any discretion from the FWC if either party made application to terminate an EA.<sup>7</sup>

### ***Protected Industrial Action***

*Given the low current level of disputes, it is an open question whether there is any requirement for changes in the FWA's arrangements for industrial disputes, but the Commission is interested in:*

- *any appropriate changes to what constitutes protected industrial action under the FWA*
- *arrangements that might practically avoid industrial disputes*
- *the scope and desirability of creating more graduated options for industrial action beyond lock-outs for employers. Would options like this assist negotiation or increase disputation?*
- ...
- *the prevalence of 'aborted strikes' (the capacity to withdraw notice of industrial action) as a negotiating tool, and the degree to which there is any practical response to this apart from the good faith bargaining requirements of the FWA (IP 3, pg 13-14)*

<sup>7</sup> Section 226.

44. Glencore supports changes to the protected action regime to limit access to industrial action. Restrictions should be placed on employees' ability to take protected industrial action before genuine and meaningful discussions have occurred and also to take protected industrial action in support of unreasonable and unrealistic claims (as opposed to "strike first, talk later"). At the moment, the requirement that protected industrial action is only available when a party is "genuinely trying to reach an agreement" is interpreted in an "aspirational" way ie. wanting an agreement, as opposed to seriously trying to reach an agreement.

Consideration should be given to "raising the bar" for when protected action may be authorised. For example, where the FWC is satisfied that negotiations have broken down or reached an impasse.

45. The legislative prohibition on strike pay is potentially undermined by third party funding during employee protected action (eg. union "fighting funds"). Preventing third-party financing of employee protected action is a practical measure that will discourage unjustified protected action.
46. While employers are prohibited from making payments to employees during certain periods of industrial action, the same restriction does not apply to other entities such as unions and associations. Some unions now have the financial capacity to fund lengthy industrial disputes. As a consequence, the legislative intent that protected action should also cost employees is thwarted.

Glencore considers that the prohibition on payment should be broadened to prevent employees receiving payments (or the benefit of any payments) from any source in relation to periods of industrial action, such as union "fighting funds".<sup>8</sup>

47. The current industrial action provisions place employers on the defensive in respect of any protected industrial action, and the balance in this respect needs to be restored. Aborted strikes are a significant concern. Common difficulties faced by employers in our industry include that:
- a. Employee claim action can be withdrawn by employees at the 11th hour in order to require the employer to go to the time and expense of implementing contingency arrangements to mitigate the effects of the protected action but avoid the actual loss of pay that comes from taking the action. This is a common tactic that defeats the purpose of notification, and leads to employers incurring considerable costs, compared to no cost to employees.

For example at one of our CHPP facilities, there is a half hour handover between the incoming crew and outgoing crew. There are legal proceedings on foot associated with claims for payment by an incoming crew who turned up to work, and alleged they were not taking industrial action, despite being covered by a notice of protected action that was relied upon by the outgoing crew that was on strike and unable to effect the handover.

- b. The practice also encourages employer response action (lockout), after some industrial action has been taken, as it avoids the uncertainty and inconvenience of managing this tactic. Glencore supports changes to

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<sup>8</sup> Sections 470, 474 and 475.

require that industrial action that is notified must either be taken as notified – including the number of stoppages notified – or the total notice be withdrawn, in which case there should be a period (eg. 30 days) before action can be taken again, unless the employer agrees in writing to the withdrawal.

- c. Employers can only take protected action after employees first take action, so there is limited scope for employers to impose bargaining pressure on employees at critical points during the negotiations, such as impasse. This imbalance needs addressing. Employers should have the same rights to initiate protected action as employees.<sup>9</sup>
- d. The precise time that each aspect of the industrial action commences should be a requirement of the notice.<sup>10</sup> The requirement to notify only the day on which industrial action will start (section 414(6)) is inadequate in a 24/7 operating environment and in an industry where the procedures to stop and start certain work is highly complex.

For example, Glencore has experienced industrial action in our coal preparation and handling facilities where it takes up to 1 hour to safely cease processing. Other difficulties arise where the notice does not indicate which shift will be affected (having regard to our 24 hour operations) and the need to interface with rail transport which has a 3 day forward plan.

