AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

ACCI SUBMISSION TO THE PRODUCTIVITY COMMISSION

REVIEW OF NATIONAL COMPETITION POLICY ARRANGEMENTS

JULY 2004

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This submission begins with a statement of ACCI's views regarding the appropriate principles of competition policy and preferred competition policy objectives.

The submission then gives a general analysis of the competition policy framework as it relates to important concepts such as:

- the implementation of competitive neutrality;
- reform of government business enterprises;
- infrastructure reform;
- access to essential facilities;
- legislation, regulation review and reform; and
- prices oversight.

The submission also contains a short discussion of the public benefit/public interest test.

ACCI also wishes to emphasis the need to think of competition policy in an international context.

Finally, ACCI believes that two particular areas that have suffered from lack of focus in discussions of competition policy are the area of workplace relations and reform of vocational education and training. For that reason this submission concentrates heavily on these two areas.

Principles of Competition Policy

Competition is the underlying dynamic which drives the market-based commercial and economic system which best serves to create wealth and enhance living standards for the benefit of all.

Conversely, impediments to competition reduce the pace and the dividends of economic development and growth, at a cost to all. Interventions which impede competition in pursuit of political or social objectives often impose greater costs than benefits upon economies, and often disadvantage those they purport to help.

Competition policy must work to optimise commercial and economic efficiency, acting as a powerful stimulus to economic development and growth. Where governments seek to achieve some social equity or other (re) distributional outcome on the basis of 'public interest' or 'public benefit', these should be pursued through other policy channels, such as taxation and/or public expenditure.

Competition Policy Objectives

The ACCI's overarching competition policy objectives include:

- prompt and effective implementation of the agreed national competition policy regime within Australia at all tiers of government; and

- the adoption under the auspices of the World Trade Organisation of effective and transparent competition policies which reinforce trade and investment liberalisation.

Specific and near term competition policy objectives should include:

- ensuring consistent application of competitive neutrality rules, including action to identify and/or obviate inappropriate implementation;
- monitoring the structural reform of government business enterprises, in particular the separation of regulatory, and monopoly and competitive functions;
- encouraging access to essential facilities in ways which stimulates competition in otherwise restricted markets;
- promoting legislation/regulation review and reform which delivers a substantial reduction in the burden thereof on commerce and industry; and
- monitoring pricing oversight and reform processes to ensure charges and the like by government agencies and business enterprises are based on competition and efficiency criteria.

The Competition Policy Framework

An effective national competition policy regime is not a discrete, stand-alone initiative, but an integral part of Australia's essential microeconomic reform imperative.

While sectoral reforms in areas such as aviation, telecommunications, post or electricity are necessary, competition policy embraces a more structural, cross-sectoral approach. Both sectoral and cross-sectoral approaches should be regarded as complementary and reinforcing, rather than as alternatives or mutually exclusive.

Competition policy must expand the nature and breadth of competition, applying extensively across the Australian economy, principally by tackling head-on unnecessary and unjustifiable barriers to effective and efficient competition.

Competition policy must focus on liberalising the domestic business environment to allow 'winners' to self-select and thrive commercially, and ensure greater empowerment of consumers in the market place.

Targets for Competition Policy

The subject of competition policy is a vast one and there are a large number of areas of the Australian economy that have been subject to it.

In this submission, ACCI concentrates its commentary on the two areas of workplace relations and training. That is not to deny that there are in fact a multitude of areas that have been and should be the subject of competition policy.

This submission also lists other competition related issues on which ACCI has made submissions or developed policy over the last few years. They are all available on the ACCI website at www.acci.asn.au.

Workplace Relations a Vital Competition Policy Issue

Workplace relations reform remains one of Australia's primary policy challenges moving into the second half of this decade.

Australia's very significant workplace relations reform to date has, along with major taxation, competition and regulatory reform, and prudent economic management ensured the Australian economy and labour market has weathered various economic challenges. Reforms throughout the past decade have directly delivered Australia's very impressive employment, interest rate and wider economic performance.

This cannot be considered either a static or a completed reform process. Ongoing reform, and a wider scope and pervasiveness of workplace reform is essential if Australia is to cement and not surrender the gains of economic and competition reform to date.

In response to the questions posed in the Productivity Commission's Issues Paper:

a. Addressing restrictions on competition in 'input' markets should become a priority for the future as described in this submission and as outlined in detail in the ACCI Reform Blueprint, *Modern Workplace: Modern Future.*

b. The benefits of further fundamental labour market reforms are clear – they include cementing the benefits of reforms to date and further gains in fundamental areas of macro economic resilience and growth, employment gains, unemployment falls, increased productivity, efficiency and innovation and improved living standards for more Australians.

a. The costs of workplace reform are as regularly and shamelessly exaggerated as they are hotly debated. On all available measures, and in particular in net/overall terms, over a decade of workplace relations reform has secured improved outcomes for Australians, not a detriment. Considering the checks and balances in Australia's workplace relations system, and all genuine reform proposals to date, ACCI can identify no particular net costs of further well-managed workplace reform which need be balanced against the obvious and manifest benefits.

