October 2022

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Australian Chamber of Commerce and Industry

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Australian Chamber of Commerce and Industry

1 Introduction

The Australian Chamber of Commerce and Industry (ACCI) welcome the opportunity to respond to the draft report on *Lifting productivity at Australia's container ports: between water, wharf and warehouse* (the draft report).

ACCI is Australia's largest and most representative business body, representing a diverse network of businesses, industry associations, and state and territory chambers of commerce, proving a broad and unique perspective. While we are not presenting to the Commission directly as experts in the maritime sector, ACCI represents the perspective of users of the maritime logistics system and based on the fundamental importance of moving goods in and out of the country for entire economy and society.

The Australian economy is strongly anchored in trade, so we need to ensure products are imported and exported through our port systems efficiently, effectively, and competitively. Yet, as the draft report clearly indicates, Australia's maritime logistics sector is plainly inefficient, and the statistics are concerning.

Lack of competition in parts of the maritime logistics system means consumers pay too much. As the report estimates, inefficiencies in our port system (when compared to global turnaround time averages) have a direct cost of $605 million a year, not to mention indirect costs for Australian businesses and consumers. Higher productivity at container ports is achievable and would deliver significant benefits.

If, as the draft report projects, by 2050 containerised freight task is set to more than triple at the Port of Brisbane, nearly triple at Port of Melbourne, and increase 2½-fold at Port Botany, then it is essential that barriers are removed to enable Australian ports to become more efficient, and substantial investment is made to increase capacity and lift productivity. This includes greater investment in automation of cranes and container handling, as well as in rail and land-based systems to quickly and efficiently transport containers from the ports. A wide range of policies need to better encourage and reward investment in productive technologies in our ports.

In addition to the substantial capital investment required, this will require significant changes to our industrial relations and enterprise bargaining systems, as our port workers will need to work differently and adapt to the changes in the workplace that increased automation will bring. Currently our workplace laws and enterprise bargaining agreements are holding our ports back from gaining the full benefit of investment in automation. Closely linked to bargaining, day to day workplace cultures on our ports are often amongst some of the poorest and most contested in the country, letting down port employees, port businesses and our wider community.

Nothing compels the world's shipping lines to service Australia. It is incumbent on us to make an efficient environment for them to operate in. It is in the national interest to urgently pursue meaningful action in the maritime logistics sector, initiating a long-term reform agenda that will improve the productivity performance of the maritime logistics sector.

The following addresses many of the draft findings, information requests and recommendations. We will be pleased to meet with the Commission to elaborate and explore specific positive reforms for further progression into your final report.

2 The performance of Australia's container ports

The draft report identifies that data related to port performance is fragmented, incomplete and inadequate, which is limiting analysis of port performance. Key data on labour inputs are not available and other data gaps mean that analysis of labour productivity and productivity at other points in the container's journey cannot be measured.

It is however abundantly clear from the draft report that Australian ports are not operating efficiently, with significant scope to increase throughput, use capital inputs more efficiently and make strategic investments in new assets to improve their productivity.

There is a pressing need for better publicly available data to assess the performance of Australia's ports and to benchmark labour and container handling. For some time, ACCI has been arguing for ports operators and regulators to improve the quality of data on port performance and to publish benchmarking outcomes. Australia needs a continuous national conversation on how well our ports are performing for our community, economy, consumers, producers, and this needs to rest a foundation of regular high profile data releases which are debated, as we debate growth, employment, inflation etc.

While the Australian Competition and Consumer Commission (ACCC) has a role in monitoring Australian container stevedores and is required to report annually to Government, its remit is currently limited to prices, costs and profits.

The ACCC's powers should be expanded, and the detail in the data it collects from stevedores broadened, to enable a more comprehensive, continuous assessment of the performance of the sector. This should include essential information such as labour inputs, capital inputs, crane movement and other time-based metrics, to enable key measures such as labour productivity to be measured and analysed, so that a full picture of productivity of Australia's ports are presented and to enable benchmarking of performance to be undertaken. The ACCC performs a similar role in monitoring the performance of other sectors, such as airports. Similarly, in the electricity and gas sectors, the ACCC works closely with the regulator, the Australian Energy Regulator, in monitoring the performance of the gas and electricity. Therefore, the ACCC is well placed to expand its role in monitor port performance.

In addition, once this data is collected, measured and analysed by the ACCC, it should be used to benchmark Australian ports against best practice ports in other countries. This is essential to drive continued improvement in our port systems. While recognising there are challenges in directly comparing ports due to scale, import/export ratios, and regulatory environments, Australian ports should learn from and aspire to best practice systems in more advanced and innovative ports, such as Shanghai, Singapore, Rotterdam, Hamburg, and Antwerp.

This needs to begin with the development of a series of consistent, reliable and contextually relevant data points and key measures of port performance, which should be reported annually. This should extend not just to port throughput and productivity, but also assess performance of the end-to-end supply chain. These measures are critical to support investment decisions and identify realistic opportunities to improve port performance and supply chain efficiencies. These metrics should be aligned with international standards to allow a direct comparison with the best performing international ports.

There are few downsides to increasing information availability. The benefits of collecting and processing richer data required to implement a comprehensive management framework would greatly outweigh the costs. The sector itself, government, unions, investors and analysts need high quality performance metrics and benchmarking information, both to allow the Australian industry and specific operators to know how they're performing against domestic norms, and to know how we compare internationally.

3 Market power of container ports

The draft report highlights that Australia container ports are currently regional monopolies, but it is far from clear that it is economically efficient to have a single container port in some Australian cities, particularly Melbourne and Sydney.

ACCI has argued for increased competition in the maritime port system to provide more choice in the sector and achieve efficiency gains. Yet there are entrenched anti-competitive structures in place at our ports that need to be addressed if our ports are to become truly competitive and world class.

