Ai GROUP SUBMISSION

Productivity Commission

Inquiry into Australia's Maritime Logistics System

22 February 2022

Executive summary

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into Australia's Maritime Logistics System.

As an island nation Australia's economy heavily relies on its maritime ports. Any issue at the ports can significantly impact countrywide supply chains and business activity. As shown by the ACCC's recent container stevedoring monitoring report,[1] problems with Australia's maritime logistics system have continued to worsen and there are acute supply chain pressures caused by the COVID-19 pandemic.

Given how closely Australia's economy relies on maritime ports, these issues require urgent and swift government action to ensure that our supply chains can function productively, competitively and resiliently, now and into the future

This submission argues that:

- The Productivity Commission should assess the degree to which recent increases in port prices and the introduction of new charges are due to inadequacies in the regulatory regimes applying to the monopoly-like characteristics of the ports.
- It is important that port businesses are supported to consider national interests when determining their objectives.
- Going forward, privatisation agreements need to be structured with Australia's long-term interests in mind.
- The construction of alternate ports could alleviate the load in main ports. However, any such consideration would need to take into account existing privatisation agreements and connecting infrastructure demands.
- There is currently a severe shortage of skilled workers and a need to upskill the workforce. There must be a coordinated national approach to address these issues.
- Port infrastructure needs to be updated to better handle Ultra Large Container Vessels (ULCVs) to assist in alleviating supply chain issues.
- Rail access is needed for ports.
- More storage space needs to be provided for containers.

[1] ACCC, Container stevedoring monitoring report—October 2021.

- *Part X of the Competition and Consumer Act 2010* should be repealed, with retention of shipper collective bargaining provisions.

- The scope of the National Transport Commission review of Terminal Access Charges should be expanded to examine the potential of regulation to encourage stevedores (and empty container parks) to cost recover directly against their commercial client (the shipping line) rather than via third party transport operators.

- The Federal Government should consider potential regulation, similar to the US Federal Maritime Commission, to ensure reasonable container detention policies are administered.

- Amendments should be made to the *Competition and Consumer Act 2010* (Cth) (CC Act) and the *Fair Work Act 2009* (Cth) (FW Act) to re-draw the boundary between competition laws and workplace laws to prevent enterprise agreements from containing provisions which restrict or hinder the acquisition or supply of goods or services by a business.
- An effective way of addressing the extreme restrictions in waterfront enterprise agreements that drive up costs for the whole community, would be through a Ports and Shipping Industry Code (PSI Code) which addresses enterprise agreement content. The Code could be created through amendments to the FW Act.

- Given that the legislative source for the PSI Code is proposed to be the FW Act, the logical regulator with responsibility for its enforcement would be the Fair Work Ombudsman (FWO).

- The restrictive work practices that exist on the waterfront are due in large part to the activities of the Maritime Division of the CFMMEU (MUA). The Productivity Commission should recommend industry-specific reforms aimed at safeguarding the Australian community from the unreasonable union conduct that the MUA frequently engages in.

- The *Stevedoring Industry Award 2020* is in urgent need of modernisation to align with the manner in which ports need to operate. The Productivity Commission should recommend that the Federal Government make a formal request to the FWC that the Commission undertake a review of the Stevedoring Industry Award to modernise its provisions. There would be merit in the Government being an active participant in that review. The review should consider the interests of users of ports, and not just the interests of stevedoring companies and their employees.

- Coastal trading reforms need to be implemented to enable foreign ships to apply for single voyage licenses, multiple voyage licenses or continuing licenses through a simple system that does not impose an unnecessary regulatory burden on them and that reduces shipping transport costs for Australian businesses.

Information Request 1: What is the issue?

A. Infrastructure

The largest container ships that the Ports of Melbourne, Botany and Brisbane can accommodate are in the range of 8,000 – 10,000 TEU (twenty-foot equivalent units),[2] with the most common size being 5,000 TEU.[3] However, ULCVs – ships with a capacity of more than 14,000 TEU – make up half of all new build capacity.[4] ULCVs can replace up to three conventional container ships and significantly reduce costs and emissions, creating a compelling case for their use. In Europe, slot cost on a ULCV is approximately 50% lower than that of a 5,000 TEU vessel.

There are infrastructure limitations around the use of ULCVs in Australia. The use of larger container ships would require significantly improved capacities of host ports in terms of equipment, technology and skilled staff to enable the handling of a higher number of containers in a short amount of time. They also need significant infrastructure in and around them that can handle the congestion these volumes will bring. Some ports may not have all the necessary characteristics to handle ULCVs effectively,[5] and the negative consequences of the attempt could wind up erasing the economic benefits of using them in the first place.[6]

B. Port and shipping pricing

As an island nation Australia's maritime ports function is the life blood of the local economy with over 98% of Australian trade going through these ports.[7] Due to the large distances between ports, having to dock at an alternate port results not only in substantial charges for importers/businesses arising from road/rail freight but also raises issues relating to a lack of land/sea interface. In the port environment, businesses rarely have a choice of stevedores as it is determined by the size of the ship the businesses are able to secure a spot on, making customers particularly vulnerable to uncompetitive prices and contractual terms.

Shipping companies have begun to levy additional congestion charges to cover added

[2] 'Containerised trade trends and implications for Australian ports,' HoustonKemp (January 2019).
[3] Ports & Shipping Policy in Australia in the 21st Century – a 'Wicked Problem', Macquarie Lighthouse lecture series (March 2019).
[4] 'Australia's ports infrastructure stuck in no man's land', Infrastructure Magazine (2020).
[5] 'Containerised trade trends and implications for Australian ports,' HoustonKemp (January 2019).
[6] 'Australian Ports: Discussion Paper'. Australian Industry Group, November 2020.
[7] Value of Ports, Ports Australia.

operational costs caused by port congestion or delays triggered by industrial action or other labour shortages. For instance, a shipping company recently introduced a congestion fee of $350 USD per TEU.[8] Similarly, other logistic services providers have followed suit and introduced their own charges. Additionally, some Ai Group members have provided Ai Group with copies of invoice letters from a national stevedore concerning the levying of a charge of $28.50 per container to ameliorate the impact of the labour shortages caused by Covid cases in January. There has also been a significant increase in other surcharges relating to increased costs of returning empty containers due to congestion and container detention fees (imposed as a daily charge by the carrier for use of a container). Shipping lines allow a 7 to 10-day period without charge for the container to be returned at a designated depot; after this a daily rate is charged.[9] Container Transport Alliance Australia has pointed out that there is a lack of empty storage capacity in Sydney to handle peaks, despite some added capacity coming on stream recently. Their view is that if a customer cannot de-hire a container in a timely manner because empty parks are at capacity, it may be inappropriate for shipping lines to charge high container detention fees for late de-hire.[10] In addition to incurring daily fees due to their containers having to be diverted to empty parks, businesses also report being charged transfer fees to move the containers.[11]

Furthermore, rent and ancillary fees have risen considerably at ports around the country. Stevedores have justified higher charges by reference to sustained increases in property related costs and the need to raise funds to enable them to improve terminal landside handling capacity.[12] Stevedores have tried to re-balance costs by passing them on to transport operators (rather than shipping lines), but road and rail land transport operators have raised concerns with the imposition of the charges given that they are not a product of commercial negotiation. The transport operators must go to the stevedore to which they are directed and therefore have no means to move their business in order to avoid price increases.[13] For instance, an Ai Group member reported:

> *"The position is becoming very desperate, rates are doubling with no indication where it will stop, 40ft containers from India today have increased from USD $4200 to USD $8000."*

The Productivity Commission should assess the degree to which recent price changes and the introduction of new charges are due to inadequacies in the regulatory regimes applying to the monopoly-like characteristics of the ports.

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[8] 'Port Congestion Surcharge – Sydney,' Maersk (September 2020).
[9] 'Current legal position on container detention in Australia,' Freight and Trade Alliance.
[10] 'Already-stretched Australian supply chains hit by container park congestion,' The Load Star (September 2020).
[11] 'Australian Ports: Discussion Paper'. Australian Industry Group, November 2020.
[12] ACCC, Container stevedoring monitoring report—October 2019, p.19.
[13] ACCC, Container stevedoring monitoring report—October 2019, p.19.

C. Reliance and security

Given that nearly all our physical trade is connected to a port, port operators are custodians of infrastructure assets of key national significance.[14] In the absence of appropriate regulatory arrangements, these operators may be unable to determine the infrastructure and asset needs of Australian importers and exporters into the future. It is important that port businesses are supported to consider national interests when determining their objectives.

D. Skills and training

Ai Group members are reporting a severe shortage of skilled workers.