The Commission is invited to conclude that ongoing workplace relations and labour market reform is a first order priority to secure the ongoing economic and labour market gains identified in this Inquiry's terms of reference. In making its recommendations, the Commission should have regard to the ACCI Workplace Relations Reform *Blueprint*, and in particular the priority areas in which workplace relations reform can secure outcomes directly consistent with the terms of reference of this Inquiry.

Competition Policy and Vocational Education and Training

Another area into which the NCP should be extended is reforming the provision of training in Australia.

ACCI's quarterly *Survey of Investor Confidence* has been showing for a long period now the increasing concern the employers have in securing skilled staff. The July 2004 survey reported, for the first time in the 14 years of the survey, that the "availability of suitably qualified employees" was the number one constraint on future investment decisions.

This is a problem that is related to the lowest unemployment rates for over 20 years. However, it is more than that and it is also explained by lack of appropriate competition in the vocational education and training (VET) sector.

It is a matter we need to address not least because an ageing population will over time exacerbate the problem.

It is time to refresh the approach to User Choice policy in VET.

There is no doubt that the original notion of User Choice was a timely and critical element of the reforms to the national training system, with the primary objective of increasing responsiveness to the needs of clients. User Choice encourages a direct market relationship between individual training providers and the clients: employers and employees. However, after much fanfare, employers still wait for the things they were promised.

BACKGROUND

The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

ACCI is Australia's largest and most representative business organisation. Through our membership, ACCI represents over 350,000 businesses nationwide, including:

- Australia's top 100 companies.
- Over 55,000 medium sized enterprises employing 20 to 100 people.
- Over 280,000 smaller enterprises employing less than 20 people.

Businesses within the ACCI member network employ over 4 million working Australians.

ACCI members are 33 employer organisations in all States and Territories and all major sectors of Australian industry.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.

ACCI members actively participate in developing national policy on a collective and individual basis.

As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

INTRODUCTION

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The terms of reference ask the Productivity Commission

> "to consider the extent of the benefits the reform program has delivered to date and to inform an assessment of the most worthwhile competition related reforms that could be achieved in the future, including competition related reforms which could apply beyond current NCP arrangements".

During April 2004 the Productivity Commission published an issues paper entitled *Review of National Competition Policy Arrangements*, which gives a detailed summary of the development and implementation of the NCP since 1995. We do not attempt to reproduce that here and refer readers to the issues paper for the necessary background to the NCP.

This submission begins with a statement of ACCI's views regarding the appropriate principles of competition policy and preferred competition policy objectives.

The submission then gives a general analysis of the competition policy framework as it relates to important concepts such as:

- the implementation of competitive neutrality;
- reform of government business enterprises;
- infrastructure reform;
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- prices oversight.

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ACCI COMPETITION POLICY

Below is set out ACCI's competition policy position.

Principles of Competition Policy

Competition is the underlying dynamic which drives the market-based commercial and economic system which best serves to create wealth and enhance living standards for the benefit of all.

Conversely, impediments to competition reduce the pace and the dividends of economic development and growth, at a cost to all. Interventions which impede competition in pursuit of political or social objectives often impose greater costs than benefits upon economies, and often disadvantage those they purport to help.

Competition policy must work to optimise commercial and economic efficiency, acting as a powerful stimulus to economic development and growth. Where governments seek to achieve some social equity or other (re) distributional outcome on the basis of 'public interest' or 'public benefit', these should be pursued through other policy channels, such as taxation and/or public expenditure.

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Competition policy must focus on liberalising the domestic business environment to allow 'winners' to self-select and thrive commercially, and ensure greater empowerment of consumers in the market place.

Competitive Neutrality

Competition policy should open to existing and potential businesses, new commercial opportunities in areas previously dominated by, or reserved for, government operators. It should also expand competition in previously restricted markets.

Competitive neutrality means ensuring Government Business Enterprises (GBEs) have no net advantage over private sector competitors by reason of their government ownership.

Such advantages have traditionally included tax exemptions or concessions, easier/less costly access to finance, or less stringent corporate compliance and financial reporting obligations.

Implementation of competitive neutrality must include the establishment of consistent, effective, objective and transparent complaints mechanisms, to ensure such reforms are not used by

governments or their agencies to exploit monopoly or dominant position(s) in a market place, especially in the delivery of essential and/or infrastructure services.

Commerce and industry encourages governments to implement appropriate competitive neutrality regimes through the corporatisation of larger GBEs, and the commercialisation of other significant undertakings, both of which create more discrete operating entities with greater transparency in their commercial conduct. The wider and deeper application of privatisation is encouraged.

Government Business Enterprises

The nature and operations of government business enterprises (GBEs) have changed markedly over the past decade. Less importance is now being attached to any 'public good' roles, with greater emphasis being given to GBEs operating as efficient business organisations, albeit government-owned.

This trend is most evident in the corporatisation of a sizeable number of GBEs, and highlighted in the privatisation of an increasing number of such entities.

Commerce and industry considers it essential GBEs be fully and equally subject to competition policy requirements, ensuring a level-playing field for rules-based competition between private and public sector enterprises.

GBEs must also be subject to appropriate 'structural separation'. That is, separating the GBEs' natural monopoly, competitive and regulatory functions.

In the former instance (separating the monopoly from the competitive functions), commerce and industry considers this is essential to ensure there is no unfair advantage arising or cross-dividends flowing from the monopoly to the competition-exposed activities.

