AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Submission to Treasury

Competition Law Amendments: Exposure Draft Consultation

Secondary boycotts and workplace relations

September 2016

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 98 years, AMMA's membership spans the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resource industry is an attractive and competitive place to invest, do business, employ people and contribute to our national wellbeing and living standards.

The resource industry is and will remain a major pillar of the national economy and its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resource industry currently directly generates over 8% of Australia's GDP. In 2014-15, the value of Australian resource exports was $171.9 billion. This is projected to increase to $256 billion in 2019-20. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Over 50% of the value of all Australian exports are from the resource industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserves.

AMMA members across the resource industry are responsible for significant levels of employment in Australia. The resources extraction and services industry directly employs 219,800 people. Adding resource-related construction and manufacturing, the industry directly accounts for four per cent of total employment in Australia.

Considering the significant flow-on benefits of the sector, an estimated 10 per cent of our national workforce, or 1.1 million Australians, is employed as a result of the resource industry.

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EXECUTIVE SUMMARY

1. AMMA welcomes the opportunity to comment on the exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016, and related explanatory material[1].

2. AMMA is an employment-focused organisation and is the representative voice of Australia's resource industry on employment and workplace relations. For the purposes of this review, AMMA has therefore confined its submissions to the employment / industrial relations proposals in the exposure draft[2] and the employment related recommendations in the Harper Report[3].

3. In summary, AMMA submits that the government should proceed as follows:

   a. Introduce and seek to have passed the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 with expedition, and ideally with passage prior to the end of 2016.

   b. Include the Bill's proposed Schedule 6 unaltered which would increase maximum penalties for secondary boycott behaviour from the current $750,000 to $10 million or more.

   c. Include in a revised version of the Bill amendments giving effect to the Harper Review's Recommendation 37 on trading restrictions in industrial agreements (which would have the effect of prohibiting anti-contractor and anti-labour hire terms in enterprise agreements). That recommendation is currently not taken up in the Bill.

4. Re the Bill as currently drafted, AMMA welcomes the government acting to subject secondary boycotts to the same maximum penalties as cartel behaviour, price fixing, and other anti-competitive activities.

5. It is AMMA's view that in a secondary boycott situation, everyone loses. Unions are big businesses with deep pockets and our laws must be able to comprehensively stamp out secondary boycott behaviour.

6. While the government, in this Bill, has acted to stamp out secondary boycotts, it must also do the same re "anti-contractor" and "anti-labour hire" clauses in industrial agreements, or else risk leaving the job half done.

[1] https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments
[2] Competition and Consumer Amendment (Competition Policy Review) Bill 2016, Schedule 6
[3] Competition Policy Review, Final Report, 31 March 2015, Section 3.13, pp.67-69

7. It remains AMMA's very strong view that unions should not be able to tell businesses who they can trade with, and should not be able to use the enterprise bargaining system to lock employees and job seekers out of work.

8. As recommended by both the Harper Review on competition policy and the Productivity Commission review on workplace relations, unions using enterprise bargaining to restrict commercial contracting and labour hire must be effectively outlawed.

9. This could be achieved by including in the final version of the Bill the Harper review recommendation that would extend the application of prohibitions under s45E and s45EA of the Competition and Consumer Act 2010 (CCA) to industrial agreements and awards.

10. These issues are discussed in more detail throughout this submission.

SECONDARY BOYCOTTS

11. Resource employers' principal concern for the purposes of this review is the maintenance of adequate and effective prohibitions against secondary boycott conduct.

12. Maintenance in this instance requires action. The maintenance of adequate and effective protections is not a call for the status quo and in fact requires changes to the existing Competition and Consumer Act 2010 (CCA) to ensure that our law continues to effectively prohibit such boycotts.

13. Australia has had prohibitions on secondary boycotts for decades, and there has been a long-standing bipartisan acceptance that such conduct has no place in industrial relations in Australia.

14. Australia maintains a workplace relations system in which primary boycotts (strikes, bans, limitations, work to rules, etc) can be pursued by employees (and their unions) against employers with complete legal immunity.

15. Where a union is acting on behalf of its members, and the members support the course of action being pursued by a union, they have significant powers to cause employers direct economic harm and thereby persuade the employer to agree to the union's claims (for example a given level of wage increase).