Given the increasing use of autonomous vessels in the shipping industry, there is a need to upgrade regulatory and safety codes to keep up with the change.[15] There will also be issues relating to cybersecurity involving greater automation, which will require the use of more skilled labour in managing these advanced systems.

Additionally, the transport and logistics industry expects an increasingly need for greater digital skills in procurement and scheduling professionals, to enable the introduction of newer technology and the use of data analytics to ensure the resilience of the supply chain. It is anticipated that Australian transport and logistic enterprises will use blockchain for financial reconciliation, tracking goods and services, and supply chain reporting.[16]

The Transport and Logistics industry is currently undergoing a transformation of its driving operations as Autonomous Vehicles (AVs) are being used more commonly. Vehicles are also being equipped with sensors, cameras and other devices which generate large volumes of data. There are also experiments involving the use of fatigue management technologies which can send warnings to drivers.[17] Transport Certification Australia has formulated protocols which set interoperability requirements for heavy vehicles with telematics and fatigue management technologies.[18] The implementation of such technologies requires the simultaneous upskilling of the workforce to manage and utilise them efficiently.

E. Industrial relations

There are some major industrial relations problems that need to be addressed in the maritime logistics industry. The problems and recommended solutions are discussed later in

[14] Ports & Shipping Policy in Australia in the 21st Century – a 'Wicked Problem' Macquarie Lighthouse lecture series (March 2019).
[15] Maritime Industry Outlook 2021, Industry Reference Committee, 2021.
[16] Transport and Logistics Industry Outlook 2021, Industry Reference Committee, 2021.
[17] Transport and Logistics Industry Outlook 2021, Industry Reference Committee, 2021.
[18] Ibid.

this submission.

F. Coastal trading

There are problems with Australia's coastal trading system that need to be addressed. The problems and recommended solutions are discussed later in this submission.

Information request 2: What needs to change?

A. Infrastructure

Ports in Europe, East Asia and North America have responded to the increase in ULCVs with radical infrastructure investment, but Australia has lagged. Meanwhile, our closest neighbour, New Zealand, created a secondary port, which can efficiently service vessels of up to 11,500 TEUs presently. The port was built with expansion in mind, enabling it to keep up with customer expectations and market demands.[19] They have land holdings to expand, making it likely that it will service bigger ships in the future. This gives it an advantage against other ports with limited expansion options, like many Australian ports.[20]

If we decide to expand our capability, there are four key factors in servicing ships of this size:

1. The cost of creating and maintaining channel depth.
2. Wharf side investment so infrastructure can withstand higher volumes.
3. Landside factors (like integrated and uncongested access to national railway and heavy vehicle road networks).[21]
4. The feasibility of deep seaports – do we have suitable locations for maritime infrastructure which are also able to accommodate deep sea operations, or will such locations require significant modifications?

[19] 'About Port of Tauranga,' Port of Tauranga.
[20] 'Australian Ports: Discussion Paper'. Australian Industry Group, November 2020.
[21] Ports & Shipping Policy in Australia in the 21st Century – a 'Wicked Problem', Macquarie Lighthouse lecture series (March 2019).

B. Port pricing

1. Port pricing needs to be closely monitored to enable the immediate and downstream industry participants to operate under efficient market conditions.

2. Shipping and port competition should be liberalised.

3. Reliance and security

Going forward privatisation agreements need to be structured with Australia's long-term interests in mind. Current competition law gives the ACCC little power over the conduct of former state monopolies like ports, though the ACCC has urged the states to consider regulation to help prevent the use of unconstrained market power.[22]

For future lease or privatisation agreements, any regulatory arrangement should be made clear to potential purchasers. This should include but not be limited to, outlining the regulatory regimes regarding potential national interest issues prior to the submission of bids.

For existing port leasing or privatisation agreements, the Productivity Commission should assess the sovereign risk issues associated with any *ex-post* change in regulatory arrangements and the extent of the financial ramifications for existing lease holders (who may be superannuation fund members) that would arise from any *ex-post* changes to an agreement regarding issues of national interest and any appropriate compensation that should be paid. A potential source for compensation could be the state that privatised the asset recompensing lease holders for the difference in the bid, had the new regulatory regime been introduced *ex-ante.* Undoubtedly, certain contractual issues would arise resulting from any attempt to impose regulatory arrangements after the fact and there may be a case for the lease holders to enter arbitration with the state government responsible for the privatisation.

C. Skills and training

There must be a coordinated national approach to address the skilling issue. This includes both the upskilling of new labour, and re-skilling existing labour as needed. Upskilling the workforce will also allow for significant upgrades to infrastructure that have been constrained in the past because of labour skill constraints. For instance, using specialised port management equipment and software to mimic the technological edge of other countries (i.e., Germany) requires upskilling the workforce to work with the same technology/machinery, not only to enable the better management of the current

[22] 'Port privatisation forces price inflation on Australian importers and exports,' Australian Financial Review (June 2017).

infrastructure but also to allow the integration of greater automation.[23]

D. Industrial relations

There are some major industrial relations problems that need to be addressed in the maritime logistics industry. The problems and recommended solutions are discussed later in this submission.

G. Coastal trading

There are problems with Australia's coastal trading system that need to be addressed. The problems and recommended solutions are discussed later in this submission.

Information Request 3: How and why would any changes lift performance, and by how much? Who needs to do what to make those changes happen? In particular, what should governments do? And what should the private sector do?

A. Infrastructure

A larger port means bigger boats, cheaper slot costs, and a better deal for industry and consumers locally. Therefore, we recommend:

1. Modernising ports – Upgrading infrastructure to better handle ULCVs to assist in alleviating supply chain issues.

2. Setting up rail access for ports – Australian container ports require rail access to improve mobility and reduce cost.

3. Providing more storage space for containers.

4. Upskilling the workforce to enable modernisation i.e., increasing automation to better handle ULCVs and the faster handling of all container ships.

5. NSW's Port Botany Landside Improvement Strategy (PBLIS) has allowed port operations to increase efficiency with existing infrastructure, contributing to a reduction in wait times for truck drivers from 8 hours to 33 minutes. Similar strategies should be implemented in other ports and on larger scales.

6. The construction of alternate ports could also lead to alleviating the load in main ports. However, any such consideration would need to take into account existing

[23] Maritime Industry Outlook 2021, Industry Reference Committee, 2021.

privatisation agreements. For instance, if the privatisation of Port Botany was carried out under the understanding that the port management would inherit the same market structure as if it was under state control, then there would be a cause for compensation for the existing owners. The Productivity Commission should determine the best approach to reconcile the matter. There are several strategies that could be used:

a. Having the beneficiaries of the change (owners of the potential replacement port) negotiate an agreement with the owners of the existing port.

b. Having port owners enter arbitration with the state government responsible for the privatisation agreement

c. Having the respective state government compensate existing owners for loss of market share because of the construction of a new port.

B. Port and shipping pricing

With regard to port and shipping pricing, we recommend:

1. The repeal of *Part X of the Competition and Consumer Act 2010,* with retention of shipper collective bargaining provisions*,* leaving two options:

    a. Foreign owned shipping lines to operate in line with competition laws faced by other businesses involved in Australian commerce; or

    b. If deemed necessary for foreign owned shipping lines to have ongoing protections, expand the role of the ACCC (or introduce a federal maritime regulator) to administer processes to safeguard the interests of exporters, importer's and consumers, in particular to monitor the appropriateness of shipping line (and contracted stevedore / empty container park) surcharges, fees and penalties. While the ACCC presently commissions an annual 'Container Stevedoring Monitoring Report', a more active role as regulator is required to alleviate issues relating to high market concentration.

2. The scope of the National Transport Commission review of Terminal Access Charges should be expanded to examine the potential of regulation to encourage stevedores (and empty container parks) to cost recover directly against their commercial client (the shipping line) rather than via third party transport operators.

3. Regulation of container detention practices – the Federal Government should

consider potential regulation, similar to the US Federal Maritime Commission, to ensure reasonable container detention policies are administered.

C. Reliability and security

To improve reliability and security, we make the following recommendations:

1. Liberalising port management and opening up shipping routes to increase the options available to Australian businesses.

2. In order to secure Australia's national interest, state governments may need to come to a new agreement with the current lease holders of existing ports and this may mean compensating them for any alteration to existing contracts.

E. Skills and training

Skills and training needs for the shipping, transport and logistics sector(s) can be met by developing a coordinated strategy to fill in skill shortages in the sector using demand-based funding. Countries like Germany which have higher port efficiencies also tend to have higher educational standards with reference to hiring practices. Replicating such systems can help contribute to upskilling the labour force. We have detailed some of the more prominent skills needs faced by the shipping, transport, and logistics sector(s). Such needs can be met by coordinating the implementation of skills requirements across the country through diplomas and other VET qualifications that will allow the industries to better equip their workforce to enable greater automation and more efficient supply chains.