In the latter instance (separating out the regulatory from the operational functions), commerce and industry remains firmly of the view it is totally inappropriate for a GBE to be both 'player and the referee' in a marketplace.

Such a dual role contains the inherent risks of the GBE lacking full objectivity in regulatory matters, and conferring upon itself unfair competitive advantage through the regulatory regime it designs and administers.

Infrastructure Reform/Access to Essential Facilities

The importance of infrastructure reform is underlined both by its economic significance and its traditional poor performance. Four government-dominated sectors in Australia - energy, transport, communications and water supply - account for 16 per cent (or one dollar in six) of the operating costs of most Australian industries.

These sectors are also major resource users, often in competition with the private sector. They are also important determinants of the efficiency and competitiveness of Australian commerce and industry, in both domestic and international markets.

Similarly, various reports have consistently identified evidence of poor performance, including poor capital and labour productivity, excessive and inefficient use of material inputs, inappropriate pricing practices and poor financial performance.

Competition policy must stimulate infrastructure reform through the access to essential facilities regime and sectoral reform initiatives in key infrastructure areas such as communications, electricity, gas, water and all elements of the transport chain.

A consistent, objective and transparent regime dealing with access to essential facilities, which cannot reasonably be duplicated by actual or potential competitors, is an important element of competition policy.

In determining access arrangements the implementing authorities must be sensitive to the implications of their decisions on access (especially terms and conditions, but also charges) for existing and new investment.

Commerce and industry continues to support the corporatisation of the broadest possible range of government commercial-style activities, with a compelling presumption in favour of privatisation where the activity has a commercial orientation and/or operates in a competitive marketplace.

Legislation, Regulation Review and Reform

Legislation and regulation review and reform are a continuing obligation for governments beyond the liberalisation of competition in the national economy.

Such reviews should examine, inter alia, barriers to competition such as restrictions on who is able to enter a market and how those already in a market are able to conduct themselves. Occupational and professional licensing arrangements are relevant in this regard.

The onus of proof should fall on those advocating the intervention to justify the need and the efficiency/effectiveness of the proposed approach over alternatives in objective, rigorous and transparent public inquiry process.

The threshold applying under the existing national competition policy regime is sound. That is to say, interventions should not restrict competition unless the benefits of doing so to the community as a whole outweigh the costs, and the objectives of the intervention can only be achieved by restricting competition.

Commerce and industry supports additional work to enhance the transparency and identify the net benefits/costs of legislative and regulatory interventions in the business environment through the publication by all jurisdictions of exhaustive compendiums of legislation/regulation applying therein. To ensure robustness of these compendiums, those items of legislation/regulation not included should be taken to have no effect.

Prices Oversight

The pricing of commodities, products and services plays a significant role in the efficient and effective operation of the market. Any policy actions or interventions which distort prices weaken business competitiveness and economic efficiency must be held to an absolute minimum.

Commerce and industry believes the competitive market place is the most efficient and effective form of prices oversight.

Where governments seek to apply formal prices oversight arrangements, this should be done consistently and transparently, in particular to GBEs operating in non-competitive markets. Such prices oversight arrangements should also be independent from the GBE(s) whose pricing arrangements are being assessed.

The pricing arrangements of GBEs should primarily reflect the efficient allocation of resources and their sustainable operating competitiveness in the marketplace. Pricing for infrastructure and/or essential services should be based on economic, ahead of social, considerations.

Where governments impose performance requirements on GBEs (such as rate-of-return objectives), these should not have price-distorting effects. Community service obligations should not be funded by price-based cross-subsidies but from publicly accountable fiscal allocations.

Public Benefit/Public Interest

The ACCI believes the primary objective of competition policy is to maximise effective and efficient competition across the Australian economy, commerce and industry in order to promote economic efficiency and growth, and underlying international competitiveness.

However, in pursuing these goals, the Chamber acknowledges the guiding National Competition Principles recognise restraints on competition can lead to net public benefit, although these first must be subject to examination in open, transparent, rigorous, public inquiry processes.

The ACCI believes the 'public interest' and 'public benefit' tests under the national competition framework are best applied in ways which maximise effective and efficient competition across the Australian economy.

In this regard, the primary considerations are international competitiveness, and economic efficiency and growth.

However, the Chamber notes other considerations identified in the Competition Principles Agreement include: sustainable development; social welfare and equity; industrial relations; regional development; and the interests of consumers.

The ACCI further believes the 'public interest' or 'public benefit' should be examined over a long term, not a short term, time horizon, given the tendency for costs to emerge before benefits in most reform processes.

Commerce and industry expects a high degree of consistency in the application of 'public interest' and 'public benefit' tests between jurisdictions, industries and sectors, failure to deliver which can produce uncertainty and distort commercial decision-making.

However, any exceptions or cases for special treatment should be allowed only after an open, transparent, rigorous, public inquiry process, with clear reasons being made public for the decision taken, including an evaluation of alternative means for achieving the preferred outcome.

Where governments seek to achieve some social equity or other (re)distributional outcomes on the basis of 'public interest' or 'public benefit', these be pursued through other policy channels, such as taxation and/or public expenditure.