16. This is complemented by substantial protections on freedom of association and prohibitions on actions that punish employees for union participation (or non-participation as the case may be).

17. There is absolutely no need under the Australian system for unions to cause harm against innocent third parties (other employers and their employees) to secure outcomes in direct disputes with other organisations or to make things difficult for their "target" company. This has been recognised and accepted since the 1970s through strong statutory prohibitions against secondary boycotts.

18. The need for effective secondary boycott prohibitions was clearly accepted by the Harper Competition Policy Review in March 2015:

> *"A strong case remains for the CCA to retain the prohibition of secondary boycotts. A sufficient case has not been made to limit the scope of the secondary boycott prohibition, nor to broaden the scope of the exception for employment-related matters."*[4]

19. The Harper Review ultimately made the following recommendation on secondary boycotts:

[4] Competition Policy Review, Final Report, 31 March 2015, Section 3.13, p.68

Recommendation 36 — Secondary boycotts[5]

The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law.

It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

20. AMMA strongly supports the proposed amendment to the secondary boycott provisions of the CCA as set out in Schedule 6 of the exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016.

Increased penalties

21. The effect of the amendment in Schedule 6 of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 would be to make secondary boycott conduct subject to the same scale of maximum penalties as apply to other breaches of Part IV of the CCA.

22. This is an exercise in delivering equivalence and is one which AMMA strongly supports. To be very clear, resource employers:

    a. Want penalties to be set at such a level that secondary boycotts never occur, and so that such conduct is not considered by any union to be a legitimate or practical part of the tactics they can ever bring to bear against employers.

    b. Never want to see such penalties paid, or any prosecutions under the secondary boycott provisions of the CCA.

23. Secondary boycotts are already rare in Australia, but the proposed amendments will ensure they remain out of bounds and beyond practical consideration in future disputes.

24. The Bill's proposed penalties for a breach of the CCA's secondary boycott provisions would go from a current maximum penalty of $750,000 to the higher of:

[5] Competition Policy Review, Final Report, 31 March 2015, Section 3.13, p.68

a. $10 million;

b. Three times the total value of the benefit obtained from the secondary boycott; or

c. 10 per cent of the annual turnover of the corporation for the 12 months leading up to the secondary boycott occurring.

25. It would be fallacious to deem such penalties excessive. In AMMA's view, such penalties should be set at a level that such conduct, and secondary boycott tactics, are never used and which are, as the above penalties are, commensurate with penalties for other breaches of competition law.

26. On this basis, there is no basis for the maximum penalties for breaching the secondary boycott provisions of the CCA to be any lower than the maximum penalties for other breaches of Part IV of the CCA.

The growing importance of more effective enforcement

27. AMMA is reinforced in supporting the proposed increased levels of penalties for breaching Part IV of the CCA by considering the nature of contemporary trade unions and the conduct and tactics of a small minority of unions.

28. Employers are concerned that some unions will be willing to test the law in this area, and may have the resources to incur and pay fines while causing economic and market harm to employers if the existing maximum penalty for breaching the secondary boycott provisions ($750,000) is retained unaltered.

29. **Larger unions with more cash:** The nature of Australian unions was deliberately changed in the 1990s to ensure their survival and effectiveness. Through strategic factional and functional mergers, contemporary Australian unions have become very large and well-resourced organisations, able to pursue tactics and litigation strategies directly comparable to those corporations could consider.

30. By way of example, the CFMEU is the combination of multiple long-standing union bodies into a single super union. In public documents obtained from the Fair Work Commission's website, the CFMEU's Mining and Energy Division alone reports reserves (equity) of $73.6 million in 2016.

31. Clearly, the CFMEU and a number of contemporary Australian unions have the capacity to pay substantial fines and pursue strategies to break employers or those they are targeting to get to employers by outspending them. The law needs to change to provide for maximum penalties that deter against such a calculated approach and discourage the conduct they are nominally trying to discourage.