Privatisation of port leases in NSW is a case in point. This was handled poorly, entrenching the local monopolies of the existing ports and protecting them from competition. The Port Commitment Deeds included in the long-term lease agreements with NSW Ports, the operators of Port Botany and Port Kembla, requires the NSW Government to compensate the operators if the Port of Newcastle container traffic exceeds a specified cap, at a rate equivalent to the wharfage fee the port operators would receive if they handled the containers. Port of Newcastle is then required to reimburse the NSW Government for any compensation paid to NSW Ports. This has effectively halted Port of Newcastle’s plans to develop a multi-purpose deepwater container terminal and greatly limited recent investment to increase its container handling capacity.

The proposed Port of Newcastle Multi-purpose Deepwater Terminal would make it a viable alternative to Port Botany, Port Kembla and the Port of Brisbane for exporters and take advantage of Port of Newcastle’s existing heavy vehicle road and rail network.

Independent analysis by HousetonKemp estimated the proposed Port of Newcastle Multi-purpose Deepwater Terminal has the potential to contribute $2.5 billion to the national economy and generate more than 19,000 direct and indirect jobs, while reducing road and rail congestion around Port Botany and substantially reducing freight costs for regional importers and exporters. Yet these

opportunities are being passed up, with importers and exporters and their customers left paying higher prices for the transport of their goods.

The incentive for players in the industry to invest in productivity gains and improve their competitive position in the market is clearly missing. Australia's maritime logistics system does not provide for a competitive environment.

Stronger incentives are needed in the maritime shipping sector to make Australia's port system a more competitive ecosystem, driving industry players to be more efficient. With greater competition comes greater incentive to invest to improve productivity.

4 Competition issues

The draft report recommends repealing Part X of the *Competition and Consumer Act*. This gives international shipping companies partial and conditional exemptions from cartel conduct, contracts that restrict dealings or affect competition and exclusive dealings. Consistent with other industries, in respect of price cooperation arrangements between shipping lines, the draft report favours requiring shipping lines to demonstrate public benefits outweigh the costs of reduced competition.

ACCI agrees there is no justification for exempting shipping lines form cartel conduct provided by Part X of the *Competition and Consumer Act 2010* (CCA). There are a number of shipping lines servicing Australia and maintaining competition between these shipping lines is important to ensure that the market operates effectively, and that prices paid by importers and exporters are kept as low as possible.

In recent years, there has been a contraction in the international maritime freight sector, with shipping lines forming alliances to achieve economies of scale and wider service coverage. These alliances give the carriers considerable bargaining power over ports and terminals. They have the potential to function as vehicles for collusion between carriers, as they provide carriers with in-depth insights on the cost structures of their competitors.

These risks underscore the need to repeal Part X of the CCA, to limit the potential for collusion and anticompetitive behaviours by the alliances. As noted in the draft report, existing provision under Part VII of the CCA are sufficient to deal with shipping line agreements, provided they are able to meet the net public benefits test. Putting shipping lines onto the same footing as other industries will ensure that any anticompetitive avenues are removed and cooperation between shipping lines can only occur when the costs of reduced competition are outweighed by other public benefits.

Over the last decade, the EU has removed exemptions from competition policy long enjoyed by international shipping companies. Australia should do the same by repealing Part X of the CCA.

ACCI agrees with the draft report recommendation that terminal access charges should be regulated and only charged to shipping lines. [Recommendation 6.2]

Australian ports have been privatised in recent decades, but they remain local monopolies and not subject to the same competitive pressures as other sectors in a competitive market. ACCI

acknowledge the National Transport Commission recently worked with the ports to develop National Voluntary Guidelines, which were released in March 2022. However, it is yet to be seen whether these guidelines have been effective in lowering terminal access charges.

While voluntary guidelines can deliver some improvements, better enforceable regulation is needed to ensure Australian ports are operating efficiently, and terminal access charges are representative of the cost of the service.

The situation is similar to that of many other state-owned assets that have been privatised in recent decades, such as the electricity and gas sectors. These sectors are highly regulated, with the operator's revenue, and/or the unit price paid by the customer, determined by the regulator, limited to the operating costs, costs of servicing capital and a reasonable profit margin. The ACCC should be directed to more closely monitor terminal access charges to ensure these fees are set at a reasonable rate and are only charged to the shipping lines, not the transport operators.

ACCI agrees with the draft report recommendation that shipping contracts should not be exempt from unfair contract terms provisions in Australian law. ACCI has strongly advocated for the enforcement of unfair contract terms in competition law for all other business sectors. The protections are necessary to safeguard the legitimate interests of parties that would be disadvantaged by unfair terms. This is particularly important for small businesses and contractors that are commonly offered standard form contracts on a take-it or leave-it basis, with little power or opportunity to negotiate changes to contracts. There is no reason why shipping companies should be exempt from these provisions.

5 Infrastructure needs

The draft report finds substantial investment in port and rail infrastructure is needed to increase the productivity of ports and reduce congestion and recommends this investment should be made by port operators without the need for taxpayer funding. Any taxpayer funding for rail infrastructure beyond the port precinct should be subject to a clear cost benefit analysis. Land use around existing port precincts should be directed to highest value land uses (these may not be port uses). In general, the draft report viewed State long term planning processes to meet port infrastructure needs as seemingly inadequate.

ACCI agrees with this assessment. Investment in port infrastructure in Australia is well behind the curve relative to other comparable nations, such as New Zealand, Europe, East Asia and North America. For example, New Zealand has built a secondary terminal at Auckland with forward planning and land holdings for expansion and servicing of larger ships.