Given the growing automation movement in the shipping industry, we need to address skills gaps that will inevitably arise with the use of autonomous vehicles. The workforce will need to be familiarised with the regulatory framework surrounding safety and compliance involving the operation of autonomous vehicles. Furthermore, greater automation will mean greater reliance on computer systems and, by extension, greater vulnerability to cyber threats, as autonomous systems rely on the proper functioning of their computer systems. The ports and shipping industry will require a skilled workforce to prevent cyber security events and to mitigate the adverse effects of any such incident. Such transitions and upskilling also requires input from current port operators to better inform government policies aimed at alleviating current and future skills shortages in the ports and shipping sector.

Any significant improvements in the shipping sector must be accompanied by improvements in the transport and logistics sector to enable improvements to alleviate crises across the supply chain. This will require the upskilling of the transport and logistics sector workers to

be able to incorporate the use of artificial intelligence, blockchain, and data analytics.[24] This will require specific training courses (diplomas etc.) to enable the upskilling needed for the use of above-mentioned technologies.

While skills requirements can be set for new workforce entrants, existing workers will require additional upskilling incentives.

Industrial relations

The industrial relations practices in the maritime and ports sector are hampering productivity and increasing costs for both operators and users of ports and shipping. There is a clear case for further Government intervention.

In October 2021, the Australian Competition and Consumer Commission (ACCC) released its Container stevedoring monitoring report for the 2020-21 reporting period (ACCC Report). Chapter 6.2 of the ACCC Report highlights the negative impact which industrial relations practices and outcomes had on stevedores over the reporting period.

The ACCC Report concluded that restrictive work practices and industrial action are hampering productivity improvements and damaging the operation of the entire supply chain.[25] With respect to the impact which industrial relations problems have had on the maritime logistics sector, the Report stated:[26]

> *The ACCC considers that industrial relations have played a pivotal role in inhibiting productivity and efficiency gains at Australian ports, exacerbating delays and increasing costs to Australian importers and exporters.*

Referring to provisions in enterprise agreements applicable to the sector, the ACCC said:[27]

> *Overall, these provisions constrain workplace performance, reduce and distort incentives to improve productivity, reduce timeliness and reliability, and increase labour costs for a given level of activity. This has contributed to the sub-optimal performance of the nation's major ports and added to the pandemic-induced supply constraints.*

[24] Transport and Logistics Industry Outlook 2021, Industry Reference Committee, 2021.
[25] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p 64.
[26] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 65.
[27] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 66.

The ACCC also referred to provisions in stevedores' enterprise agreements that impose extremely onerous processes in relation to the adoption of new technologies and provisions that make it more difficult for stevedores to fully utilise their equipment:[28]

> *Increasingly, restrictive work practices related to both supply and deployment of labour, have limited stevedores' ability to utilise their technological enhancements effectively. This is a critical factor in the 'plateauing' of general productivity gains in stevedoring services and port operation in recent years, which negatively impacts the productivity of container vessels and their crew, and in turn, increases the blue-water freight costs of importing and exporting goods. All these additional costs will ultimately be borne by Australian consumers.*

The ACCC Report noted that each time a stevedore's enterprise agreement expires, the MUA and the stevedore engage in protracted negotiations.[29] Referring to the significant number of days stevedores are spending in dispute with the MUA over bargaining, the Report said:[30]

> *Critically, in addition to adversely impacting on stevedores' revenues and costs, the industrial actions are causing damage to many Australian businesses that are not parties to the industrial dispute. Market participants informed the ACCC that supply chain disruptions have increased significantly over the past few years and that industrial action was one of the major causes of these disruptions. Market participants have stated that these disruptions have caused considerable delays, higher costs, and loss of business.*

A survey undertaken by Ai Group in 2021 as part of the *State of Play* report on supply chain pressures revealed that two thirds of businesses were hit by supply chain chaos in 2021 and more than half expected that disruption to continue. The Australian economy cannot afford further unnecessary supply chain disruptions during the recovery from the pandemic.

Intersection between competition laws and workplace laws

The boundary line between competition laws and workplaces laws has been inappropriately drawn and we urge the Productivity Commission to recommend necessary changes in this area, given that this issue is impeding productivity in the maritime logistics system.

[28] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), pp. 66 and 67.
[29] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 67
[30] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 67.

Section 45E of the *Competition and Consumer Act 2010* (Cth) (CC Act) prohibits the making of a contract or arrangement or the arriving at an understanding with an organisation of employees, or an officer thereof, which contains a provision that has the purpose of:

- preventing or hindering supply or continuation of the supply of goods or services to a second person that the first person has been accustomed, or is under an obligation, to supply, or doing so subject to conditions; or

- preventing or hindering acquisition or continuation of the acquisition of goods or services to a second person that the first person has been accustomed, or is under an obligation, to supply, or doing so subject to conditions.

Section 45EA of the CC Act prohibits a person giving effect to such provisions.

Sections 45E and 45EA were included in the *Trade Practices Act 1974* (Cth) by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). The explanatory memorandum to the Act provided:

> *New section 45E prohibits a person making an agreement with a union for the purposes of preventing or hindering trade between that person and another person (the target). New section 45E is directed at situations where a person capitulates in order to avoid loss or damage as a result of threatened industrial action against the target. It complements sections 45D and 45DA, ensuring that the prohibition on secondary boycott action is not weakened by collusion between firms and unions.*

The CC Act (and the *Corporations Act 2001*) should govern relations between two or more businesses and should ensure that unions cannot block or impede supply and acquisition between businesses. The CC Act should only contain reasonable exemptions for anti-competitive practices permitted by workplace laws; not excessively broad exemptions which permit highly anti-competitive arrangements to be imposed on businesses.

The *Fair Work Act 2009* (FW Act) should not govern the relations between businesses. This Act should govern the relations between employers and employees. It should not give rights to unions or employees which have the effect of blocking or impeding supply and acquisition between businesses.

Provisions in industrial instruments which prevent or hinder the acquisition or supply of goods or services between two businesses need to be prohibited under the CC Act and the FW Act.

In *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 ("The ADJ Contracting Case") the Full Federal Court dismissed Ai Group's application for judicial review of a decision of a Full Bench of Fair Work Australia (now the Fair Work Commission (FWC)). The case related to whether a number of clauses in a union pattern agreement negotiated

between the Communications, Electrical and Plumbing Union (CEPU) and the National Electrical and Communications Association (NECA) were unlawful under the FW Act and the CC Act.

Amongst other arguments, Mr Stuart Wood QC on behalf of Ai Group argued that compliance with a clause in the pattern agreement which imposed very substantial restrictions on the engagement of contractors (including contracting firms) would breach section 45EA of the CC Act. We argued that:

- The enterprise agreement made between ADJ Contracting Pty Ltd and the CEPU operated as an arrangement or understanding, within the meaning of sections 45E and 45EA of the CC Act; and

- At least one of the purposes of the arrangement or understanding was to prevent or hinder ADJ Contracting from acquiring services from existing contractors.

In rejecting Ai Group's arguments, Justices North, McKerracher and Reeves held: (Emphasis added)

CLAUSE 4.3(B)(V) CONTRAVENTION OF THE CC ACT (GROUND 4 AND GROUND 5)

68. AIG argues that compliance with the First Impugned Clause might in terms of s 192 of the FW Act result in a person, namely, ADJ or the CEPU being liable to pay a pecuniary penalty in relation to a contravention of s 45EA of the CC Act. FWA fell into jurisdictional error, AIG says, in concluding that the Agreement and the conduct antecedent to the approval should not 'be considered [or 'categorised as'] an arrangement or understanding in terms of the CC Act' because 'the making of an enterprise agreement does not comfortably fit within the terms of s 45E'. Section 45E of the CC Act is directed towards preventing union conduct through exercise of significant power from threatening companies dealing with other companies who do not possess the qualities that the union seeks or requires. AIG says the First Impugned Clause contains such a provision. AIG contends that both the First Impugned Clause and the conduct antecedent to the inclusion of the clause in the Agreement amounted to making an unlawful arrangement or reaching an unlawful understanding within the meaning of s 45E of CC Act.

69. Regardless of the intricacies of supply and acquisition on which there is no specific evidence, <u>the argument for AIG fails at five levels:</u>

- *<u>First, the Agreement itself is not with a union in the s 45E sense.</u>*

- *<u>Secondly, the Agreement has statutory force – it is not the consensual type of agreement, arrangement or understanding to which the CC Act is</u>*

directed.