32. **Deliberate militancy and law breaking**: Some unions are willing to break the law to pursue their industrial relations claims. In February 2013, the WA secretary of the Maritime Union of Australia, Chris Cain, addressed the union's "militancy conference" in Fremantle, telling the assembled gathering that:

> *"…laws need to be broken, you're going to get locked up".*[6]

33. Where any actor in our society says it will deliberately break the law, the state must take action to ensure that penalties of sufficient gravity and impact that the intended law-breaker backs away. In relation to fines, maximum penalties need to be set at such a level that the courts can take action to ensure the law has its intended effect.

34. **Litigation strategies**: We have seen in recent years the persistent willingness of some unions to break our workplace relations laws, and frustration from the courts that available sanctions are not stamping out such conduct.

35. An increasing number of court decisions bemoan the persistent failure of construction unions, for instance, to observe the law, and the willingness of those unions to continue to break the law.

36. Justice Jessup of the Federal Court has issued a series of decisions imposing penalties on the CFMEU's Victorian division that illustrate the court's increasing frustration with the union and its persistent breaches of law.

37. In November 2015, Justice Jessup asked when sentencing the CFMEU:

> "*Has there ever been a worse recidivist in the history of the common law?*"[7]

38. A month later, Justice Jessup made various comments on the union and its record:

> *"Counsel for the respondents submitted that, however bad may be the Union's prior record of contravention, it would be wrong for the court to impose a penalty that was disproportionate to the gravity of the particular contravention under consideration. I accept that a principle in these terms has found expression in the past, but never, so far as I am aware, in a situation in which the previous record is as egregious as that of the Union in the circumstances presently facing the court."* [8]

[6] Bill Shorten turns a blind eye to his militant union masters, Michaelia Cash, *The Australian*, January 21, 2016
[7] https://www.fwbc.gov.au/news-and-media/cfmeu-and-president-penalised-245000-%E2%80%9Chas-there-ever-been-worse-recidivist-history-common-law%E2%80%9D
[8] https://www.fwbc.gov.au/news-and-media/cfmeu-and-president-penalised-245000-%E2%80%9Chas-there-ever-been-worse-recidivist-history-common-law%E2%80%9D

39. Justice Jessup also said that to describe the CFMEU's record as "serious" would be to understate the situation to a significant degree.

40. His following quote neatly illustrates the relevance of the CFMEU's conduct to the consideration at hand (equalising penalties against secondary boycotts with those for other CCA penalties):

> *"This record, and the judicial observations to which I have referred, suggests that the penalties heretofore imposed on the Union have been inadequate to provide the specific deterrence which is so conspicuously required in this area of the law."* [9]

41. The community cannot and should not accept a situation in which maximum penalties able to be imposed upon a union pursuing secondary boycott action prove to be inadequate to provide the specific deterrence sought.

42. **CFMEU-MUA merger**: We also ask that Treasury/Government note that Australia's two most militant unions, and those most likely to test prohibitions on secondary boycotts, have announced an intention to merge to form an even larger and more consolidated organisation.

43. The CFMEU and MUA announced in late 2015 their intention to merge into a massive militant union organisation. This would form an organisation with combined financial resources potentially in the hundreds of millions of dollars, which would clearly put it on a par with many of the trading corporations whose conduct is regulated by the existing maximum penalties in s.76 of the CCA (i.e. fines of up to $10 million, or 10% of turnover).

44. Clearly, increased maximum penalties are required, more commensurate with the resources and tactics of some parts of the trade union movement.

45. **Willingness to engage in secondary boycotts**: We need do no more than point out that the ACCC prosecuted the CFMEU for its conduct in the high profile CFMEU-Boral-Grocon matter. According to the ACCC in November 2014:

> *"The Australian Competition and Consumer Commission has instituted proceedings in the Federal Court against the Construction Forestry Mining and Energy Union (CFMEU), alleging it engaged, or attempted to engage, in secondary boycott conduct directed at Boral Resources (Vic) Pty Ltd and Alsafe Premix Concrete Pty Ltd (collectively Boral), in breach of the Competition and Consumer Act 2010 (the CCA).*
>
> *"The ACCC alleges that between February 2013 and April 2014, the CFMEU instructed shop stewards to ban the use of Boral concrete at commercial construction sites in metropolitan Melbourne. Shop stewards*

[9] https://www.fwbc.gov.au/news-and-media/cfmeu-and-president-penalised-245000-%E2%80%9Chas-there-ever-been-worse-recidivist-history-common-law%E2%80%9D

> *then allegedly told Boral customers that on certain commercial construction sites Boral concrete was not permitted, or that safety checks on Boral concrete trucks, causing significant delays, would be conducted if a customer proceeded to acquire Boral concrete."*[10]

46. This is something of a perfect storm for the risk of future secondary boycotts. There is a very real risk from some quarters, and this risk can only be minimised by updating penalties against such conduct as proposed in the exposure draft.