Competition Policy in an International Context

The globalisation of commerce and industry, and the liberalisation of trade, investment and capital means competition policy can no longer be regarded as an exclusively domestic policy issue.

The nature and reach of competition per se and of competition policy in different national jurisdictions can have a profound effect on the competitiveness of both Australian exporters, and those using imported inputs in their domestic business activities.

The World Trade Organisation (WTO) and many of its national members, including Australia, have recognised the tight linkages between international trade and domestic competition policy liberalisation.

Overall the reduction in trade barriers has been an enormous boon to Australia and to other countries. An increasingly freer and fairer international trading system over the last 50 years has been a huge boost to Australia's living standards. Indeed, since the formation of the WTO in 1995, Australian exports have expanded by more than 50 per cent, and now total over $A154 billion. This growth in exports has created more than 250,000 new jobs, with one-in-five jobs in Australia now dependent upon exports, with the proportion increasing to one-in-four in regional and rural Australia.

According to the Australian Department of Foreign Affairs and Trade (DFAT), a 10 per cent increase in our national export performance could create as many as 70,000 new jobs – a substantial economic dividend of tangible benefit to ordinary Australians. Businesses engaged in international trade also share the commercial benefits of their success with their employees, with those working for exporting companies enjoying higher wages – around $A17,400 per annum more – than those working in the non-traded sector of the Australian economy. More broadly, gains from past trade liberalisation efforts, have given the equivalent of $A1000 to each Australian family annually since 1986 – a welcome 'tax cut' by any measure.

One aspect of the WTO's deliberations is the possibility of a multilateral competition policy agreement. Unfortunately, the WTO's Doha Development Agenda is stalled with a disastrous September 2003 meeting in Cancun, Mexico. Restarting substantial negotiations will present a major challenge to Australian and foreign negotiators.

Given the vacuum created Australia must find other avenues in addition to the WTO to advance the cause of freer trade for our products. ACCI totally supports the Commonwealth Government's policy of 'competitive liberalisation', which includes the pursuit of WTO compatible bilateral trade agreements with countries like Singapore, Thailand and the USA. It is a demanding agenda of multilateral, regional and bilateral trade initiatives that Australian business needs to be fully engaged in.

Implementation of Competition Policy

While commerce and industry accepts the initial rounds of assessments and competition dividend payments needed to give added weight to political considerations, later performance assessments and the quantum of any payments must be based solely on the delivery of meaningful outcomes, rather than demonstrations of reasonable effort.

TARGETS FOR COMPETITION POLICY

The subject of competition policy is a vast one and there are a large number of areas of the Australian economy that have been subject to it.

In this submission, ACCI concentrates its commentary on the two areas of workplace relations and training. That is not to deny that there are in fact a multitude of areas that have been and should be the subject of competition policy.

It is worth noting a list of other competition related issues on which ACCI has made submissions or developed policy over the last few years. They are all available on the ACCI website at www.acci.asn.au. They include:

- the Senate inquiry into ***The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*** (submissions September 2003 and October 2003 and response to report in May 2004);
- the Government's ***Review of the Competition Provisions of the Trade Practices Act*** (submissions in July 2002 and October 2002);
- the Governments implementation of ***Collective Bargaining arrangements for small business*** (submission August 2003);
- the Productivity Commission's ***Inquiry into Worker's Compensation and Occupational Health and Safety*** (submission June 2003 and response to interim report October 2003)
- the Government inquiry on the ***Australian Government Electronic Authentication Framework*** (submission May 2004);
- the Council of Australian Governments' consideration of a ***National Water Initiative*** (submission November 2003);
- the Government implementation of ***Corporate Law Economic Reform (CLERP) package number 9***, (submission November 2003);
- the House of Representatives inquiry on the ***Structure of Telstra*** (submission February 2003);
- the Australian Competition and Consumer Commission investigation of ***Guidelines for Developing Effective Voluntary Industry Codes*** (submission November 2003);
- the Government inquiry into ***Building a Stronger Regional Business Environment*** (submission October 2002);
- the Government inquiry into ***National Research Priorities*** (submission July 2002);
- the Government's ***Higher Education Review*** (submissions in June 2002 and October 2002);
- the Government's inquiry ***Reforming the Corporate Governance of Federal Statutory Authorities*** (submission January 2003);
- the Board of Taxation's ***Review of International Taxation Arrangements*** (submission November 2002);
- the Government's ***Review of the Job Network*** (submission January 2002);
- the Government's ***Energy Market Review*** (submission April 2002 and response December 2002);
- the Government's ***Fuel Taxation Review*** (submission November 2001);
- the Government's ***Review of the Price Surveillance Act*** (submission May 2001);
- the Australian Treasury ***Review of the Commonwealth Government Securities Market*** (submission December 2002);
- the Government's ***National Food Industry Strategy*** (submission July 2001);
- the Productivity Commission's review of the ***Post 2005 Assistance Arrangements for the Automotive Manufacturing Sector*** (submission May 2002);

- the Productivity Commission's ***Review of Textile Clothing and Footwear Assistance*** (submission June 2003);
- the Government's inquiry into the ***Information Technology Outsourcing Initiative*** (submission March 2001);
- the Productivity Commission's ***Review of the National Access Regime*** (submission May 2001);
- the Productivity Commission's ***General Review of Tariffs*** (submission January 2000);
- the Government's ***Cost Recovery Policy*** (submission December 2000).