- *Thirdly, s 192 of the FW Act is concerned with agreements not arrangements or understandings.*
- *Fourthly, the Agreement is not an arrangement or understanding with CEPU.*
- *Fifthly, there is no evidence of CEPU's involvement in the antecedent conduct which could suffice to establish the elements of s 45E of the CC Act.*

70. *To expand on these points a little, for this argument to succeed, AIG must overcome the difficulty of the absence of evidence. AIG does not and cannot contend that a contract with CEPU arose by ADJ agreeing to the Agreement. It relies upon the fact that ADJ and the CEPU 'would have to have made' an arrangement or at least reached an understanding as to those terms so as to give rise to creation of the Agreement. But there is no cogent evidence of this.*

71. *In any event, s 192(1) of the FW Act deals with the consequences of a failure to comply with the terms of an 'agreement'. It is not dealing with compliance with any anterior arrangement or understanding as that is known for the purposes of the CC Act.*

72. *Further, not only is the Agreement not an agreement with a union for the purpose of s 45E of the CC Act (which AIG concedes), but it cannot operate in itself as an arrangement or understanding. The Agreement has statutory force. It is neither a contract, arrangement or understanding within the meaning of the CC Act, but a creature of statute. The anterior process of negotiation is not the reaching of an agreement or understanding for the purpose of s 45E of the CC Act.*

73. *The AIG argument that the statutory instrument is less binding and less formal than a formal contract (and therefore an agreement or understanding) must also be rejected. The statutory instrument has more formality and greater consequence than any contract arrangement or understanding could have. Sanctions for its breach are greater and apply to persons whether they voted for it or not, whether they were in the relevant employment at the time when it was approved and even if they were completely unaware of its existence.*

74. *As to s 45EA of the CC Act, the argument necessarily fails if the argument under s 45E fails. As s 45E is not contravened, s 45EA cannot be breached.*

75. *AMMA also raised an additional ground of review not raised by AIG in relation to potential contravention of s 45 of the Building Construction Industry*

*Improvement Act 2005 (Cth) (**the BCII Act**). This argument was raised before the Full Bench and rejected. At [44] of the majority decision, Senior Deputy President Harrison and Commissioner Roe said (endnotes omitted):*

> *[44] AMMA raised a challenge to clause 4.3(b)(v) which it conceded was not raised before Her Honour. It submitted that compliance with the clause may result in ADJ being liable to pay a pecuniary penalty under the Building and Construction Industry Improvement Act 2008 (sic) for a contravention of s.45 of that act. The submission has little immediate attraction. It is not at all clear how compliance with the clause would constitute an act of discrimination as provided for in s.45(1)(a)(i) or (ii). Compliance with the clause requires no consideration to be given to the kind of industrial instrument covering the contractor nor which person the industrial instrument is made with. This is not a matter raised by the grounds of appeal and we are not inclined to consider it further. The point was not developed in any detail and it is relevant to note does not appear to have been raised below by the Australian Building and Construction Commissioner (ABCC) who appeared before Her Honour. The challenge made by the ABCC to clause 4.3(b)(v) was referable to s.354 of the FW Act and was dismissed by Her Honour at paragraphs 29 and 30 of her decision.*

76. The Full Bench was correct to reject this submission for the reasons it did. Section 45 of the BCII Act relevantly prohibits discrimination on the basis of a person's employees not being covered by a particular kind of industrial instrument or industrial instrument made with a particular person. The operation of the First Impugned Clause does not contain any discriminatory content within any of the reasons set out in s 45 of the BCII Act.

77. Each of these grounds for AIG and AMMA must be dismissed.

There is no logical reason why a less formal arrangement or understanding entered into by a union which prevents or hinders supply or acquisition of goods or services between businesses should be outlawed under sections 45E and 45EA but an enterprise agreement negotiated by a union should not.

Provisions in enterprise agreements which prevent or hinder a business in acquiring goods or services from, or supplying goods or services to, another business should be outlawed including, for example:

- Clauses which impose restrictions on the engagement of independent contractors (including contracting firms);

- Clauses which impose restrictions on the engagement of labour hire firms or conditions on the engagement of labour hire workers;

- Clauses which impose restrictions on particular types of supplies or suppliers (e.g. a requirement that Australian-made supplies must be used); and

- Clauses which nominate particular suppliers of products or services (e.g. costly income protection insurance products offered by insurance providers which pay large commissions to unions, e.g. PROTECT, which the MUA promotes).

Enterprise agreement provisions which restrict or hinder the supply and acquisition of goods and services are common in the maritime logistics industry, as highlighted in the ACCC Report:

> ***Recruitment decisions:*** Some stevedores must initially offer any promotional opportunities internally and are only allowed to make offers to external candidates in the absence of an adequate internal candidate. Some stevedores are required to consult with the Maritime Union of Australia (MUA) or apply criteria agreed with the MUA when conducting recruitment. These provisions can foster skill mismatches and reduce the ability of management to hire the most qualified person for the job.
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> ***Outsourcing of labour****: Some EAs have highly restrictive clauses on outsourcing labour, particularly with respect to performing some preventative and corrective maintenance tasks on terminal container handing equipment and infrastructure. Good management practice would normally involve a case-by-case assessment of the viability of contracting out, by comparing the benefits and costs of alternative providers. The restriction to contracting out decreases pressure on permanent employees to be competitive with contractors, thereby reducing workplace performance.*

For example, stevedoring businesses are not free to engage labour through a recruitment business or a labour hire firm, or to outsource work to other businesses.

In 2014-15, the Commonwealth Treasury undertook its Competition Policy Review (Harper Review). The final report noted the outcome in the ADJ Contracting Case and stated:[31]

> *It appears that there may be a conflict between the purposes of the CCA, as reflected in sections 45E and 45EA, and the industrial conduct permitted under the Fair Work Act. The apparent purpose of subsection 51(2) and sections 45E and 45EA is to exempt from the CCA contracts governing the remuneration, conditions of employment, hours of work or working conditions of employees, while prohibiting*

[31] Competition Policy Review (Final Report) March 2015, pp. 393 – 396.

contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors).

However, it appears to be lawful under the Fair Work Act to make awards and register industrial agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

Although the evidence suggests that these issues are more significant in some industries than others, it is desirable that the apparent conflict between the objective of sections 45E and 45EA and the operation of the Fair Work Act be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour if they choose.

…

The Panel considers that collective bargaining in respect of the remuneration, conditions of employment, hours of work or working conditions of employees should continue to be exempt from the application of the CCA, as reflected in paragraph 51(2)(a).

However, the Panel does not support expanding these categories. Collective bargaining should not intrude on the freedom of companies to acquire goods or services, including labour services, from other contractors, or their freedom to supply goods or services to others.

Accordingly, the Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent that the awards and industrial agreements deal with the remuneration, conditions of employment, hours of work or working conditions of employees. Such an amendment would preserve the integrity of the current exception in paragraph 51(2)(a), while protecting the trading freedom of employers outside the scope of that exception.

With that change to the CCA, it would become necessary for the Fair Work Commission to consider whether a proposed award or industrial agreement may potentially fall within the scope of sections 45E and 45EA. The Panel considers that the ACCC should be given the right to intervene (that is, to be notified, appear and be heard) in proceedings before the Fair Work Commission concerning compliance with sections 45E and 45EA. From a practical standpoint, this would require a protocol to be established between the ACCC and the Fair Work Commission. This would allow the Fair Work Commission to identify potential non-employment restrictions in lodged applications and notify the ACCC accordingly.

Also, the Panel observes that sections 45E and 45EA are presently framed in narrow terms. The prohibition only applies to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. As framed, the prohibition would not apply to a restriction in relation to any contractor with whom the employer had not previously dealt.

Given the findings and recommendations of the Panel in the Harper Review and the continuing issues which result from an absence of effective prohibitions on industrial agreements that stifle competition, including in the maritime logistics industry, the following legislative amendments should be made:

- Sections 45E and 45EA of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business falls within these sections.

- Paragraph 51(2)(a) of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business does not fall within the exemption in this section.

- Section 194 of the FW Act should be amended to ensure that clauses in enterprise agreements which prevent or hinder a business in acquiring goods or services from, or supplying goods or services to, another business are "unlawful terms".

These changes would overcome the limitations identified by the Full Court of the Federal Court in the ADJ Contracting Case.

Ai Group also agrees with the Harper Review Panel recommendation that a procedural right be given to the ACCC to be notified by FWC of proceedings for the approval of enterprise agreements which contain restrictions of the kind referred to in sections 45E and 45EA, and that a right be given to the ACCC to intervene and make submissions. The ACCC's views on the correct interpretation of the CC Act would carry great weight and the ACCC's intervention in relevant proceedings for the approval of enterprise agreements would assist the FWC to identify those agreements that contain terms that could result in a breach of the CC Act.