How this would operate

47. The explanatory materials accompanying the exposure draft contain the following useful table of current and proposed penalties.

New law	*Current law*
The maximum penalty for a breach of the secondary boycott provisions is the greatest of: • $10,000,000; • three times the total value of the benefit obtained from the secondary boycott; or • 10% of the annual turnover of the corporation for the twelve months leading up to when the secondary boycott occurred.	The maximum penalty for a breach of the secondary boycott provisions is $750,000.

48. AMMA supports a single set of maximum penalties for all conduct contravening Part IV of the CCA.

49. AMMA notes that the "middle option", being three times the value obtained from the secondary boycott, appears on its face a little ineffectual in relation to secondary boycotts as none of the participating or impacted parties obtains a benefit (and indeed the fact that such conduct damages all concerned is one justification for their prohibition).

50. However, this seems to be clarified by s.76(1A)(b)(ii) of the CCA which qualifies that such a consideration would only come into play "if the Court can determine the value of the benefit that the body corporate, and anybody corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission".

51. In secondary boycott cases, and in the absence of existing s.76(1A)(a), maximum penalties are more likely to be determined by:

[10] https://www.accc.gov.au/media-release/accc-takes-court-action-against-the-cfmeu-alleging-secondary-boycott-and-undue-harassment-or-coercion

a. $10,000,000; or

b. 10% of the annual turnover of the corporation for the 12 months leading up to the secondary boycott occurring.

ACCC investigations and prosecutions

52. Resource industry employers strongly support the Harper recommendation that "the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law".

53. Secondary boycotts inflict considerable pain through supplier-client relationships and part of the reason they are such a dangerous and unacceptable tool in bargaining is the damage they inflict and the speed of that damage.

54. Incapacity to deliver, ship, receive, trade, transact or offer services has a rapid effect. This is a particular issue in the resources sector. Whilst minerals and oil do not spoil like fresh produce, logistics and shipping operate to very tight schedules and any delays in shipping can rapidly cause multi-million dollar losses, not to mention flow-on problems in global logistics.

55. Rapidly stamping out secondary boycott conduct, or even the threat of such conduct and the uncertainties such threats create, is a matter of priority.

56. Therefore, AMMA submits that whilst not a statutory matter or specific amendment, it is very important that the ACCC be capable and mindful to rapidly and clearly take action on alleged secondary boycott conduct.

57. Employers, unions and the wider Australian community need to see secondary boycott complaints actioned with the same visibility and speed that the ACCC brings to bear on price fixing, cartels and consumer concerns.

58. We appreciate that this may be difficult for the ACCC in practical terms. However, resource employers want to see a situation in which secondary boycotts are rare or rarer than they are now, and in which a proper penalty level completely stamps out such conduct. With so few unions in Australia, this is not an impossible aim. It is difficult for any regulator to remain match-fit and raring to go where threats of penalties are doing their work and stamping out the prohibited conduct in question.

59. However, the regulator needs to remain ever vigilant and able to act quickly where threats are made or boycotts imposed. The ACCC needs to make protection against secondary boycotts and (as set out below) against trading restrictions in industrial agreements part of its core business, and be able to act very rapidly on any complaints it receives.

60. A direction to the ACCC to act more promptly on complaints of secondary boycott conduct, or an agreed performance standard with government in regard to such complaints, could stand alone, separate to the passage of any changes. Whilst the current $750,000 maximum penalty is acutely inadequate, such an administrative change could be pursued now, in parallel to any legislative change as to penalties.