As noted above, the proposed investment in Port of Newcastle Multi-purpose Deepwater Terminal concept would accommodate larger shipping vessels in Australia and have land available for future development activities. Newcastle is one of the few major ports with deepwater access and the land available to enable significant expansion, as well as existing rail and road infrastructure to support it. The development has the potential to increase competition and stimulate investment to improve productivity at the other major ports in NSW and the Port of Brisbane. However, as noted

above, the Port of Newcastle development, and/or the entry of any new stevedore wiling to build a new container port in NSW, is being held back by anticompetitive clauses built into the long-term lease agreements with the NSW Government.

There is no current infrastructure to service the larger ships which are becoming increasingly common on international shipping routes. To service these larger ships, substantial investment is needed to create and maintain necessary channel depth, develop the wharf infrastructure to accommodate larger volumes including larger and heavier equipment, and integrate with rail and heavy vehicle road networks including longer rail sidings, intermodal facilities, and accommodations for trains longer than 1.2km.

Rail connectivity is needed to meet current container freight demands and bring more goods into the Australian market at a faster pace. It is essential to reduce current congestion at ports and this will become critical as ports are upgraded to service larger ships. Although investment is being made to connect Australian ports through the Inland Rail project, further investment is needed in the port precinct to improve the serviceability by train.

Many Australian ports are located in areas facing increasing urban encroachment, adding to congestion and slowing the movement of containers away from the port precinct. Planning is needed to develop new ports away from urban centres, in locations that allow deepwater access for increasingly larger container ships, provide room for growth to meet the needs of the future, and ensure access to support the development of necessary rail and heavy vehicle road networks. This will also go some way to driving greater competition at Australian ports.

In NSW, the Port Commitment Deeds included in the long-term lease agreements for NSW Port must be removed to enable the development of Port of Newcastle Multi-purpose Deepwater Terminal concept.

ACCI understands, the Port of Melbourne has developed a long-term development strategy, out to 2050, for substantial investment in port infrastructure, including extending berths for larger ships and upgrading port rail infrastructure. Yet, this infrastructure is needed to improve productivity at the ports now, so Port of Melbourne should be encouraged to fast-track these projects. Similarly, planning for further development of the Port of Brisbane should be brought forward, particularly private investment to extend the rail network to the port precinct.

6 Workforce arrangements

ACCI welcomes the focus on workforce arrangements. Ports seem strikingly exposed to negative impacts of poor employment regulation / workplace relations dysfunction, in bargaining in particular. This is harming not only the sector but the wider economy and community.

The maritime industry seems to not be supported by our workplace relations system; but bedevilled by it, and there seems no repairing our ports without tackling the significant workplace relations problems the Commission identified in the draft report.

Draft Findings: ACCI strongly agrees with various draft findings, which should be reflected and built on in the final report, and subject to specific remedial recommendations for reform, directed squarely to the unique problems and characteristics of the maritime industry.

ACCI calls for urgent, industry-targeted action on the following draft findings in particular:

Unions hold substantial (and unbalanced) bargaining power

Conditions in container terminal operations, together with the workplace relations framework, confer significant — and unbalanced — bargaining power on unions. (Draft finding 8.1)

Restrictions on merit-based hiring and promotion harm workers and productivity

There are substantial restrictions on merit-based hiring, promotion and training within container terminal operations. These restrict fair and reasonable access for workers who are qualified, but not currently employed by the specific container terminal operator. They also harm existing terminal workers by precluding them from jobs that best fit their skills and preferences, and create undue hurdles for potential container terminal workers. Overall, the clauses act to constrain productivity. (Draft finding 9.1)

Container terminal enterprise agreements distort operators' ability to automate

Container terminal enterprise agreements contain terms which substantially restrict or disincentivise operators from introducing further automation. These clauses, reflected in mandated consultation lengths and, for some operators, the requirement for employee or third party (such as an independent panel or Fair Work Commission) consent, appear to go beyond equivalent clauses in other industries or the model consultation term in the Fair Work Act 2009 (Cth). (Draft finding 9.4)

Extensive protected industrial action in the ports during recent bargaining caused disruption and impacted productivity in container terminals

Disruption and, to some extent, reduced productivity are an expected consequence for bargaining parties of protected industrial action. But high levels of protected industrial action in the ports over an extended period during the recent bargaining round translated into markedly lower productivity at affected container terminal operators. (Draft finding 9.7)

Protected industrial action in the ports caused substantial disruption and economic costs to third parties in the supply chain

The integration of container terminal operators in the supply chain means that protected industrial action in the ports has an outsized impact on importers, exporters and other third parties. The extent and seriousness of protected industrial action seen during recent bargaining in the ports resulted in substantial economic harm to these third parties. (Draft finding 9.8)

Others working more directly in the industry may provide more specific endorsement, evidence and prioritisation for other draft findings.

6.1 Adopt a Ports Code

This inquiry was prompted by particular and extraordinary problems in the application of general workplace relations legislation, the Fair Work Act, to a specific industry.

This raises questions as to whether any remedial actions should apply to the general law or be focussed more topically, targeted directly to the industry. The Commission raises the following in the Draft Report:

> Some inquiry participants have argued for a ports code akin to the building code. If adopted, this could involve a longer and more prescriptive list of unlawful agreement content than proposed above. The Commission is seeking feedback to help it in reaching a conclusion about the merits or detriment of a ports code in the final report.

Codes of practice are a unique mechanism targeted to address particular problems / regulatory failures in a defined industry. Such codes use the procurement power of government or other heads of power to impose particular, bespoke requirements on an industry.

Across the OECD, government procurement is increasingly used to impose expectations on those seeking to do business with government, directly and indirectly, ranging from providing training, providing jobs to women and indigenous people, through to local content requirements and protections against exposures to forced labour (modern slavery).

Royal Commissions have recommended remedial codes of practice in construction to address demonstrated workplace relations failures, in which toxic (and even criminal) cultures persist and intensify, and in which the good intentions and benefits of enterprise bargaining in particular, were being actively gamed, misused and abused.

