Ai GROUP SUBMISSION

The Competition Policy Review's Final Report

MAY 2015

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia alone and directly manages a number of those organisations.

Australian Industry Group contact for this submission

Dr Peter Burn, Head of Influence & Policy
Ph: 02 9466 5503
Email: peter.burn@aigroup.com.au

Overview

Ai Group welcomes the opportunity to provide input on the Government's consideration of the Competition Policy Review's Final Report.

We broadly support the recommendations of the report and maintain that their considered implementation would assist in lifting the performance of the domestic economy and its ability to meet national economic and social ambitions.

We particularly note our support for:

- Recommendations 1 and 2 relating to the principles that Australia's governments should commit to in relation to competition and in the domain of human services.
- Recommendation 6 proposing the Productivity Commission be asked to undertake a review of intellectual property and proposing a separate independent review of intellectual property provisions in international trade agreements.
- Recommendation 9 in relation to restrictions on competition in planning and zoning rules.
- Recommendations 15, 16 and 17 in relation to the promotion of competitive neutrality.
- Recommendation 24 relating to the application of competition law to government activities in trade and commerce.
- Recommendations 36 and 37 relating to secondary boycotts and trading restrictions in industrial agreements.
- Recommendations 43, 44, 45, 46 and 47 relating to the establishment, role and activities of the Australian Council for Competition Policy.
- Recommendation 48 proposing the Productivity Commission be asked to assess the revenue implications of reforms agreed by the Australian, state, territory and local governments as a basis for informing the application of competition policy payments.
- Recommendation 52 regarding a Media Code of Conduct for the ACCC.

Our more specific comments in this submission relate to:

- Our concerns with Recommendations 29 and 30 relating to the adoption of an "effects test" in provisions of the CCA relating to price signalling and the misuse of market power.
- Our very strong support for Recommendations 36 and 37 relating to secondary boycotts and trading restrictions in industrial agreements.

Recommendations 29 and 30 – "Effects test"

While we appreciate the efforts the Competition Policy Review panel have taken in response to the range of concerns in relation to proposals regarding practices or conduct with "the purpose, effect, or likely effect, of substantially lessening competition", we remain concerned that this approach would create significant areas of uncertainty for business with little potential gain.

If the Government wishes to pursue these recommendations further, we would urge including the proposed recommendations in the economic modelling exercise referred to in Recommendation 56. Adoption of these recommendations should only be considered if there are demonstrable benefits that outweigh the costs of the additional uncertainties that would be created by their adoption.

Recommendation 36 – Secondary Boycotts

Ai Group strongly supports Recommendation 36 in the Final Report.

We agree that the prohibitions on secondary boycotts in sections 45D to 45DE of the CCA should be maintained and effectively enforced by the Australian Competition and Consumer Commission (**ACCC**) with the increased vigour comparable to that which the ACCC applies in pursuing other contraventions of the CCA.[1] While not mentioned in Recommendation 36, the ACCC needs to also enforce sections 45E and 45EA with vigour.

Ai Group also agrees that the ACCC should be required to publish in its annual report the number of complaints made to it involving secondary boycott behaviour and the number of those complaints investigated and resolved each year.[2] Again, a similar approach should be taken with sections 45E and 45EA.

Further, Ai Group concurs with the Panel that there is "no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law".[3]

The Panel supported the current arrangements whereby there is access to secondary boycott remedies through both Federal and State jurisdictions.[4] Ai Group shares this view, however, we also believe, consistent with the recommendations of the Royal Commission into the Building and Construction Industry in 2003, that Fair Work Building and Construction (or its intended replacement – the Australian Building and Construction Commission) should be given shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts in the building and construction industry.

[1] See Report at pages 68, 387 and 392.
[2] See Report at pages 68, 391 and 392.
[3] See Report at page 68. Also see Report at page 391.
[4] See Report at page 391.