WORKPLACE REFORM AND COMPETITION POLICY

One of this Inquiry's principal frames of reference is:

> "to inform an assessment of the most worthwhile competition related reforms that could be achieved in the future, including competition reforms which could apply beyond current NCP arrangements"[1].

The Productivity Commission is to report on:

> "areas offering opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition, including through a possible further legislation review and reform programme, together with the scope and expected impact of these competition related reforms"[2].

One of the principal areas of major national reform Australian employers have identified as a priority is further reform of the Australian labour market and Australian employment regulation.

Reform of Australia's federal and State workplace relations systems is a significant, if not pre-eminent policy area in which the benefits of competition policy reform to date can be cemented and furthered.

Conversely, any fundamental reversal of reform in workplace relations and employment regulation carries the very real risk of surrendering the economic, labour market and societal gains fundamental economic reforms, including both competition and labour market reforms, have delivered.

The issues paper prepared by the Commission identifies reforms to the regulation of employment as potentially playing a role in this area as follows:

> "…there may also be scope to harness competition to further improve the efficiency of input markets. While this is a complex area, a comprehensive forward agenda could presumably include an assessment of remaining work practice and other restrictions on competition in the labour market."[3]

ACCI submits that workplace relations reform should become a major priority area for future competition based reform in Australia.

[1] Productivity Commission (2004) *Review of National Competition Policy – Issues Paper* (April 2004)
[2] Productivity Commission (2004) *Review of National Competition Policy – Issues Paper* (April 2004)
[3] Productivity Commission (2004) *Review of National Competition Policy – Issues Paper* (April 2004), p.13

ACCI Workplace Reform Blueprint

In October 2002, ACCI released its vision for the ongoing reform of the Australian labour market and workplace relations system throughout this decade.

Modern Workplace: Modern Future - A Blueprint for the Australian Workplace Relations System 2002-2010 is a detailed and comprehensive policy manifesto critically evaluating all major areas of workplace relations and employment policy and identifying options and priorities for further reform.

Each of the reforms identified and extrapolated in the *Blueprint* would contribute to further economic and labour market gains for Australia, and to the outcomes sought through this review (i.e. the terms of reference).

Copies of the *Blueprint* have been forwarded to the Commission, and should be read with this submission *in full* as specific proposals which can secure significant gains to the Australian economy and remove impediments to efficiency and enhanced competition.

This said, there are a variety of priority of areas from the Blueprint proposals which ACCI considers as particular priorities and as particularly relevant to the Commission's considerations in this inquiry:

a. More flexible and accessible agreement making, which will yield a next generation of gains in productivity, efficiency, flexibility and innovation.

b. Further evolution of award and statutory labour market regulation into a genuine safety net supporting bargaining.

c. Further substantial reforms to employment protection laws in Australia.

d. Applying the lessons of regulatory reform to Australia's workplace relations system, to date largely immune from such reform.

e. Greater harmonisation of Federal and State workplace relations regulation in Australia.

Flexibility, productivity, innovation, awards and agreement making

One of the key innovations and gains in Australian workplace relations during the past 20 years has been the consistent trend towards greater determination of working relations at the workplace level, and away from previous highly centralised approaches.

Section 3.1 of the ACCI Workplace Relations Reform *Blueprint*[4] examines in some detail several of the benefits of bargaining reforms in Australia to date, and identifies the benefits further reforms would yield.

Bargaining reforms have been identified by both the OECD and IMF in particular as measures to further increase the competitiveness and economic performance of Australia. Bargaining is a fundamental component of a more flexible, less centralised system. A system where its central feature is enterprise determination of wages and employment conditions is far superior in competitiveness terms than the former award based system. Awards by definition were multi-

[4] pp.47-51

employer and in many cases multi sector. One size was made to fit all, despite the fact that one size did not represent all.

There is still far too heavy a reliance on award based determination in our system – and the award system is too invasive in its regulatory intensity. This is in part due to the reactivation of national test case arbitration by the ACTU and the renewed assertion of arbitral authority by industrial tribunals – evidenced by some far reaching decisions in recent test cases (for example, the indication in the 2004 wage case that some employees are simply 'incapable of bargaining' and thereby operating outside the arbitral jurisdiction; and the 2004 redundancy test case decision which removed a 20 year old exclusion for small business from redundancy obligations).

An award system that does more than simply deliver a simple safety net of modest minimum standards will inevitably lead to a weakening of competition in the labour market. If all employers in a sector (or, say, of a small business profile) are bound to awards; if all then have to pay common standards; if those standards are set at a level where employers cannot effectively offer wages or conditions beyond those standards; then there is in practice a reduction in labour market competition.

The imminent re-regulation of a large part of Victorian small businesses due in late 2004/early 2005 as a result of the forced (statutory) move of thousands of employers from schedule 1A of the Workplace Relations Act 1996 to common rule federal award respondency will re-create award based regulation and reduce competition within that (large) cohort of employers (until now, the most deregulated sector of formal employment in Australia). However, for those employers already respondent to federal awards, they will see this move as positive – it will remove for them a competitive disadvantage they have had against schedule 1A competitor businesses through their higher (award based) labour costs.