ACCC intervention would also have the wider, preventative benefit of sending a clear message to industrial parties that they need to ensure that the enterprise agreements which they negotiate do not contain terms which would lead to breaches of the CC Act.

Section 192 of the FW Act provides that the FWC *may* refuse to approve an enterprise agreement if the FWC considers that compliance with the terms of the agreement may

result in a person committing an offence against a law of the Commonwealth or being liable to pay a pecuniary penalty under such a law. To date, section 192 has been rarely used, but this most likely would change if the Panel's recommendation was implemented. Section 192 was inserted in the *Fair Work Bill 2008* in response to strong objections by Ai Group and other industry representatives about the abolition of the previous prohibition on enterprise agreement terms that restricted the engagement of contractors and labour hire and the section was no doubted drafted with the CC Act in mind.

In order to ensure that these recommendations can be implemented effectively, the ACCC needs to be appropriately resourced to enable intervention in FWC proceedings in appropriate cases.

The restrictive and uncompetitive conditions which are routinely bargained for in the maritime logistics sector indicate the urgency of legislating for these necessary reforms.

Restrictive and unproductive provisions in enterprise agreements

The ACCC Report identifies the extremely restrictive and unproductive provisions in the enterprise agreements that apply to the stevedoring companies in areas including:

- The recruitment of new employees;
- The order in which employees must be engaged to work on particular shifts;
- The allocation of work to employees;
- The outsourcing of labour; and
- The efficient utilisation of equipment.

The ACCC Report referred to a number of common restrictive provisions in stevedores' enterprise agreements:[32]

> ***Recruitment decisions****: Some stevedores must initially offer any promotional opportunities internally and are only allowed to make offers to external candidates in the absence of an adequate internal candidate. Some stevedores are required to consult with the Maritime Union of Australia (MUA) or apply criteria agreed with the MUA when conducting recruitment. These provisions can foster skill mismatches and reduce the ability of management to hire the most qualified person for the job.*
>
> ***The order of engagement****: Most EAs contain provisions (also known as the 'order of pick') that specify the order in which different types of employees are engaged for a*

[32] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 65.

shift. The order of engagement constrains management's ability to make the most effective use of the workforce, thereby reducing productivity and, in turn, timeliness and reliability.

***Employee allocation**: A number of EAs have highly restrictive employee allocation clauses with respect to employee shift start, notification and cancellation times. Stevedores lack labour flexibility to enable optimisation and minimisation of 'idle' person-hours or 'waste', which means stevedores have to carry excess labour when volumes are low. This type of restriction can be expensive, disruptive and counterproductive.*

***Outsourcing of labour**: Some EAs have highly restrictive clauses on outsourcing labour, particularly with respect to performing some preventative and corrective maintenance tasks on terminal container handing equipment and infrastructure. Good management practice would normally involve a case-by-case assessment of the viability of contracting out, by comparing the benefits and costs of alternative providers. The restriction to contracting out decreases pressure on permanent employees to be competitive with contractors, thereby reducing workplace performance.*

The ACCC Report also provided examples of enterprise agreements that create onerous processes in relation to technology adoption and which make it very difficult for stevedores to make full use of their equipment:[33]

For example, the FACT EA does not preclude technology adoption and automation of production processes. However, the conditions in 'Introduction of Change' and 'Automation' clauses could be viewed as administratively onerous, particularly with respect to employee consultation, involvement, and impact mitigation.

…

For example, while Patrick has 8 ship-to-shore cranes installed at Port Botany, labour constraints limit it to staffing only 5 to 6 of these at a time. This limits the extent to which it can deploy its cranes when multiple vessels are at berth.

Patrick is similarly constrained from flexibly rostering staff across different shifts. It is uneconomical to employ sufficient permanent staff to operate all cranes at all times, but Patrick is unable to employ further staff on a flexible basis to allow it to operate additional cranes to meet peak load as, and when, required. Even though Patrick has made considerable investment in enhancing crane capabilities, restrictive labour constraints limit Patrick's ability to effectively utilise its cranes to meet peak demand.

[33] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 66.

The following examples extracted from *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* provide examples of the types of highly restrictive, unproductive and inappropriate provisions in enterprise agreements which apply on the waterfront:[34]

8. TECHNOLOGICAL CHANGE

8.1 When the Company has made a definite decision to implement automation and/or technology or mode change, the Company will communicate the decision to the Parties to this Agreement in accordance with Clause 7 of this Agreement.

8.2 The Parties will then immediately commence discussions regarding the implementation of automation and/or technology or mode change. The discussions will commence no later than twelve (12) months in advance of the scheduled go live date. If any form of automation and/or technology or mode change is implemented over a period of less than twelve (12) months, the timeframe of twelve (12) months may be shortened by agreement between the Parties.

8.3 The Parties will:

8.3.1 Negotiate in good faith with respect to the application of any roles, tasks and classifications to be included in the Agreement arising out of the implementation of automation and/or technology or mode change.

8.3.2 Refer not agreed matters as to the coverage of the Agreement to the HPA CEO and MUA National Secretary who will make a final decision on non-agreed matters.

8.4 No Employee shall be made redundant due to the implementation of automation and/or technology or mode change. This undertaking will apply to Employee numbers at the time of the implementation of automation and/or technology or mode change and will not exceed:

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8.5 To ensure ongoing work for all existing Employees, hours of work will be reduced for each Employee to such an extent that all Employees shall be sustainably employed on adjusted hours and salaries for those reduced hours of work without reduction of the Ordinary Rates of Pay applicable in Clause 16.6.

[34] ACCC, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 66.

8.6 Notwithstanding the obligation of Clause 8.4 and Clause 8.5 above, the Parties acknowledge that changes may be needed to address the requirements of the business. To facilitate this process, the Parties shall refer to Clause 40.

8.7 Automation and/or technology or mode change will be implemented in a cooperative and transparent fashion.

8.8 Nothing in this Clause shall prevent the Company from developing, preparing and/or implementing technological change once a definite decision has been made as long as the processes in this clause have been fully applied and adhered to.

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10. RECRUITMENT AND PROMOTION

Recruitment

10.1 Vacancies, including promotional and permanent level appointment opportunities as they arise, will be filled by trained and suitable people within the business, where available.

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10.4 Appointment of positions covered by this agreement will be undertaken on the basis of:

10.4.1 40% of appointments from family and friends of employees covered by this agreement

10.4.2 30% appointments from the MUA

10.4.3 30% appointments from Hutchison.

An effective way of addressing the extreme restrictions in waterfront enterprise agreements that drive up costs for the whole community, would be through a Ports and Shipping Industry Code (PSI Code) that addresses enterprise agreement content. The Code could be created through amendments to the FW Act.

The FW Act already provides for a Code for Outworkers in the Clothing Industry (s.789DA) and a Small Business Fair Dismissal Code (s.388). In addition, the Act already contains some industry-specific prohibitions on enterprise agreement content that apply to emergency management bodies, namely that agreements which apply to these bodies cannot include provisions that restrict or limit the ability of a body to engage or deploy its volunteers (s.195A). Therefore, there is no reason why the Act cannot contain industry-specific

prohibitions on enterprise agreement content in the Maritime and Ports Industry to enable stevedores to reasonably manage their businesses and to enable businesses to move their products through ports efficiently and at a reasonable cost.

The PSI Code should include prohibitions on agreement provisions that impose inappropriate restrictions. The list of prohibited content contained in section 11 of the *Code for the Tendering and Performance of Building Work 2016* (Building Code) should act as an appropriate guide for the development of prohibited content in the PSI Code. Prohibitions on agreement clauses which attempt to avoid the requirements of the PSI Code should also be included, similarly to section 11A of the Building Code.

The proposed PSI Code should be complimented by necessary amendments to the FW Act including:

- An amendment requiring the Minister for Industrial Relations to make the PSI Code.
- An amendment to section 186 providing that an enterprise agreement that did not comply with the Code would be unable to be approved.
- An amendment to section 253 providing that terms contained in enterprise agreements that do not comply with the Code are of no effect.
- The inclusion of a civil penalty provision for body corporates and individuals who contravene the Code.
- The inclusion of a transitional provision enabling parties to apply to the FWC for assistance in resolving uncertainties and difficulties about the interaction between existing enterprise agreements and the requirements of the Code (similar to clause 45 in Schedule 1 of the Act which applies in respect of the recent casual employment amendments to the Act).