The Code mechanism is highly specialised and targeted, used on an exceptional basis where particularly intractable problems persist and where, in particular, prohibitions on enterprise agreement content are necessary to eliminate work practices that are damaging the industry and the wider community. Our ports appear to meet these criteria for recourse to an industry-targeted approach to future workplace relations.

Information request 9.5 in the Draft Report asks:

> What might be the benefits and drawbacks of introducing a ports code (modelled on the previous Building Code)? If there is a code who should be responsible for its enforcement?

This stage of the review process ACCI simply wishes to signal that:

- ACCI does not generally support the draft findings giving rise to amendments to the Fair Work Act itself, of general application to all industries. This inquiry has been undertaken through a specific prism or focus on ports, and it should lead to changes focussed on maritime work.

- A superior approach would seem to lie in looking to the model of the building code (prior to the most recent changes since the election), and the use of industry targeted regulation to curtail exceptional misuses and failures in workplace relations in such an industry.

- The Commission should make recommendations without regard to recent changes to the Building Code or Government policy to abolish the ABCC. In other words, if a code style approach is merited it should be recommended as a model, divisible from current changes to the Building Code.

It should be stressed that the code obligations in construction were upon employers, and it was employers that were exposed to sanctions for breaching the code, not unions and not employees. At its crudest, the construction code ensured that employers could not agree to unacceptable terms which were damaging to themselves, to their employees, to the wider industry, and to the wider community that relies on timely and cost-effective access to built-infrastructure.

An industry bargaining code is an extraordinary measure that relies on the imposition of additional regulation against businesses, backed by new liabilities for those businesses to work within acceptable parameters in the negotiations and in what they can agree to, in the wider public interest as well as the best interests of their enterprises and employees.

Whilst port businesses may be worried about being exposed to new obligations and liabilities through such a code, the necessity of doing so through additional rules on employers is explained by (a) previous experience in the construction industry, and (b) the unique gravity and persistence of workplace relations failures on our ports.

Such codes come into consideration only when ordinary workplace relations clearly and comprehensively fails over time, and continues to fail - and that is the only possible reading of the draft report, an extraordinary and unique regulatory failure of workplace regulation on our ports.

The extraordinarily poor and damaging workplace relations on our ports justify in ACCI's view consideration of extraordinary, and industry targeted measures, and in this instance a code linked to government procurement or other appropriate head of power that relies in part for its operation on potential offences and compliance obligations against port employers.

ACCI does not wish to enter into the mechanics or legal foundations for a Code at this point. Were a code under consideration there may be some value in a public exposure draft process and submissions.

We also reserve employers' view on who should enforce such a code, but suggest that:

- There are lessons to be learned from the various evolutions of the ABCC.
- There are areas of commonality and different between construction and ports, there being for example many more employing entities, and much greater labour mobility in construction.

The following input is framed generally, but with a clear intent that any changes be progressed through a code mechanism for ports, not through changing workplace relations rules for all enterprises.

6.2 Agreement Content

Agreement content is somewhat of a misnomer or only partial representation, as it encompasses not just what can be included in finalised enterprise agreements and legally enforced, but (a) what can be sought through the bargaining process and give rise to legally protected industrial action, and (b) what can be drawn into an overall log of claims and used to strategically advance other priorities such as wage claims or attempts to control the use of contractors or casual labour.

Collective bargaining under the Fair Work Act and its predecessors is not, has never been, and can never be a free for all.

The state should not legally enforce or attach legal obligations or immunities to simply any topics upon which unions and employers may engage, agree or disagree.

A union should not for example be able to pursue an agreement, or strike towards an agreement seeking to have a company report on an alternative accounting standard differing from that under Australian law, to disclose information contrary to law, or to do business or not do business with particular entities. Enterprise bargaining should not be able to be used to have entities disaffiliate or disassociate with others, invest or divest, exercise legal powers beyond the employment relationship or not do so.

This is at its heart employment-based legislation, and collective bargaining must be restricted to collective negotiations on terms and conditions of employment, respecting the limits of that concept and the legal relationship between employer and employee, and its boundaries against other legal relationships and responsibilities including those of commercially managing and directing enterprises, and complying with other legal duties, such as those to shareholders, customers, regulators etc.

Our workplace relations legislation has long set out matters that cannot be included in enterprise agreements or give rise to legally protected industrial action. Under the current Fair Work Act these are (broadly) the discriminatory, objectionable and unlawful terms.

Draft Recommendation 9.1 seeks to prohibit enterprise agreement content that imposes excessive constraints on productivity in the ports and imposes costs on the supply chain. Based on the unique problems that this inquiry is bringing to light, and a remedial focus targeted specifically to the maritime industry rather than in the general application of the Fair Work Act, these are very valid matters to tackle in the public interest.

Merit based hiring: ACCI continues to support banning "family and friends" union preference clauses. Under any future code or other targeted implementation mechanism, these should become matters that unambiguously cannot be included in agreements, or give rise to bargaining claims, or give rise to legally protected industrial action on our ports.

Grave freedom of association concerns are raised by any clause that indirectly leads to employers being required to preference union members first in hiring, and there are clearly fairness, diversity and discrimination concerns raised by outsourcing who is hired to trade unions and their associates (such as formerly employed union members seeking re-employment).

More generally, ACCI does not support unions seeking to "coerce", through the use of industrial action and other bargaining tactics, employers into agreeing to terms that excessively or damagingly constrain or abrogate to others the running of businesses or fundamental management decision making.