The Commission is encouraged to consider the achievements secured through reforms to bargaining rules and processes to date, and the scope of this reform process to further competition and competitiveness into the future. The *Blueprint* identifies various measures which could be taken to further reform workplace bargaining in Australia.

Arbitration and the courage to have a genuine safety net

Bargaining does not operate in a vacuum. Like so much of the workplace relations system, outcomes in bargaining and capacities to secure flexibility and competitiveness are strongly controlled by settings in other allied policy areas.

One of the principal of these is the intersection between bargaining and awards/arbitration by the Australian Industrial Relations Commission (AIRC).

Section 3 of the *Blueprint* addresses ACCI's vision for the award system and arbitration in some detail.

The key to unlocking further bargaining and workplace determination lies in either critically examining the rules for agreement making for further refinement and simplification, or critically reforming procedures and administrative requirements to allow the views of more employers and employees to become the rules they work under. The way forward does not lie in more regulation of how bargaining is undertaken.

Perspectives and principles emerging from competition reform during the past decade appear to have much to teach the workplace relations system.

In turn, greater scope for bargaining, in more workplaces, on more topics, with less reference to externally imposed models appears to have significant scope to further the competitiveness of Australian workplaces in a wide variety of industries and in all areas of our economy.

Another area where Australia's workplace relations system is profoundly uncompetitive is in terms of wages policy. Rather than have a single minimum wage as a true safety net distinguishing income earners from welfare recipients, we have tens of thousands (54,000 in fact – yes this is not a misprint) minimum wages arbitrated annually and increased in what is effectively one decision of the arbitral tribunal (in the national wage case). These minimum wages are not solely directed at the low paid, but to income levels of over $50,000 per year. In 2004, the wage case arbitrated wage increases that for the first time in major awards took arbitrated rates of pay to over $1,000 per week. No other country with which Australian industry trades has such a wages system. Where minimum wages exist they are truly that – generally a single adult and youth minimum wage. Our wages system is well and truly out of step with international standards of wage regulation by the state.

Employment protection law and job creation

Another major priority issue in examining the competitiveness of the Australian workplace relations system and scope for greater competitiveness of Australian enterprises is employment protection in Australia, and in particular laws regarding unfair dismissals and redundancies

Unfair Dismissal / Termination of Employment

Unfair dismissal and termination obligations of employers attract significant debate in Australia and have been a highly politicised and contested area of employment law since the introduction of a national statutory system in the early 1990s.

ACCI supports the existence of a statutory remedy for unfair dismissal within strict boundaries, including the boundaries of efficient operation and delivering just processes and outcomes to all parties.

However, despite some positive reforms since the mid 1990s in particular, unfair dismissal reform remains a major concern in Australia:

> "In July 1999, in the Survey of Investor Confidence of the Australian Chamber of Commerce and Industry (ACCI) about 54 per cent of small businesses indicated that they might have hired more staff had it not been for the unfair dismissal laws.
>
> ACCI's Pre-Election Business Survey of November 2001 found that small businesses ranked unfair dismissal laws as the fifth most important problem facing them."[5]

The OECD has observed that:

> "…debate continues in Australia as to whether current provisions significantly discourage hiring. Particularly for small businesses, employer organisations are of

[5] OECD Country Report – Australia, March 2003, p.155

> the view — expressed in hearings before parliamentary committees — that unfair dismissal laws are still holding back job creation.
>
> Although there are substantial impediments to using empirical data for analysing the employment effects of unfair dismissal legislation, this view finds some support in business surveys. A recent study by D. Harding (2002), based on the results from telephone interviews of 1802 small and medium-sized enterprises, presents estimates of the impact of unfair dismissal laws on this part of the business sector and the total economy.
>
> The study gives a range of the estimated costs the legislation imposes on the national economy, of which the lower bound is A$ 1.3 billion (0.2% of GDP). In addition, the study found that unfair dismissal laws contributed to the loss of about 77 000 jobs from businesses which used to employ staff and now no longer employ anyone.
>
> A major conclusion from Harding's analysis is that the negative employment effect has shown up in particular in higher unemployment of low skilled workers in the low-wage segment, a group among which the young are over-represented. Hence, the negative employment effect from the legislation has the potential to last over a person's lifetime."[6]

The OECD concluded that:

> "There also seems to be scope for reducing the disincentives on firms, especially smaller businesses, to hire workers arising from unfair dismissal legislation."[7]

Section 7.2 of the ACCI Workplace Relations Reform *Blueprint* addresses dismissal and termination rights, and how these should operate in contemporary Australia. On p.104, ACCI identifies 17 key areas in which unfair dismissal law and process could be reformed.

Redundancy and restructuring

Another very significant issue for employers is redundancy and what their obligations are when forced to abolish positions in the interests of ongoing competitiveness and overall solvency. Section 7.4 of the ACCI Workplace Relations Reform *Blueprint* addresses redundancy issues.

This was however published prior to the AIRC redundancy test case (2003-2004) and prior to the unwelcome and misguided decision to apply redundancy pay obligations to smaller businesses for the first time.