It is essential that any PSI Code not permit parties to make unregistered 'side-deals' which circumvent the Code. This could be achieved by including within the PSI Code a prohibition on making, implementing or bargaining for an agreement that will not be approved under the FW Act, and which deals with matters that would not be permitted if the agreement was an enterprise agreement. This is the approach that is taken in the Building Code.

A national Code has existed in the building and construction industry since 1997 with the commencement of the Commonwealth-State-Territory National Code of Practice for the Construction Industry. In 1998, the Code was supplemented by *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry*, the application of which was limited to Commonwealth projects. The original Code and Guidelines were introduced as reforms aimed at complementing the objectives of the *Workplace Relations Act 1996* (Cth). The Royal Commission into the Building and

Construction Industry recommended that the Commonwealth, by its leadership, act to invigorate the Code and Guidelines and extend their application.[35] The original Code and Guidelines were also considered by the Honourable Murray Wilcox QC, who was appointed by the then Labor Government to undertake consultations surrounding the creation of a specialist division for building and construction work within Fair Work Australia (now the FWC). The Wilcox Report considered it desirable to retain the Code and Guidelines as an adjunct to the statutory provisions governing conduct in the industry.[36] In making his recommendations, Wilcox QC accepted that there had been a modest increase in building industry labour productivity in the years leading up to the report and attributed part of that increase to improved on-site industrial relations.[37]

The *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) provided for a code of practice to be issued by the relevant Minister to be complied with by persons in respect of building work. The current *Code for the Tendering and Performance of Building Work 2016* added upon the obligations of code-covered entities and increased the reporting requirements of building industry participants covered by the Code.

The Building Code, under its various iterations has been an effective tool in promoting industrial harmony and improving productivity in the building and construction industry.

An appropriate regulator to administer and enforce the proposed PSI Code

Given that the legislative source for the PSI Code is proposed to be the FW Act, the logical regulator with responsibility for its enforcement would be the FWO.

The FWO is established under Part 5-2 of the FW Act and has functions which include:

- Promoting harmonious, productive and cooperative workplace relations and compliance with the FW Act and fair work instruments;
- Monitoring compliance with the FW Act and fair work instruments;

[35] Commonwealth, Royal Commission into the Building and Construction Industry, Final Report (2003) p 64.
[36] Commonwealth, *Transition to Fair Work Australia for the Building and Construction Industry Report* (2009) p 87.
[37] Commonwealth, *Transition to Fair Work Australia for the Building and Construction Industry* (2009) p 58.

- Inquiring into, and investigating, any act or practice that may be contrary to the FW Act, a fair work instrument or a safety net contractual entitlement;

- Commencing proceedings in a court, or making applications to the FWC, to enforce the FW Act, fair work instruments and safety net contractual entitlements;

- Referring matters to relevant authorities;

- Representing employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under the FW Act or a fair work instrument, if the FWO considers that representing the employees or outworkers will promote compliance with the FW Act or the fair work instrument; and

- any other functions conferred on the FWO by any Act.

Importantly, paragraph 683(1)(g) of the FW Act indicates an assumption that future legislation may confer further powers upon the FWO.

The FWO is highly proactive in fulfilling its compliance and monitoring functions. In its 2020/21 Annual Report, the FWO stated that in that reporting period, as part of its proactive compliance activities, it investigated 874 workplaces and recovered $5,837,773 in unpaid wages.[38] The FWO possesses relevant expertise to fulfil the functions which would be necessary to act as the relevant regulatory body for the PSI Code. The FWO regularly undertakes industry-specific compliance activities e.g. in the retail and hospitality industries.

We note that the Australian Building and Construction Commission (ABCC) is currently undertaking certain compliance and monitoring functions on the waterfront as part of its powers to investigate contraventions of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act). In February this year, it was reported that that the ABCC was investigating whether unlawful picketing occurred in 2021 during a dispute involving the MUA on the docks in Fremantle.[39] The ABCC's involvement in this matter is partly dependent upon whether its powers extend to the waterfront owing to:

- A maritime port or terminal facility being a "building site" for the purposes of the BCIIP Act;

- A maritime port or terminal facility being an "ancillary site" for the purposes of the BCIIP Act.

[38] Fair Work Ombudsman, *Annual Report 2020/21* p. 12.
[39] Workplace Express, 'ABCC seeks to widen its ambit' (2 February 2022).

Conduct of the MUA

The restrictive work practices that exist on the waterfront are due in large part to the activities of the MUA.

The MUA has a long track record of taking action to prevent automation, improved rostering and improved labour deployment. It also exerts a great deal of influence over the employees who are recruited to work on the waterfront.

The MUA routinely refuses to meaningfully re-negotiate enterprise agreements until they have expired, exposing the employers and the community to crippling industrial action.

The MUA (and the broader CFMMEU, which it is a part of) have frequently engaged in unlawful action in order to achieve its aims.

In December 2018, the MUA was fined $125,000 for breaching a 100m exclusion order at the Webb Dock site.[40] McDonald J of the Victorian Supreme Court described the conduct as "contumacious" and involved "deliberate defiance of a court order".[41] A clear indication of the disregard with which the MUA treats the rule of law is found in the following extract from McDonald J's Decision:[42]

> *The MUA made a calculated decision that its industrial interests in its dispute with VICT would be well served by defying the orders of the Supreme Court of Victoria. I infer that this decision was made by the three officials, confident that the union would readily be able to meet the expense of any penalty imposed by the Court. I infer that the MUA made a calculated decision that the risk of financial penalty for engaging in conduct in contempt of court was simply a cost of doing business.*

In February 2021, the MUA notified proposed strike action at the Port of Melbourne's then new "robo-terminal" - the Victoria International Container Terminal (VICT) in favour of what the VICT chief executive characterised as a seven-hour "manual labour roster" in place at other stevedores.[43] VICT claimed at the time that the MUA claim would have raised the total cost of employment at VICT by 117% (more than $119 million), thereby making the operation unviable.

[40] *VICT v CFMMEU* [2018] VSC 794, [42].
[41] *VICT v CFMMEU* [2018] VSC 794, [10].
[42] *VICT v CFMMEU* [2018] VSC 794, [43].
[43] Workplace Express, 'First protected strike next week at robo-dock" (9 February 2021).

In June 2021, the MUA planned to launch over a week of strike action at the Port of Melbourne merely a few days after the city emerged from lockdown restrictions.[44]

The dispute at the Port of Melbourne lasted from 2017 to 2021. Eventually, a deal was reached which prompted VICT to drop a $80 million damages claim against the MUA over a picket in 2017.[45]

In June 2021, the MUA initiated strike action in the form of a 24 hour stoppage at Fremantle Ports.[46] Despite the desperate situation faced by many businesses during the ongoing pandemic, the MUA WA branch secretary stated that the stoppage and related protests were aimed at "bringing the dispute to a head".[47] The union also acknowledged that other Fremantle port users such as BGC and Cockburn Cement, had been impacted by the dispute.[48] The strike action forced Mineral Resources to divert iron ore carriers more than 1,000km to Esperance.[49]

The MUA also organised industrial action at tugboat operator Svitzer in July 2021.[50] The industrial action prevented ships carrying supplies from entering the ports. This was despite deckhands on tugboats reportedly earning $130,000 per year on a 26 week per year roster.[51] The industrial action followed Svitzer attempting to remove unreasonable conditions in their enterprise agreement which mandated payment to casuals and re-called permanent employees of a full-day's work at 100% loading for just two hours' work and to amend the fixed crew levels which added substantial costs.[52]

Indicative of the MUA's militant and unreasonable approach, the union initially refused to enter discussions with Svitzer. The following public comments were made by then MUA President Christy Cain:[53]

> *They've attacked us, and we're going to f---ing attack them… So now it's on. We're going to be moving from port to port to port, from Melbourne to Sydney to Fremantle to Newcastle coal terminals to Adelaide to Port Kembla… All around this country. We're in a f---ing blue until we get a proper union agreement signed off with what we deserve… we're not going to miss Maersk either … They will be missing their f---ing windows because they have put us to task. Every Maersk ship that comes into Australia will be getting 24 [hour bans], 24 and 24.*

[44] Australian Financial Review, 'Victoria to face port strikes just as lockdown ends' (9 June 2021).
[45] Workplace Express, 'Landmark union deal for Melbourne robo-terminal' (1 July 2021).
[46] Australian Financial Review, 'Iron ore carriers diverted as strike action hits WA port' (24 June 2021).
[47] Australian Financial Review, 'Iron ore carriers diverted as strike action hits WA port' (24 June 2021).
[48] Australian Financial Review, 'Iron ore carriers diverted as strike action hits WA port' (24 June 2021).
[49] Australian Financial Review, 'Iron ore carriers diverted as strike action hits WA port' (24 June 2021).
[50] Australian Financial Review, 'Maersk ships targeted as port strikes escalate' (12 July 2021).
[51] Australian Financial Review, 'Maersk ships targeted as port strikes escalate' (12 July 2021).
[52] Australian Financial Review, 'Maersk ships targeted as port strikes escalate' (12 July 2021).
[53] Australian Financial Review, 'Maersk ships targeted as port strikes escalate' (12 July 2021).