Numerous areas of our workplace relations system preclude employees agreeing to particular matters or situations considered fundamentally antithetical to their interests, regardless of their intentions or positions on a particular proposition, and in particular regardless of what others may see as informed consent. One cannot be employed on a continuing basis without enjoying award wages or various of the National Employment Standards on leave for example, regardless of how much one is offered to do so, or one's purported contractual intent to do so.

This is just such an example for employers, and the wider community. Employers should be protected from being coerced into agreeing to outsource such decision making to unions in any way, just as for example unions would not allow employers to control their electoral, financial or representative decision making (and our law specifically prohibits employers from seeking to 'tame cat' unions).

Restricting casuals: For all the highly contested debate on casual employment, the mischaracterizations, misrepresented data and deliberate demonization, it is an inescapable reality that:

- Many Australians want to work casually, like the flexibility, or like the extra money.
- Casual work can suit people trying to reconcile work with other life commitments, including family and care commitments, and casual working can often be (despite claims to the contrary) an important support for diversity and inclusion. Industries and workplaces that restrict casual work, risk unduly excluding parents and carers, particularly women.
- Casual work facilitates flexibility in how enterprises operate and adjust to both the unforeseen or contingent, or to more usual changes within their parameters of elastic demand which cannot be realistically met within a reasonable ongoing labour cost commitment.

The Commission has consistently recognised the negative impacts of allowing the misuse of agreement making to limit opportunities for those seeking to work casually and businesses seeking to make use of casual work.

Based on the draft findings and analysis our ports seem to have particular problems in this regard and should be opened up to greater scope for casual employment. Those in one form of work should not be able to misuse collective bargaining to exclude others from future work opportunities, particularly when the cohort doing the excluding (predominantly men working full time) are using their collective voice to shut the door to those to date not able to secure work in an industry (particularly women who may wish to work casually or part time). This may not be intentional, but insisting on restrictions on casual working on our ports can communicate a sense of the incumbents slamming the door on a more diverse profile of employees who would like to come after them.

Restricting change and innovation: Employers and employees regularly use enterprise bargaining to agree approaches to workplace change, and to address how changes may be implemented that can lead to redundancies. Agreements address both financial matters (how many weeks per year of service of redundancy pay for example) and consultative or procedural matters on how change will be undertaken.

There is a tipping point at which measures for job security and employment protection risk exactly the opposite and become threats to enterprise resilience and job retention.

Employment protection strictness and costs should be about balance, and when they become unbalanced businesses will move out of Australia or realise the excessive costs of workplace change at this point, rather than in future following further unrewarding and unsustainable trade.

If bargaining is inviting and facilitating approaches to change and innovation that stifle change and endanger businesses and the provision of port services to our community, then a targeted re-examination of bargaining rules and the content of agreements for our ports must be considered.

6.3 Improving the Practice of Bargaining

ACCI shares the Commission's substantial concerns with the unhealthy and unacceptable mix of protracted bargaining, excessive recourse to industrial action, synchronised negotiations coordinated to cause maximum damage and uncertainty across port operations, and just sheer poor outcomes in the quality of agreements and their failure to support sensible practical day-to-day approaches to workplace relations on our ports.

ACCI supports the Commission's intention to improve the practice of bargaining in the sector. Enterprise bargaining cannot be a mere ritual or show on our ports – it has to genuinely benefit employers, employees and the wider community that relies on imports and exports.

Looking at Draft Recommendation 9.2, ACCI invites a wider focus. Our ports are seeing (a) overly protracted negotiations, (b) too commonly with recourse to strikes or threats of strikes, (c) too focussed on externalities or industry level claims not the +enterprise at hand, and (d) after all that, so called bargaining on our ports yields very poor quality agreements, which do not settle disputes and do not deliver harmonious productive, day-to-day workplace relations, but instead invite and perpetuate an ongoing culture of petty grievance and disputation. During the life of agreements – after 'successful bargaining', poor, contested, unproductive day-to-day workplace relations persist.

Workplace relations on our ports has been dysfunctional for decades, under both the centralised award system, and nominally less centralised enterprise bargaining. Problems in the industry have been immune to remediation through general reforms under both Labor and the Coalition. Something more serious and more targeted is required if we are to see genuine changes in the maritime sector.

To improve bargaining in the ports, the draft report recommends creating a mandatory requirement for Fair Work Commission intervention when certain thresholds in bargaining activity in the ports are reached (time limits and/or thresholds linked to the number or scale of protected industrial action(s)).

While ACCI supports Fair Work Commissioners having the requisite knowledge, skill and experience to consider applications and mediate and/or conciliate matters in the industry by invitation of an employer and union/employees, ACCI does not support compulsory arbitration or Fair Work Commission intervention.

ACCI does not support Draft Recommendation 9.2. In practice, and frankly in the hands of unions in this industry, it seems set to inescapably invite gaming and deliberate misuse for the reward of arbitration.

Unions would seem to have an incentive to lengthen and deliberately render intractable disputes for the reward of getting to the Commission; an environment still perceived to deliver better gains than unions would secure from employers through negotiation.

Arbitration also risks being seen as a mechanism to secure the final unresolved and unsecured claims that a union has not been able to get from an employer. What incentive would there be for union to resile from its final 5 or 10% of ridiculous or 'try on' claims, if it knew that it could persist with the hope of getting at least something out of the Fair Work Commission under such a model? It seems unlikely that after protracted negotiations the employer would be able to threaten to take any sign on bonus or commencement bonus off the table.

6.4 Industrial Action by Employers

Draft Recommendation 9.3 seeks to add specified options for protected industrial action by employers to the Fair Work Act, including allowing by specificity employers to engage in more graduated forms of protected industrial action in response to employee industrial action, such as:

- Instituting limits or bans on overtime.
- Directing employees to only perform a particular subset of their normal work functions and adjusting their wages accordingly.
- Reducing hours of work.

This is predicated on employers presently having recourse only to lock out employees for an extended period of time in response to strike action.