TRADING RESTRICTIONS IN INDUSTRIAL AGREEMENTS

61. Unions strategically use enterprise bargaining not only to address terms and conditions for employees, or employment matters at workplaces, but to restrict the doing of business in commercial contracts.

62. Some unions regularly seek to include in enterprise agreements clauses that restrict or regulate the capacity of an employer to:

    a. Use labour hire providers through commercial contracts.

    b. Enter into contracts for services with individuals (independent contractors) rather than contracts of service with employees.

63. These anti-contractor and anti-labour hire clauses are highly contentious[11] but often a bargaining priority for the unions that seek them.

64. The recent Productivity Commission (PC) review into Australia's workplace relations system illustrates how unions use enterprise bargaining to restrict the use of contractors and labour hiring:

> *"…while a union cannot directly bar an employer from engaging an independent contractor or a labour hire worker, it may be able to subtly exert pressure and affect the terms under which those workers are engaged.*
>
> *"One way of achieving this is to ensure that the employer's EA contains terms that give the union more control over the employer's engagement with independent contractors and labour hire agencies. This is typically done by requiring an employer to disclose to employees and their representatives:*
>
> *• the name of any independent contractor or labour hire agency proposed for work*
>
> *• the type of work*
>
> *• the duration of work; and*
>
> *• the qualifications of the independent contractor or labour hire workers.*
>
> *Furthermore, while independent contractors or labour hire workers remain on the payroll the employer may not be permitted to make ongoing employees redundant.*
>
> *Another way of achieving this is to ensure that the terms of engagement of these alternatives are roughly the same as those of ongoing employees. This is generally done through the insertion of 'jump up'*

[11] Productivity Commission (2015) Workplace Relations Framework, Final Report, Vol 2, p.686

clauses, which ensure that the terms and conditions of an independent contractor or labour hire worker's engagement are no less favourable than those of ongoing workers."[12]

65. This is a long-standing, serious concern for employers, especially those in the resource and construction industries. Claims for such contractor and labour hire clauses can protract and delay enterprise bargaining, even where agreement can be reached on other matters such as wages and conditions. This is in addition to the direct negative impact such restrictions have on businesses and the job security and remuneration of their employees.

66. This issue was taken up by AMMA with the Harper Review; with the Government in the wake of the Harper Review recommendations; and with the Productivity Commission (PC) in its major review of Australia's workplace relations framework (2014-15).

67. Recommendation 37 of the 2015 Harper Competition Policy Review is as follows:

Recommendation 37 — Trading restrictions in industrial agreements[13]

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

68. The Government's November 2015 response to the Harper Review includes the following in relation to Recommendation 37:

"This issue is being considered further as part of the Productivity Commission Review of the Workplace Relations Framework, which is scheduled to provide its final report to the Government in November 2015."[14]

[12] Productivity Commission (2015) *Workplace Relations Framework*, Final Report, Vol 2, p.816
[13] Competition Policy Review, Final Report, 31 March 2015, Section 3.13, pp.69
[14] Government response to the Competition Policy Review, Release date: 24 November 2015, p.30

69. The Productivity Commission subsequently completed its review of Australia's workplace relations framework and its final report was released in December 2015.

70. The PC made the following recommendation for reform in this area:

> RECOMMENDATION 25.2 (SECTION 25.3)
>
> The Australian Government should amend the *Fair Work Act 2009* (Cth) so that enterprise agreement terms that restrict the:
>
> (a) engagement of independent contractors and labour hire workers, or regulate the terms of their engagement, should constitute unlawful terms under s. 194 of the Act
>
> (b) engagement of casual workers should constitute unlawful terms under s. 194 of the Act.
>
> The Australian Government should also specify in the Act that enterprise agreement terms could not restrict an employer's prerogative to choose an employment mix suited to their business — for example by deterring or discouraging the use of casual workers by restricting their hours of work.

Why this change is needed

71. The use of labour hire and contractors pertains to the doing of business between commercial organisations, a matter that should not be able to be restricted or abrogated through industrial negotiations with trade unions or employees that are not parties to either the labour hire or independent contractor arrangements they seek to restrict.

72. As the PC observed in its conclusions[15]:

a. Such terms inevitably limit the capacity of employers to respond to changing market conditions or to make best use of the skills of their employees.

b. Unions do use such terms to limit options available to business strategy and to obstruct change, negatively affecting productivity, competitiveness and jobs.