In the context of a dispute with Qube Holdings, the MUA was accused, in September 2021 of targeting international shipping lines with black bans if they continued with the stevedore.[54] Although MUA WA secretary Will Tracey denied the accusation at the time, he made the following comments:[55]

> *There may well be, at various ports around the world, a reaction to Wilhelmsen using scabs at Fremantle… That could quite possibly be the case. That's something that probably the international dockers' community don't take too well to.*

Shortly after those statements were made, a union picket at Fremantle prevented ships from unloading farm machinery which was necessary to capitalise on Western Australia's 'bumper harvest'.[56] Unionists refused to cross a picket line to service ships owned by Qube's largest customer Wallenius Wilhelmsen.[57] A Wilhelmsen vessel carrying the essential farm machinery was ultimately forced to leave the port with its cargo still on board.[58] At the time, Qube director Michael Sousa said that a Qube port worker in Fremantle earned on average $139,500 a year for 169 days of work.[59] Wallenius Wilhelmsen stopped calling into Fremantle due to the industrial action after having to divert three ships at significant cost.[60] Wholesalers were forced by the action to transport cargo overland back to Western Australia from other States.[61]

In October 2021, the Western Australian Government wrote to the FWC requesting it to deal with the dispute on its own initiative and referred to the capacity for the FWC to end industrial action if it threatens a significant part of the economy.[62] At the time, the WA Ports Minister said that the action was " causing substantial delays in unloading vessels at Fremantle Port, and consequently resulting in significant disruption to the WA economy".[63] The Minister said that WA Government was particularly concerned by the impact of port delays on specific industries in the state, including the agricultural, mining and construction sectors and that the Government was " very keen to ensure that our COVID economic

[54] Australian Financial Review, Wharfies union accused of threatening shipping line with black bans' (14 September 2021).
[55] Australian Financial Review, Wharfies union accused of threatening shipping line with black bans' (14 September 2021).
[56] Australian Financial Review, 'Union picket at Fremantle forces ships to turn away' (1 October 2021).
[57] Australian Financial Review, 'Union picket at Fremantle forces ships to turn away' (1 October 2021).
[58] Australian Financial Review, 'Union picket at Fremantle forces ships to turn away' (1 October 2021).
[59] Australian Financial Review, 'Union picket at Fremantle forces ships to turn away' (1 October 2021).
[60] Australian Financial Review, 'Wharfies forced to isolate as union launches Melbourne port strikes' (4 October 2021).
[61] Australian Financial Review, 'Wharfies forced to isolate as union launches Melbourne port strikes' (4 October 2021).
[62] Australian Financial Review, 'Strikes continue at Fremantle Port after WA govt failed to show up' (13 October 2021).
[63] Australian Financial Review, 'Strikes continue at Fremantle Port after WA govt failed to show up' (13 October 2021).

recovery in WA is not negatively impacted by this dispute".[64]

The MUA only terminated its three months of strike action after the Federal Industrial Relations Minister, Senator Michaelia Cash, announced an intention to intervene.[65] Minister Cash expressed concerns that "critical supplies" to the construction and mining industries would be impacted by the strikes and referred to financial harm being caused to the Western Australian economy, damage to the reputation of Fremantle Port and the risk to jobs.[66] At the time, the construction industry in Western Australia was warning that the residential sector was in danger of "grinding to a halt" due to a shortage of building materials.[67] By the time the strike came to an end, seven ships in ten days had been forced to divert their cargo to Adelaide and Melbourne and shipping lines were no longer taking bookings at the port.[68] Despite the return to work, Qube referred to ongoing obstructive behaviour that was threatening its operations such as record absenteeism and a drop in productivity.[69] A new workplace deal was reached between the MUA and Qube in October 2021 after the strike action had reportedly cost employees more than a million dollars in lost wages.[70]

The MUA's industrial action across the country initially threatened to cause months of delays in the lead up to Christmas last year as workers went on strike in favour of more pay and control of recruitment in Sydney and Melbourne. This was despite both ports already experiencing shutdowns due to the pandemic. In September 2021, Patrick Terminals stated that the port disruption had to date involved almost 200 notifications and cost more than $15 million in revenue, decreasing its market share from 48% to 43%.[71] At the time, industrial action had caused wait times for container ships of 18 days to berth in Sydney, 9 days in Melbourne, 8 days in Brisbane and 3 days in Fremantle.[72] Wharf workers in Sydney were paid, at the time, an average of $172,000 on a 35 hour roster and worked less than 200 days in a year.[73] One of the key provisions sought by the MUA in the context of its dispute with Patrick Terminals was the requirement that the company hire family and friends of existing employees, similar to an equivalent clause negotiated with Hutchison Ports earlier the same year.[74] Existing provisions governing recruitment at Patrick Terminals

[64] Australian Financial Review, 'Strikes continue at Fremantle Port after WA govt failed to show up' (13 October 2021).
[65] Australian Financial Review, 'MUA suspends Fremantle Ports strikes ahead of federal intervention (15 October 2021).
[66] Workplace Express, 'Cash seeks to end protracted Qube bargaining dispute' (15 October 2021).
[67] Australian Financial Review, 'MUA suspends Fremantle Ports strikes ahead of federal intervention (15 October 2021).
[68] Australian Financial Review, 'MUA suspends Fremantle Ports strikes ahead of federal intervention (15 October 2021).
[69] Workplace Express, 'Record absenteeism as port strike halted, says Qube'. (19 October 2021).
[70] Australian Financial Review, 'Wharfies reach peace deal in Fremantle dock war' (29 October 2021).
[71] Australian Financial Review, 'Port strikes threaten to cripple Christmas' (27 September 2021).
[72] Australian Financial Review, 'Port strikes threaten to cripple Christmas' (27 September 2021).
[73] Australian Financial Review, 'Port strikes threaten to cripple Christmas' (27 September 2021).
[74] Australian Financial Review, 'Wharf strike over family and friends hiring' (27 September 2021).

have been reported as involving the union withdrawing agreement to staffing decisions if management does not utilise a list of preferred applicants which generally include family and friends.[75]

The MUA's strikes at Patrick Terminals in Melbourne continued despite the company being forced to isolate up to 20% of its Melbourne workforce due to a COVID-19 case.[76]

Shortly after Patrick Terminals initiated an attempt to terminate its current enterprise agreement, the MUA announced a further strike at Fremantle Port, imposing indefinite work bans on mooring and unmooring ships operated by Japanese owned Ocean Network Express.[77] The bans threatened retail imports in the lead up to Christmas and fruit and vegetable exports to South-East Asia. Patrick Terminals was expected to be the worst hit as it serviced most of Ocean Network Express' vessels.[78] Each day of delay was estimated to cost shipping lines $60,000.[79]

The MUA ultimately withdrew its strike action against Patrick Terminals in early November 2021 after the company applied to the FWC to terminate the action under section 424 of the FW Act due to its "threat to the economy".[80]

The Federal Court has recognised the vulnerabilities of maritime logistics sector to industrial action. In a decision regarding appropriate penalties for unlawful bans at the Port Botany container terminal in 2017, Justice Michael Lee ordered the MUA to pay $2 million in compensation to Patrick and Qube, Lee J said:[81]

> *…given the tight turnarounds for shipping containers to maximise productivity, it is easy to conceive of even small disruptions having large impacts on the business.*

Negotiations for enterprise agreements on the waterfront are commonly protracted and involve rolling strike action. Of the main stevedores referred to in the ACCC Report, the longest periods of dispute in the latest rounds of bargaining involved Hutchison (971 days), DP World (728 days) and Patrick (488 days).[82] The Report noted that it appeared that during each of those negotiations, the MUA used industrial action to demand that stevedores

[75] Australian Financial Review, 'Wharf strike over family and friends hiring' (27 September 2021).
[76] Australian Financial Review, 'Wharfies forced to isolate as union launches Melbourne port strikes' (4 October 2021).
[77] Australian Financial Review, 'MUA wharf strike threatens to spoil Christmas' (27 October 2021).
[78] Australian Financial Review, 'MUA wharf strike threatens to spoil Christmas' (27 October 2021).
[79] Australian Financial Review, 'MUA wharf strike threatens to spoil Christmas' (27 October 2021).
[80] Australian Financial Review, 'Union agrees to ceasefire in docks war' (10 November 2021).
[81] Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 4) [2021] FCA 1481, [47].
[82] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 67.

accept restrictive provisions.[83]

The ACCC Report referred to industrial action at Patrick having a substantial negative impact on third parties. For example, industrial action at Patrick Terminals in 2021 resulted in added freight handling charges for Australian farmers and exporters.[84]

We urge the Productivity Commission to recommend industry-specific reforms aimed at safeguarding stevedores and the broader economy from the unreasonable union conduct that the MUA frequently engages in.