Each of the options canvassed impacts the employer as well as the employees, as striking costs an employee income as well as closing or harming an enterprise, underscoring what we've recognised in Australia for 115 years; our system should generally strive to avoid industrial action.

While ACCI supports employers having more options in industrial action, further consideration and consultation would be necessary before any such course were considered. ACCI would not support any situation in which employees were empowered to take industrial action against their employer in pursuit of bargaining claims, but the employer was disempowered to similarly pursue its interests in bargaining, and did not enjoy equivalent rights to take industrial action to those of its employees.

Short stoppages or bans: It is also suggested that employers be able to choose to either deduct wages or continue to pay employees for protected industrial action which lasts for less than 15 minutes.

ACCI cannot support this. It will invite calculated campaigns of short, but disruptive disruptions, and unions pressuring employers to agree not to deduct. Such a change risks cratering a new avenue for misuse and disruptive tactics on the ports.

Division 9 of Part 3-3 the Fair Work Act has been in place for decades. ACCI and its members see no case for changing it or the principles it enshrines in any industry, and any attempt to do so will invite widespread, deliberate misuse.

6.5 Aborted Industrial Action

The draft report recommends increasing disincentives for employees to notify and then abort protected industrial action (Draft Recommendation 9.4). Where a group of employees withdraws notice of industrial action, employers that have implemented a reasonable contingency plan in

response would be able to stand down the relevant employees, without pay, for the duration of the employer's contingency response.

This address situations in which employers incur the costs of industrial action by preparing contingencies, cancelling contingent work, supplies or fulfilment, etc, only to have a union in quite a calculated manner then withdraw the planned industrial action at the last minute. This sees the union able to present itself as not having taken the strike action, employees do not lose pay, but the union has still deliberately damaged the employer (as the union well knows) through calculated actions that cost the employer money, harm clients, harm reputations, delay services, delivery etc.

It can be somewhat ambiguous as to whether a particular 11th hour withdrawal of planned industrial action represents a welcome cooling off or stepping back towards agreed resolution, or another form of damaging tactic, but it is certainly clear that the latter does occur, and we understand the Commission has been told that it occurs regularly on the ports, hence Draft Recommendation 9.4.

While ACCI supports this in principle, it will be important that employers are given genuine choices about whether they follow through with this or not, and are able to assess particular circumstances on their merits.

Employers will need the option to agree not to stand down employees / deem them to have taken industrial action, where satisfied unions are acting in good faith, i.e. genuinely stepping back or cooling off, as opposed to cynically mucking about to maximise damage to the business.

If employees must be penalised, or deemed to have taken industrial action even where they genuinely step back from the brink at the 11th hour, this would risk the unintended consequence of disincentivising employees from returning to the bargaining table if the reasons they have aborted the protected industrial action are genuine (i.e. negotiations have continued in the days leading up to industrial action and the parties have reached resolution / or a partial resolution, or see light ahead). This would not be a positive development, consider for example reducing capacity or incentives to blink before a threatened port strike in the lead up to Christmas, that does not seem in anyone's interests.

It may also be the case that the final form of industrial action is less disruptive to operations than the originally proposed industrial action, it might be shorter, less damaging bans may be lighter or more for show than impact. In some cases, unions want to be able to be seen to be able to flex their muscles, but after this be willing to negotiate.

We appreciate that this not the same message as that we are making on strike pay for short stoppages, for which we caution against so-called employer discretion to make payments. This underscores the complexity and nuance in such matters on the ports, and frankly the uniqueness of challenges on the port workplace relations which favour industry targeted measures rather than at large changes to the Fair Work Act.

Looking at information request 9.13 we are concerned at any external body such as the Fair Work Commission substituting its determination of what is reasonable as a contingency response for the knowledge and assessment of an employer.

This would need to be worked through, but only an employer can make its judgement on how it should respond to particular threatened strikes bans or limitations on work, and on the reliability of

its supply to its customers clients etc. A reasonable contingency for one business might be outright closure and standing down non-striking employees, while for another employer other arrangements may be pursued - such judgments must lie with each employer and its assessment of each set of circumstances, not the Fair Work Commission.

In addition, employers currently do not enjoy equivalent rights to take industrial action to those of employees. Employees can take 'employee claim action' (s.409 of the Fair Work Act) and 'employee response action' (s. 410), whilst an employer is limited to 'employer response action' (s.411).

This imbalance gives unions a number of advantages, including in relation to aborted strike action.

One way of (at least partially) addressing this imbalance may be to enable 'employer response action' to commence in response to receiving a notice of employee claim action, rather than once such industrial action has occurred / commenced. This would discourage such bargaining strategies by unions, avoid disputation on what constitutes a 'reasonable contingency plan', and allow employers flexibility as to whether to take such employer response action or not.

It would also ensure that such stoppages did not count as service for employees, whereas a 'stand down' would.

6.6 Suspending or Terminating Industrial Action

Draft Recommendation 9.6

The draft report recommends making it possible to suspend or terminate industrial action that could cause 'important or consequential' economic harm.

The current test includes a concept of "significant" harm. This has been interpreted by the Courts to mean harm that is "exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context". Widespread industrial action is not "exceptional" in the ports industry, making it very hard to make a successful application.

In principle ACCI supports the development of a new test that is better suited to the uniqueness of the industry (i.e. to lowering what can prove a very high, and damagingly high threshold), but would need to consider any proposal in more detail before supporting moving to "important or consequential" economic harm.

Again, care would need to be undertaken to not erect a legislative hurdle that then gives trade unions a sightline to work towards to game the system.