This decision[8] represents a manifest blow to the competitiveness of Australia's small business sector. This was not alleviated by the subsequent decision to effectively phase these increases in over 4 years[9]. ACCI is strongly supporting measures to ensure that smaller businesses are not subject to redundancy pay and invites the Productivity Commission to consider the role such obligations can play in either maximising or retarding the competitiveness of Australian small business (and thereby whole sectors of the Australian economy reliant upon the small business sector).

[6] OECD Country Report – Australia, March 2003, p.80
[7] OECD Country Report – Australia, March 2003, p.82
[8] 26 March 2004, *Redundancy Case, Decision* [PR032004] Giudice J, Ross VP, Smith C and Deegan C
[9] 8 June 2004, *Redundancy Case Supplementary Decision*, [PR062004], Giudice J, Ross VP, Smith C and Deegan C

Labour On-costs

The issue of labour on-costs is also a very significant one employers and in particular for capacities for job creation. A wide variety of additional imposts vastly inflate the actual costs of new job creation to employers, well beyond headline minimum wages costs (for example).

Any consideration of options to improve the competitiveness of the Australian system should encompass consideration of options to cut labour on costs.

Applying the lessons of regulatory reform to workplace relations

There also appears to be substantial scope to extend the lessons of regulatory and competition reform during the past decade to Australia's workplace relations system and to the regulation of the way we work.

A key element of competition reform has been an ongoing process of regulatory review and refinement, with an emphasis on simplifying and making more effective regulation.

This has only been partially pursued in workplace relations:

a. There has been an award simplification process at the federal level. Whilst this has been very positive, awards remain long, prescriptive and highly confusing documents in need of significant ongoing regulatory improvement.

b. There has been no simplification of awards at the State level. Outside Victoria and the Territories there remain many thousands of increasingly archaic and anachronistic awards which serve primarily to obfuscate and confuse employment obligations.

Simpler, clearer regulation: Simplicity, clarity and straightforward expression of regulation appears a crucial measure to ensure that it better meets its designated purpose on an ongoing basis.

Consolidation of sources of regulation: Another key factor ACCI can see in improving the quality and effectiveness of regulation is ensuring you don't have to search high and low for it. There is a duty of the regulator to the regulated to ensure that regulation is easily accessible and locatable. Crucial to this has been ensuring regulation is not scattered across a wide range of statutes and in particular that there is not a miss-match of State and federal sources of regulation which must be accessed to determine obligations.

The need for Regulatory Impact Statements for Workplace Relations Regulations: The notion of assessing the impact of regulation prior to its introduction is a powerful one and has improved the quality and effectiveness of a wide range of regulation in contemporary Australia. Most interests and groups would agree that even where they disagree with the policy aims of a given regulatory approach, the regulatory impact assessment process has led to better regulation being implemented than was otherwise the case.

For some reason unfathomable to ACCI, the notion of regulatory impact statements and the improvements they can yield in regulation has been lost on the workplace relations system, particularly in regard to arbitrated awards. Perhaps as a function of the adversarial process which gives rise to employment obligations in Australia there is little or no consideration of the likely impact of regulation once a decision is made to regulate.

Workplace relations and the regulation of the way we work could benefit considerably from learning the lessons of regulatory improvement which have accompanied competition reform during the past decade. A requirement for a proper regulatory impact assessment as implemented through competition policy would markedly improve workplace regulation in Australia.

Proper Introduction and Information Processes: A particular problem is the imposition of new obligations with little or no notice, or as a retrospective obligation. This is at odds with sound policy making and would be unthinkable in most other areas. Workplace relations regulation would considerably benefit from:

a. Greater notice to employers in particular of any new or revised regulatory obligations to enable them to adjust internal procedures and processes (and indeed to consider how to fund additional cost imposts).

b. A greater duty on the system to better inform the regulated of their new and changing obligations.

c. Some expenditure from government to better inform those upon whom it is imposing new obligations, on these new obligations, how they work, when they are to apply etc.

Consideration of Mutual Interests: Another key exemplar from competition policy reform for workplace relations reform into the future is the doctrine of mutuality. Competition policy reform appears to have at its heart a recognition that any regulatory system relies for its ongoing relevance and effectiveness on rendering its regulation as efficient and straightforward to comply with as possible, and to ensure regulation is imposed only to the extent genuinely required taking into account an appropriate range of considerations. There is also a recognition of mutual interests, and that regulation must take into account the interests of the regulated and what they are trying to achieve as well as the interests (including the general public interest) you are regulating on behalf of.

This is sadly lacking in workplace relations in Australia. Workplace relations policy could urgently benefit from learning the lessons of competition policy reform and in particular associated regulatory reform during the past decade. There remains a vastly insufficient consideration of mutual interests in the setting and revision of workplace standards and obligations and in particular little or no regard for the interests of those who must meet workplace standards.

Harmonising Federal and State workplace relations regulation

There is growing support for fundamental reform to Australia's mishmash of 6 separate and competing workplace relations systems. A century after Federation, the degree of complexity, replication and inconsistency between workplace relations systems is one of the poorest reflections on the Australian system of government.