73. AMMA also agrees with the PC that:

> *"Restrictions on labour hire and subcontractors can be likened to restrictions on the choices of suppliers to a business more generally. For example, few would accept that it would be reasonable for an EA to*

[15] Productivity Commission (2015) *Workplace Relations Framework*, Final Report, Vol 2, pp.949-950

include provisions that prohibit the use of imported inputs produced in another state or territory, despite this weakening the capacity of employees to bargain."

There are grounds for changes to the FW Act to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the Competition and Consumer Act 2010 (Cth))."

74. One of the fundamental purposes of the CCA is to outlaw comparable restrictions on freedom to contract and not allow collusion to manipulate or restrict commercial outcomes. If this principle is accepted, it should be applied to all such efforts at collusion and restriction, including those sought by trade unions via industrial negotiations.

75. The PC concluded on contractor and labour hire clauses that:

"The effects of the current agreement terms are suboptimal for employers, independent contractors and labour hire and casual workers. Together with the fact that alternative employment arrangements are unlikely to significantly reduce collective bargaining power, this provides a sound basis for excluding terms in enterprise bargains that have the effect of limiting the hiring of subcontractors, labour hire workers or casuals.[16]*…*

"In support of the ability of firms to develop more productive working arrangements, the Productivity Commission considers that terms in enterprise agreements that act to restrict an employer's prerogative to choose the employment mix suited to their business should not be permitted under the FW Act. This will improve potential outcomes for employers, independent contractors and labour hire and casual workers, without significantly constraining bargaining power. It will also improve the ability of firms — in this case, firms being contractor entities — to compete as openly as possible, and improve innovation.[17]*"*

76. AMMA notes that the Harper review made similar observations:

"There appears to be a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act."

77. The Harper final report noted it was apparently lawful under the Fair Work Act to make awards and register enterprise agreements that placed restrictions on the freedom of employers to engage contractors or source certain goods or non-

[16] Productivity Commission (2015) *Workplace Relations Framework*, Final Report, Vol 2, p.818
[17] Productivity Commission (2015) *Workplace Relations Framework*, Final Report, Vol 2, pp.819-820

labour services. According to the review report, it was 'desirable that this apparent conflict be resolved'.

78. Recommendation 37 of the Harper review, which would have extended the application of s45E and s45EA prohibitions to industrial agreements and awards, in the process outlawing 'contractor clauses' in enterprise agreements, has not been included in the current exposure draft.

79. The inclusion of that recommendation in the final version of this Bill is an urgent and pressing matter in parts of the resource industry, with enterprise agreement restrictions on the use of contractors and labour hire (secured by unions using threats of strikes and disruption) making Australian resource operations less flexible and adaptable than they need to be to traverse changing market conditions.

Simultaneous change needed in workplace and competition law

80. The PC Review and the Harper review were undertaken in parallel, and whilst aware of each other's work, it is not the case that a recommendation in one area / one Act obviates the need for change in the other, nor would change in a single area or Act be sufficient.

81. PC Recommendation 25.2 and Harper Recommendation 37 are not mutually exclusive and the progress of one does not remove the need or urgency of progressing the other.

82. The Government should give effect to both Harper Review Recommendation 37 and PC Review Recommendation 25.2, which would see:

    a. Clauses seeking to restrict / place conditions on the use of labour hire and contractors become unlawful matters that may not be included in future enterprise agreements under the Fair Work Act 2009, and

    b. Sections 45E and 45EA of the CCA amended so that they expressly apply to awards and industrial agreements, except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees.

83. This dual approach is the only sure means to ensure that:

    a. Unions stop seeking anti-competitive and damaging anti-contractor and anti-labour hire provisions in their enterprise bargaining claims.

    b. Employers can unambiguously refuse to negotiate or countenance such provisions in enterprise agreements, having a clear legal basis for such refusals.

c. Unions are not able to hide such clauses (which would offend an amended Fair Work Act 2009) in unregistered side deals and exchanges of letters (the only sure means to avoid this is to amend the CCA as per Harper Review Recommendation 37).

d. Anti-contractor and anti-labour hire clauses in existing agreements would become unenforceable.

e. The ACCC could take action where unions did attempt to "enforce" anti-contractor and anti-labour hire provisions with the aim of stopping an employer from using labour hire and independent contracting on a commercial basis.