48. Glencore considers it would be appropriate to place a time limit on the authorisation of protected industrial action (ie. have a maximum period of 6 months for protected action to take place after which time the ballot authorising action expires and a new vote is required). This is in recognition of the fact that employee profiles may change, and employees' views about protected action may change. This can also enable a change to the present requirement that employees must "use or lose" protected action that has been authorised within 30 days (or 60 days with an extension) for fear of otherwise "losing" their ability to take it; this is regardless of whether or not bargaining has progressed and there is an immediate need to take the action. Potentially this encourages the taking of action, just to retain the right to take future action.<sup>11</sup>

49. Recent bargaining disputes illustrate that the current statutory tests for suspension or termination of protected industrial action are too stringent. In particular, the Qantas dispute in 2011-12 showed that the damage occasioned to an employer's business must be extreme before industrial action could be ended by the FWC. There would be benefit in broadening the circumstances in which the FWC can suspend or terminate protected action to include less "exceptional" circumstances, such as the absence of good faith bargaining by a union. In particular, there is a case for easier access to a "cooling off" period imposed by the FWC in which the parties can focus on bargaining rather than inflicting industrial disruption by way of stoppages and lockouts.<sup>12</sup>

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<sup>9</sup> Section 411.

<sup>10</sup> Section 414(6) simply adding "the time" to the notification requirements.

<sup>11</sup> Section 459(1)(d).

<sup>12</sup> Sections 423 – 425.



## E. Employee Protections

### General protections

*Do the general protections within the Fair Work Act 2009, and particularly the 'adverse action' provisions, afford adequate protections while also providing certainty and clarity to all parties?*

*What economic impacts do these protections have?*

*To what extent has the removal of the 'sole or dominant' test that existed in previous legislation shifted the balance between employee protections and employer rights? (IP 4, pg 6)*

50. The general protections provisions should be amended to provide less scope to review management decisions. In practice, management decisions about employee performance and conduct issues are being subjected to review from third parties (FWC and/or Court) without constraint of costs or merit. The claims are easy to make and time consuming to defend. Specifically, consideration should be given to limiting the reach of these provisions by:

- a. Narrowing the definition of "workplace right" so that it does not extend to allowing employees to review management decisions on the basis that the employee has made a complaint in relation to employment.

This "right" is abused by some employees, often in the context of performance management, to slow down reasonable management action. There is no disincentive for the employee to make a complaint, and may do so about matters not even related to his or her employment. The previous victimisation provisions would be sufficient protection for the employee.<sup>13</sup>

- b. Returning to the "sole or dominant reason" test when assessing the reason for the action, at least where the reason for the action is said to relate to the benefits of an industrial instrument or complaints made about a person's employment. This avoids artificial distinctions when a decision is made for commercial reasons (eg. costs), and a factor of the cost is the industrial instrument applying to the employees.<sup>14</sup>

- c. Improve access to costs. At the moment, claims are too readily commenced so as to avail a perceived "cloak of immunity" without regard to merit.<sup>15</sup>

51. As previously discussed above, absenteeism and the misuse of personal/carer's leave is a significant concern in our industry and throughout our operations. This is an area where the broad and uncertain scope of the general protections limits effective management. It also limits appropriate rewards for employee attendance with union claims that bonuses that are linked to attendance are contrary to these general protection laws (on the basis that if an employee takes paid personal leave they do not receive as much reward for contribution as an employee who attends work and contributes to the productivity of the operation).

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<sup>13</sup> Section 341.

<sup>14</sup> Section 360.

<sup>15</sup> Section 570(2) applies to costs in general protections matters before Courts (federal Court and Federal Circuit Court). Costs are limited to where the claim has been commenced vexatiously or without reasonable cause.

Glencore supports amendments to the general protections to support an employer's ability to take disciplinary action for non-compliance with notification and eligibility requirements for accessing leave. Industrial instruments should also be able to include reasonable attendance requirements, non-compliance with which can lead to disciplinary action, up to and including termination of employment, and include bonus schemes that reward attendance without qualification.

### ***Unfair Dismissal***

*What are the effects of unfair dismissal arrangements on firm costs, productivity, recruitment processes, employment, and employment structures? (IP 4, pg 3)*

52. It is necessary to increase employer protection from unmeritorious unfair dismissal applications by tightening the circumstances in which they can be commenced and increasing disincentives (such as costs implications, as recommended by the FW Review) when proceedings are unreasonably commenced or continued.<sup>16</sup>
53. Redeployment obligations in circumstances of "genuine redundancy" are particularly onerous given commercial pressures across the industry. Our company has been involved in at least five separate challenges to the redundancy / redeployment process. However, the time and cost spent in defending our position under an industrial process that applies a 'reverse onus' on the employer has been significant. Redeployment obligations require reconsideration in light of the fact that the obligation:
- a. is inclusive of all associated entities;
  - b. requires active preference given by the employer to those at risk of redundancy, yet does not require employees to actively seek out work;
  - c. enables employees to refuse redeployment opportunities after complex/lengthy identification processes and in parallel continue with unfair dismissal claims;
  - d. has the potential to affect managerial prerogative in organising labour (including in respect of the use of contractors and overtime); and
  - e. cuts across the very important principle of an employer's right to employ the best person for the job.