Recommendation 9.7

The draft report also recommends allowing a broader range of third parties to apply to terminate protected industrial action occurring in the ports. This includes amending the *Fair Work Act* to widen the range of third parties who can make applications to suspend or terminate protected industrial action for operators in the ports to include entities, for example, with an interest but who may find it difficult to show they are directly affected (such as employer associations, employee organisations, or third parties like importers/exporters).

ACCI supports this recommendation. The impact of protected industrial action will often be felt down the supply chain, including by small and medium enterprises who may not have the capacity to make and prosecute an application seeking the suspension or termination of that action where it is causing, or threatening to cause, significant harm.

Currently, industry associations representing the interests of those affected by industrial action do not have express standing to make an application under s.424 or s.426 in their own right (i.e. can only support a member who is also acting as a nominal applicant).

Allowing them to do so will ensure that instances of harm to third parties in the supply chain are brought before the FWC.

There also needs to be scope to address such matters prior to harm being caused, and for example an industry body, chamber of commerce, business or businesses, government, community being able to go to the tribunal to point out a clear threat of harm that will occur if industrial action is allowed to persist or proceed on the ports, disrupting supply for example.

Draft Recommendation 9.8

The draft report also recommends enabling protected industrial action to be suspended or terminated when it is causing harm to either party, rather than both. ACCI supports this recommendation.

Currently, to suspend or terminate industrial action initiated by employees the action must cause harm to both employees and the employer, despite the fact that the harm is directed at the employer.

By contrast, to suspend or terminate a lockout by an employer requires that only the employees be significantly harmed. This reflects the fact that an employer that has locked out its employees should not then be able to have the employees' protected industrial action terminated based on the significant harm being caused to it.

6.7 Extending the Fair Work Commission's Role at Ports

The draft report recommends equipping the Fair Work Commission for an extended role in bargaining on the ports (Draft Recommendation 9.9).

ACCI does not support a fast-track process for dealing with applications involving port employers, noting that applications to suspend or terminate industrial action are already heard on an urgent basis and that various measures have been taken to ensure the Fair Work Commission responds in a timely manner to urgent matters.

While ACCI supports maritime expertise amongst members of the Fair Work Commission, no change is sought or supported to the appointment process. We note that Commission members appointed from legal practice often have experience in maritime matters.

ACCI supports increased resourcing for the Fair Work Commission and enabling more decision-making by full benches to assist consistency and rigor of decision making, provided that speed and responsiveness to urgent matters can also be ensured (perhaps through interim orders by single

members pending substantive full bench determination). Full bench determination should apply to all matters involving applications to suspend/ terminate industrial action, in all industries.

6.8 Information Requests

The majority of the information requests in the draft report will be best addressed by direct parties to port operations / employment. However, ACCI wishes to respond to the following:

Information request 9.1 – Modern Awards

It seems unlikely that an industry with a long history of participation in bargaining, at least nominally, would revert to an enhanced role for modern awards, and it should be taken into account that the current government is committed to:

- More not less agreement coverage, reducing award coverage.
- Narrowing scope for agreement covered employees to revert to modern award-based employment, without expressly agreeing to do so (and even then it is not the Government's preferred way forward for any cohort of employees).

It is for the industry to indicate their appetite for a further review of the Stevedoring Award 2000, but it seems far more likely that reform should be concentrated on enterprise bargaining and on ensuring future agreements are actually agreed, reflect mutual priorities and pursue productivity and efficiency.

Thus, pending industry views, ACCI would see future reform likely to concentrate on fixing bargaining, rather than reverting to focusing on the underlying modern award.

Information Request 9.6 – Essential Services

The Commission asks "*What would be the benefits and drawbacks of classifying the ports as an 'essential service' under the Fair Work Act 2009 (Cth)? What rights and obligations should follow if the ports were classified in that way?*".

Some different industrial relations concepts may have become conflated here. There was traditionally and may remain in some states, essential services legislation which traditionally allowed state ministers to prescribe and limit industrial action in particular industries where there would be damage the community, such as health, power generation etc. These were emergency powers to restrict strikes in essential services when state awards and state tribunals held sway.

Some state governments may retain some of these powers from the 1970s and 1980s in relation to their own employees, but overwhelmingly this has been replaced by the schema for the taking of legally protected industrial action under the Fair Work Act.

There is a process under the Act for suspending or terminating industrial action, including most relevantly s.424 which provides that the Fair Work Commission <u>must</u> make an order suspending or terminating protected industrial action that is being engaged in or is threatened, impending or probable, if satisfied that the action has threatened, is threatening or would threaten:

- to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or
- to cause significant damage to the Australian economy or an important part of it.[1]

ACCI understands this is the contemporary legislative application of the essential services concept in Australia. Strikes, bans and other protected industrial action can be suspended or terminated on application precisely where "essential" services are threatened as set out in the Fair Work Act.

The wording of s.424 has been drawn as we understand it directly from cases determined by the International Labour Organisation's (ILO) flagship Committee on Freedom of Association (CFA). ACCI does not support a specific formulation solely for the ports.

Information Request 9.11 – Secondary Boycotts

The Commission asks "*Part IV, division 2 of the Competition and Consumer Act 2010 (Cth) prohibits secondary boycotts, other than in prescribed circumstances. Are changes needed to these provisions, or supporting compliance and enforcement activities, to ensure secondary boycott conduct is appropriately regulated in the ports?*".

Secondary boycotts are a uniquely damaging, unfair and particularly odious form of indirect action which Australia has prohibited for almost 5 decades. ACCI and its members continue to oppose secondary boycotts in the strongest possible terms

ACCI would be interested in any specific input the Commission may receive from the industry, but our general understanding is that Australia's longstanding protections against secondary boycotts operate effectively in their generic / cross-industry formulation, currently provided for in Part IV, division 2 of the CCA.