84. AMMA would point out, however, that neither amendments to the Fair Work Act 2009 as per PC Recommendation 25.2 nor amendments to the CCA as per Harper Recommendation 37 require the other to be in place prior to coming into effect. Both are quite capable of standing alone, and whilst delivering the full range of changes outlined above, action in either area (but ideally both) would improve the status quo considerably.

85. It is also worth recalling that the Government is yet to indicate a timetable for starting to give effect to the PC recommendations for reform of the Fair Work Act, nor has it explicitly stated which recommendations it is mindful to progress.

86. The Government should most certainly not proceed on the basis that it can fail to give effect to Harper Review Recommendation 37 because this will be part of some future tranche of workplace reforms, which for any number of parliamentary or political reasons may not progress in the current term of parliament.

Intervention in proceedings

87. The Harper Review made the following supporting sub-recommendation:

> *"The Panel considers that the ACCC should be given the right to intervene in proceedings (i.e., to be notified, appear and be heard subject to time limits) before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. The ACCC and Fair Work Commission should establish a protocol to govern these arrangements."*

88. AMMA strongly supports this proposal as a necessary, supporting corollary to the overall approach recommended by the Harper Review. The ACCC should be able to inform and assist Fair Work Commission (FWC) proceedings and point to proposed award or agreement terms that would offend or create ambiguities under an amended competition law that is properly and more fully applied to award and agreement terms.

89. We note in support of such a right of intervention in FWC proceedings, that the *Fair Work Act 2009* already provides intervention rights for various commonwealth agencies/bodies. The following rights of intervention already exist under the Fair Work Act 2009:

a. Section 569 – intervention rights for the Minister for Workplace Relations.

b. Section 569A – intervention rights for State and Territory Ministers.

c. Sections 161(2)(a) and 218(2)(a) – submission rights for the Age Discrimination Commissioner.

d. Sections 161(2)(b) and 218(2)(b) – submission rights for the Disability Discrimination Commissioner.

e. Sections 161(2)(c) and 218(2)(c) – submission rights for the Sex Discrimination Commissioner.

90. It would not only be a simple drafting matter to bestow a right for the ACCC to intervene in FWC proceedings, but the FWC processes already need to take into account such rights of intervention.

91. The recommendation for an intervention protocol between the ACCC and FWC also seems a very sound one. There are already memorandums of understanding between different government agencies in the employment portfolio.

Penalties

92. The Harper Review proposed that the maximum penalty for any such breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

93. Consistent with the approach set out above, penalties need to be set at a level that actually discourages the conduct that is to be prohibited, and this will be achieved by equalising the maximum penalties for all prohibitions of Part IV of the Competition and Consumer Act 2010 (which is the change that would be effected by Schedule 6 of the Exposure Draft Bill referred to earlier in this submission).

Transitional arrangements

94. This change, i.e. extending the application of s45E and s45EA prohibitions to industrial agreements and award, would be significant for employers, unions and employer organisations, and for employees. It would require change in

negotiating behaviours and, depending on implementation, changes to existing agreements or the enforcement of existing agreements.

95. If adopted, consideration should be given to:

    a. An appropriate period for introduction to allow employers, unions and other bargaining parties to change their conduct and approaches.

    b. A substantial education and promotion campaign preceding prosecutions and compliance activities. This should be developed in conjunction with the Department of Employment, and related bodies such as the General Manager of the Fair Work Commission and the Office of the Fair Work Ombudsman.

How the Government should proceed

96. Harper Review Recommendation 37 has not been included in the exposure draft. This should be remedied.

97. The Bill introduced into parliament following the exposure draft process should contain amendments as recommended by the Harper Review to give effect to Recommendation 37, and as included in the model provisions in the appendices to the Harper Review's Final Report[18].

[18] Competition Policy Review, Final Report, 31 March 2015, Appendix A, Competition and Consumer Act 2010 — Model Legislative Provisions