This is a critical issue in ensuring a workplace has the best chance of improving productivity. The fact that an employee is currently employed in one part of a company should not mean they have preference of employment over a better applicant in a completely separate part of an organisation.

The right to employ the best person for the job based on merit should be a fundamental principle of any long term reform. The application of this section of the Act amounts to a preference of employment provision which has been removed from the BCMI Award in 1998; and

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<sup>16</sup> Section 400A and 401; Section 611.

- f. duplicates the existing incentive for employers to identify “suitable alternative employment” for employees as a means of avoiding redundancy pay and does not necessarily remove the obligation to pay redundancy pay in any event.<sup>17</sup>

54. Ultimately, the judicial direction for determining the merits of an unfair dismissal complaint should be focused on the process that has been undertaken to determine how the redundancy has been applied and whether or not it was harsh or unreasonable in approach; rather than a far more broad ranging encroachment on how an employer can structure their operations to meet business objectives.

There is an emerging trend in unfair dismissal cases to challenge an employer’s right to manage its business in attempts to create vacant roles where there are none; using arguments designed to direct the employer as to how work is allocated and to dictate the arrangements under which work is to be performed. If successful, this will restrict business competitiveness and impinge on the ability to maximise productivity and create sustainable operating environment for the employer, the workforce and shareholders.

## **F. Other Workplace Relations Issues**

### ***Right of Entry***

*Do the existing rights of entry laws sufficiently balance the interests of employees and employers, and if not, what are the appropriate reforms? (IP 5, pg 15)*

- 55. The current regime has no effective mechanism for dealing with excessive or disingenuous exercise of rights by union officials. The FWC should be empowered to properly consider and manage such conduct and take action at the level of the union as a whole (rather than only in respect of an individual union official).
- 56. The current right for a union official to enter a site based on an entitlement to represent the worker under the union’s rules is complex and requires knowledge of union coverage which is unrealistic for our people “on the ground” administering right of entry requests.<sup>18</sup> We support an approach where union officials must be able to demonstrate active union membership onsite prior to being granted entry to a site.
- 57. The inclusion of a requirement on an employer to enter into a transport arrangement to transport a union representative to a room or area which is used for meal breaks is impracticable for an underground coal mine where the crib breaks are taken underground at a number of different locations.

This is an unreasonable imposition on the employer that requires the allocation of resources to facilitate an exercise of this nature. We support an approach where the employer organisation retains the right to provide an appropriate meeting room where employees can engage with union organisers.

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<sup>17</sup> Section 389(2).

<sup>18</sup> Section 481(1).

## ***Transfer of Business***

58. The current transfer of business provisions are unduly limiting on employers' ability to staff their businesses as they see fit. They affect flexibility and productivity, and can restrict opportunities for employees. Specifically, they:
- a. impact on employers' ability to otherwise arrange its business in the most efficient and productive way (by way of imposing terms and conditions of employment in circumstances of insourcing, outsourcing and ownership changes); and
  - b. require an instrument to follow an employee automatically upon the relevant criteria being reached, regardless of whether the transferring instrument is consistent with the new employer's arrangements where another more favourable instrument is available, and regardless of the wishes of the employee. The capacity to apply to FWC for an order incurs unnecessary costs and is a misallocation of resources.
59. The proposed change in the FW Amendment Bill does not address the underlying inflexibilities and unintended consequences arising from the present provisions, although they are an improvement. The transfer of business laws should be revised so they are clearly not triggered by actions taken at the initiative of the employee or via employment status changes agreed to by the employee (as recommended by the FW Review). The application of the "associated entity" connection should only apply where there is evidence of an intent to avoid the application of an industrial instrument (which is covered by the general protections provisions in any event).<sup>19</sup>
60. The default position should be that unless an individual employee and employer agree otherwise, the instrument does not transfer – subject to a contrary order of the FWC which may be sought by employees, relevant unions or the employer before, or upon, a transfer.
61. We believe a new employer's instrument should take precedence over any transferring instrument in certain circumstances without application to the FWC (for example, where it is "better off overall").<sup>20</sup>

## ***Anti-Bullying Legislation***

Glencore encourages the Productivity Commission to examine this legislation from a productivity perspective. To date Fair Work Commission appears to favour an approach of separating employees rather than addressing core behaviour, this has the potential to significantly disrupt or negatively impact operational productivity.

Further, this legislation currently focuses on employer and employees; we would support extending the legislation to also recognise and include the role and behaviour of unions and associations.

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<sup>19</sup> Section 311.

<sup>20</sup> Section 313 and consequential amendments to section 318.