ACCI notes from the Draft Report discussion of "*actions that have some of the characteristics of secondary boycotts can arise in the context of the ports when bargaining is occurring simultaneously between the employees and multiple operators*".[2]

Such scenarios are of concern and may be grounds on which bargaining is not being undertaken in good faith, productively or usefully, or a ground upon which industrial action may be contrary to the public interest. The previous concerns at subcontracting bans from the Harper review and the PC are noted. We caution however that the legal meaning of secondary boycotts is well defined and long-standing, and perhaps any address of such circumstances would need to be well considered and approached with considerable caution. If anything were considered this is where the mechanism of an industry code may come into play without any changes to the general secondary boycott laws under the CCA.

Employers' primary expectation regarding the secondary boycott provisions is that they be enforced, and that the ACCC be as assiduous, diligent, and rapid in signalling that they will take action on

[1] https://www.fwc.gov.au/when-commission-must-suspend-or-terminate

[2] Draft Report, p.306

secondary boycotts or any threat or suggestion of them as they are in taking action on allegedly anti-competitive practices or suggestions of them, or in protecting consumers.

The best protection the ACCC can provide is to staunchly and unceasingly recommit to taking action were any threats to be made that may potentially constitute secondary boycott conduct on or in relation to our ports, including in new and creative ways of targeting particular vulnerabilities in Australia's logistical supply chains.

6.9 Review

The Draft Report raises the prospect of a review after 5 years:

> The Commission's recommended approach to workplace relations reform in ports involves a wide suite of measures that give the FWC an expanded role, impose limits on agreement content and address imbalances in bargaining power. Whether, if implemented, they strike the right balance or involve unforeseen complexities and inefficiencies could be the subject of independent evaluation once these interventions have been in force for five years.

A programmed review is merited. However, 3 or 4 years seems more appropriate than 5, to ensure the right measures are pursued and any recalibrations are be made more promptly.

7 Skills and training

While the draft report finds that in general port workers acquire the skills they need and skills shortages can be solved through immigration when they arise, the skill requirements should not be focused on those required today, but the skills demands of the sector in the future. This will become increasingly important as ports move to a higher level of automation.

ACCI's broad understanding is of an industry that:

- Has traditionally been dominated by heavy physical work, with some specialised activities learned on the job. Whilst specialist skills and competencies are developed on the job, in technical terms maritime employment is dominated by ANZSCO Classification 7 Machinery Operators and Drivers, and Classification 8 Labourers.

- As the sector transforms towards greater automation, different mixes of skills will be required, which will require potentially higher levels of STEM and technical competence, and higher levels of education and training to operate robotic and similar technologies. Employment may continue to be dominated by ANZSCO Classification 7 but with higher technical demands / different competencies for employees.

Like other traditional blue collar or heavy industries, such as parts of manufacturing and mining, skill needs are changing, and the workforce profile will need to change to meet these needs (as well as retraining and reskilling some of those already in the industry).

Consideration needs to be given to job design and effectively planning for these foreseeable changes in jobs and skills requirements. The industry should come to this exercise with the benefit of highly comparable work being undertaken in other countries, with for example the global homogeneity of containerization delivering a rich body of data and experience upon which to base skills prioritisation and planning for maritime logistics.

With the planned introduction of skills clusters which will not only be responsible for updating the vocational education and training (VET) training packages but also workforce strategic planning, there is a good opportunity for there to be a more structured approach to identifying skill needs and gaps in all industries including maritime.

There have been issues in the past with the maritime training packages where providers and participants have gravitated towards courses delivered with time frames that are too short to effectively impart the necessary skills. This will be an important workforce strategic risk that the Skills Cluster responsible for maritime will need to successfully address.

8 Technology use at Australian Ports

While the draft reports find technology use at Australian ports is in line with international best practice, greater investment in digital technology is needed to improve efficiency along all points of the supply chain.

E-certificates for ships and seafarers are gradually gaining acceptance with the COVID-19 pandemic championing mass digitalisation and the creation of standards for electronic trade documentation such as certificates of origin, bills of lading, letters of credit, invoices etc. Advancements are also being made in single window and port community systems to track and secure supply chains while facilitating productivity gains, but Australia's developments in these areas are lagging behind other countries.

All ports have room for efficiency gains through digitalisation and data-sharing. The Simplified Trade System is expected to simplify the trade process and bring innovation through data sharing to Australia's trade landscape, but full engagement from all players in maritime shipping is needed to achieve substantial gains in efficiency and productivity.

Current congestion in the port system is difficult and damaging for business and the community to endure but it may be a catalyst for further and faster digitalisation of Australia's maritime shipping.

Australian Chamber of Commerce and Industry

9 About the Australian Chamber

The Australian Chamber represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

ACCI Members

State and Territory Chambers

Industry Associations

accommodation association
accord
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Animal Medicines Australia
APRA AMCOS
AUSactive
Australia Arab Chamber of Commerce & Industry
AACS Australasian Association of Convenience Stores
AuSAE The Australasian Society of Association Executives
AADA
Australian Beverages
ACFA
Australian Chiropractors Association
ADA Australian Dental Association
ADIA Australian Dental Industry Association
AFEI Australian Federation of Employers & Industries
afta Australian Federation of Travel Agents
Australian Finance Industry Association
AHA
Australian Institute of Credit Management
Australian Made
AMTA
ARIA Australian Recording Industry Association
Australian Regional Tourism
AREEA
ARITA
Australian Retailers Association
ARTA
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AVA Australian Veterinary Association
BIA Boating Industry Association
BIC Bus Industry Confederation moving people
Business Council of Co-operatives and Mutuals
BECA Business Events Council of Australia
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gta
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iteca Independent Tertiary Education Council Australia
IPWEA Institute of Public Works Engineering Australasia
ieaa
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Live Performance Australia
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master plumbers Expert. Committed. Professional.
MTAA Medical Technology Association of Australia
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