Recommendation 37 – Trading restrictions in industrial agreements

Ai Group strongly supports the recommendation that sections 45E and 45EA of the CCA be amended so that the prohibitions within those sections apply to awards and industrial agreements.[5] Ai Group agrees with the Panel that "businesses should generally be free to supply and acquire goods and services, including contract labour if they choose".[6]

Currently section 45E of the CCA prohibits an employer from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits the employer from giving effect to such a contract, arrangement or understanding. The decision of the Full Federal Court in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (**ADJ Case**) has significantly narrowed the scope of these provisions to the detriment of industry and the broader community.

In the ADJ Case the Full Federal Court considered a clause in a union pattern agreement which limited the use of contractors or labour hire by each employer party to the pattern agreement (i.e. hundreds of employers). It found that such a clause did not offend sections 45E and 45EA of the CCA because, amongst other things, an enterprise agreement has statutory force and therefore is not a contract, arrangement or understanding within the meaning of section 45E and 45EA.

These types of 'contractor clauses' are frequently pursued by unions during enterprise agreement negotiations. They stifle competition and impose major inefficiencies on employers. It is in the community's interest that they be stamped out. Such clauses were expressly outlawed under the *Workplace Relations Act 1996*, prior to the implementation of the *Fair Work Act 2009* (**FW Act**).

We agree with the Panel that the problem of 'contractor clauses' could be stamped out if sections 45E and 45EA are amended so that they apply to awards and enterprise agreements. However, there is an important issue that needs to be considered when drafting the relevant provisions. The Panel has recommended that the prohibitions in sections 45E and 45EA should apply to awards and industrial agreements except to the extent that they relate to "remuneration, conditions of employment, hours of work or working conditions of employees".[7] These concepts need to be very carefully defined to avoid union arguments that, for example, enterprise agreement clauses which restrict the engagement of contractors or require that "site rates" be paid to employees of contractors are aimed at the job security of the employees covered by the relevant enterprise agreement and hence "relate to" "remuneration" or "conditions of employment". Ai Group is not convinced that the draft clauses on pages 512 and 513 of the Final Report achieve the apparent policy intent underpinning Recommendation 37.

Ai Group also agrees with the observation of the Panel that in addition to amendments to sections 45E and 45EA, the exception in paragraph 51(2)(a) of the CCA may need to be amended so that it applies to sections 45E and 45EA.[8]

Further, Ai Group agrees with the other elements of Recommendation 37 that:

[5] See Report at pages 69, 395 and 396.
[6] See Report at pages 69, 394 and 396.
[7] See Report at page 69, 395.
[8] See Report at footnote 650 on page 395.

- The current limitation in sections 45E and 45EA that the prohibition applies only to restrictions affecting persons with whom an employer "has been accustomed, or is under an obligation" to deal should be removed.[9]

- 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 of the CCA;[10]

- A protocol should be established between the ACCC and the Fair Work Commission;[11] and

- The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the CC Act.[12]

Industry-wide pattern agreements

The ADJ Case (see above) concerned an industry-wide pattern agreement. The Report does not address the anti-competitive nature of industry-wide pattern agreements. These agreements are nothing more than massive price-fixing schemes that fix the price of labour across entire industries and they need to be outlawed, as recommended in 2003 by the Royal Commission into the Building and Construction Industry.

In our June 2014 submission, Ai Group submitted that industry-wide pattern agreements should be outlawed through:

- An amendment to the CCA to prescribe that industry-wide pattern agreements do not fall within the exemption in section 51(2)(a) of the Act;

- An amendment to the FW Act to prescribe that an enterprise agreement which reflects an industry-wide pattern agreement cannot be approved by the FWC; and

- An amendment to the proposed *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* to ensure that enterprise agreements which reflect an industry-wide pattern agreement breach the Code.

Ai Group urges the Government to introduce these legislative amendments.

[9] See Report at pages 69, 395 and 396.
[10] See Report at pages 69, 395 and 396.
[11] See Report at page 69, 395 and 396.
[12] See Report at pages 69 and 396.