The Stevedoring Industry Award

The enterprise agreement problems referred to above are compounded by the antiquated provisions of the so-called modern *Stevedoring Industry Award 2020* (Stevedoring Industry Award). The Award is in urgent need of modernisation to align with the manner in which ports need to operate.

The Award covers the 'stevedoring industry', defined in clause 4.2 to mean "the loading and unloading of cargo into or from a ship including its transporting and storage at or adjacent to a wharf".

The provisions of the Stevedoring Industry Award are very restrictive.

The ordinary hours provision in clause 13 of the Award are defined as falling between 7.00 am to 5.00 pm, Monday to Friday and are restricted to 35 hours per week.[85]

[83] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 67.
[84] Australian Competition and Consumer Commission, 'Container Stevedoring and Monitoring Report 2020-21' (October 2021), p. 69.
[85] *Stevedoring Industry Award 2020*, cl. 13.1(a); 13.2(b).

Casual employees engaged under the Award are entitled to a minimum payment equivalent to an entire shift for any day they are required to work.[86] Owing to the minimum duration of a shift under the Award being 7 hours, this provision requires an employer to pay at least 7 hours to a casual employee even if they require the employee to perform only 2 or 3 hours of work.[87]

The Award does not provide sufficient flexibility to an employee to transfer employees between day work and shift work under the Award. Clause 14.2(d) of the Award provides that where an employee is changed from shiftwork to day work, they will not forfeit any shiftwork conditions. Such a provision is not justified when an employee is no longer experiencing any of the disabilities that the shift penalties are intended to compensate for.

Further, the overtime provisions in the Award are not conducive to the free flow of labour to where it is needed. The Award discourages employers from requesting employees to work overtime that is not continuous with their ordinary hours. Should an employee wish to perform such work, the Stevedoring Industry Award mandates that they be paid a minimum of 7 hours, regardless of how many hours they actually work.[88] The Award also provides for an additional paid day off work if an employee works overtime on a Saturday or Sunday and has worked on 7 consecutive days.[89]

The Award provides an employer with little capacity to rearrange labour where an employee has been offered a 'double header' (2 consecutive shifts). Should the employer make such an offer, they cannot cancel the offer without paying for both shifts as though they were worked. [90]

The prescriptive conditions mandated under the Stevedoring Industry Award do not make sense given the 24 hour nature of the industry. The statement of Warren Smith of the MUA in the context of the recent 4 yearly review of modern awards identifies what he believes to be the conditions applicable to Stevedores: (Emphasis added)[91]

> *"16. Workers in the stevedoring industry face a unique set of challenges. It is a 24-hour industry scheduled around the arrival and departure times of multimillion dollar cargo ships. There is a great deal of pressure to load and discharge these ships as quickly as possible in order to maintain their efficiency and utilisation. Workers are therefore required to be flexible and their work-time is scheduled around ship arrivals and departures, which are frequently subject to change. 24-shift work is almost*

[86] *Stevedoring Industry Award 2020*, cl. 11.1.
[87] *Stevedoring Industry Award 2020*, cl. 13.3(d).
[88] *Stevedoring Industry Award 2020*, cl. 21.7(c).
[89] *Stevedoring Industry Award 2020*, cl. 21.11.
[90] *Stevedoring Industry Award 2020*, cl. 22.5(a).
[91] Fair Work Commission, AM2014/09 – Stevedoring Industry Award 2010 Statement of Warren Smith (24 December 2014).

always required, and less than 2,000 workers have a permanent, predictable roster. More than 5,000 workers in the industry must call in with 12-to 16-hours notice to find out if they are due to work or not. This frequently unpredictable 24-hour shift work has gruelling health effects, and is exceedingly challenging for workers' family lives."

The provisions in the Stevedoring Industry Award are of particular concern given the requirement for an enterprise agreement to pass the better off overall test in order to be approved by the FWC.[92] This test has been interpreted as requiring that each and every employee must be better off than they would otherwise have been under the Award.[93] Although this test has been long criticised as unworkable in removing much of the value to employers in seeking an enterprise agreement, the inflexible and outdated nature of the Award creates significant additional problems in the stevedoring industry.

The Productivity Commission should recommend that the Federal Government make a formal request to the FWC that the Commission undertake a review of the Stevedoring Industry Award to modernise its provisions. There would be merit in the Government being an active participant in that review. The review should consider the interests of users of ports, and not just the interests of stevedoring companies and their employees.

COASTAL TRADING REFORM

Ai Group represents numerous Australian companies which are extensive users of coastal shipping to transport raw materials, components and finished products between Australian ports.

The Australian companies which are users of coastal shipping need access to sea transportation at reasonable prices in order to:

- Enable them to remain competitive and productive;
- Preserve employment in the industries which use coastal shipping;
- Avoid increased congestion and higher maintenance costs on Australia's road and rail networks; and
- Avoid increasing Australia's greenhouse gas emissions as a result of replacing shipping with more carbon-intensive forms of transportation.

The existing cabotage and coastal shipping arrangements are:

[92] *Fair Work Act 2009* (Cth) s. 193.
[93] *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887.

- Too costly and inflexible; and
- Having an adverse impact on industry and employment Australia.
- Limit income generating opportunities for foreign ships, thereby making Australia a less desirable destination and reducing competition for Australian traders.

The *Coastal Trading (Revitalising Australian Shipping) Act* 2012 (Coastal Trading Act) came into operation on 1 July 2012. The Act has resulted in increased costs for users of shipping transport, and decreased availability of this form of transport.

During the development of the Coastal Trading Act and related shipping reforms, Ai Group expressed concern that users of coastal shipping would face increased transport costs and warned that this would have a significant impact on Australian manufacturing and other trade exposed industries. Despite Ai Group's concerns, the Coastal Trading Act and related shipping reforms were introduced into law. Our Member companies, many of which are Australian manufacturers and trade exposed businesses, have suffered the consequences of increased transport costs as a result of this Act.

The current regime has led to significant increases in shipping costs to Australian companies and a reliance on road transport and rail in circumstances where these forms of transport are less expensive and more accessible to the end user.

In 2015, an inquiry was undertaken by the Rural and Regional Affairs and Transport Legislation Committee into the *Shipping Legislation Amendment Bill 2015* (2015 Bill) which proposed significant and important changes to the licensing system of foreign ships for the purpose of shipping domestic cargo around Australia. Ai Group filed a detailed submission to the Committee inquiring into the Bill.

In 2017, an inquiry was undertaken by the Rural and Regional Affairs and Transport Legislation Committee into *Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017* (2017 Bill). The 2017 Bill would have increased access of Australian businesses to the services of foreign ships capable of transporting domestic cargo. It would also have increased flexibility in the coastal shipping trade and provided important economic benefits to the Australian economy and allow for greater movement of Australian domestic cargo. Ai Group also filed a detailed submission to the inquiry recommending that the 2017 Bill be passed.

Unfortunately, neither of these Bills were passed by Parliament. However, in September 2020, the Department of Infrastructure, Transport, Regional Development and Communications released a Discussion Paper proposing a number of reforms which were present in the 2015 Bill and the 2017 Bill such as:

- Removing the five voyage minimum requirement to apply for a temporary licence;

- Amending voyage notification requirements;
- Amending tolerance limits for temporary licence voyages; and
- Amendments to cover vessels on voyages to and from offshore oil and gas facilities.

Coastal shipping transportation is very important to avoid increased congestion and higher maintenance costs on Australia's road and rail networks. Australia's significant land area makes the road and rail system particularly vulnerable to adverse weather events. The damage to road and rail networks in South Australia caused by recent flooding should serve as a clear indication of the necessity of retaining a viable and cost effective alternative transport route via coastal shipping.

Between March 2006 and June 2009 the coastal shipping arrangements in place were operating very satisfactorily. Accordingly, we propose that a new regime as near as possible to this successful former regime should be re-established.

Conclusion

Without intervention, Australia's maritime logistics system is likely to continue functioning in a manner which leaves Australian businesses vulnerable to uncompetitive prices and contractual terms further exacerbating Australia's supply chain crisis.

The reforms proposed in this submission would create a more productive maritime logistics system that would better support Australian industry and national interests.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, retail, food, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance businesses need. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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