Based on its assessment of the Australian economy and labour market, the OECD recommend that:

> "The overall reach of industrial relations reform would be extended by the harmonisation of federal and State legislation and practice, not only to reduce

> regulatory costs for businesses and governments, but also to avoid reforms of the federal system being rolled back at the state level."[10]
>
> "Harmonisation of federal and State industrial relations systems Australia's dual system of federal and State industrial laws and tribunals means that most larger enterprises, and many small ones, have some employees covered by the federal system and some by the relevant state system. It implies significant inefficiencies for most businesses, as it forces employers to deal with two distinct systems, and gives rise to time-consuming jurisdictional disputes. While co-operation between different systems has increased in recent years, unnecessary and artificial conflict still frequently occurs. Hence, substantial efficiency gains could be reaped by moving to a more unified system. As a significant step towards harmonising the various workplace relations systems, the Federal Government has introduced legislation that would expand the coverage of federal unfair dismissal laws from around 50 per cent of all employees to around 85 per cent of all employees by using the full extent of the corporations power of the Constitution. The legislation would also remove access to State unfair dismissal remedies for employees in the federal jurisdiction."[11]

Section 26 of the ACCI Workplace Reform *Blueprint* addresses this challenge head on and sets out a process for greater harmonisation of workplace relations regulation in Australia. It proposes an orderly system to examine and move towards a more harmonised national workplace relations system for Australia.

The Commission is invited to consider the benefits that harmonisation of workplace relations laws would deliver to Australia and its competitiveness. In particular the Commission is encouraged to consider the economic costs of multiple-regulatory, parallel-regulatory approaches both of which create substantial difficulties in determining and complying with obligations. In particular the Commission is invited to consider the efficiency and competitiveness of:

a. Six separate systems of industrial awards with substantial replication of competing instruments.

c. Over 4,000 separate industrial awards in Australia (State and Federal).

d. Over 54,000 separate individual arbitrated award classifications, one for every 120 full time adult working Australians.[12]

e. Multiple separate unfair dismissal jurisdictions, which allow employees to jurisdiction shop and complicate the capacities of employers to simply and accurately, respond to dismissal claims, particularly where they operate across States.

f. Vastly different capacities for agreement making between the federal system and differing State workplace relations systems.

[10] OECD Country Report – Australia, March 2003, p.11
[11] OECD Country Report – Australia, March 2003, p.79
[12] Data based on ACCI research.

As observed by the current head of the AIRC, Justice Giudice:

> "Our regulatory framework should be designed in a way which accords a high priority to consistency of treatment…There is an important related issue concerning minimum standards referred to in Federal industrial legislation as the award safety net. A great deal has been done in the last 20 years or so to coordinate many basic entitlements through the State and federal industrial award systems. But there are still differences in the nature and level of entitlements. Where those differences have no rational basis but are accidents of industrial or political history they advantage some citizens and disadvantage others. This too is a lack of equality and it undermines our society in a significant way."[13]

In making this assessment it is worth recalling that the major State government (and former State government) enterprises that deliver infrastructure in the areas gas, water, electricity and transport, are in substantial part subject to regulation under federal awards, agreements and employment law.

Alternatives to Reform and Their Consequences

The flip side of all this is a consideration of what the alternatives to reform are and their consequences for Australian competitiveness, infrastructure development and market development. The alternatives to continuing to pursue the reform of the Australian labour market are twofold:

a. Determining that reform has gone far enough and that we should rest on our laurels and let the current process of reform consolidate prior to significant further change.

b. Determining that reform has gone too far, and that some retreat from reform is merited.

Either outcome carries the prospect of major detriment to Australia's competitiveness and efficiency and to the outcomes secured by the reforms commenced by the ALP Government in the early 1990s and built upon by the Coalition Government since that time.

Whatever the purported basis, a retreat from reform would be unwelcome and ill-timed. Since 1993, Australia has essentially embarked on workplace relations reform in a continuum of ongoing innovation, reduced prescription, and greater scope for flexibility and workplace determination. Reversing that trend would be of major concern. It would also be at odds with the goals of the system identified by former Prime Minister Paul Keating in 1993 and by the OECD in recent years.

The so called status quo or reform fatigue position would also be particularly insidious and wrong headed. To not seek to progress reform in this area is in fact to go backwards. Australian workplace relations law, whilst significantly reformed remains very complex and detailed, difficult to navigate, repetitious and over prescriptive.

The need to retain both collective and individual forms of agreement making in the system is critical. Proposals to abolish Australian Workplace Agreements (AWAs) - the form of individual agreement recognised first in federal law in 1997 – are misguided and out of touch with a system that needs to cater for economic diversity and labour market diversity. AWAs – currently the

[13] AIRC President Justice Geoffrey Giudice, (2001) Address to Bar Association of Queensland Industrial and Employment Law Conference, 20 April 2001. These remarks were specifically endorsed by a Full Bench of the AIRC in a decision of 7 August 2002 (Re: Minimum Wage Orders [Print PR 921046])

fastest growth category of agreement making under Australian law – have contributed to competitiveness through flexibility and performance and reward based remuneration structures that vary (depart form) one size fits all award structures.

Demonstrating the benefits of workplace relations reform

One of the considerations the Commission is directed to in the Terms of Reference for this Inquiry is:

> "to focus new review and reform activity on areas where there is clear evidence of significant potential gains, in particular where clear gains are possible in Australia's international competitiveness, in the efficiency of domestic markets or for Australian consumers; to ensure possible reform activity considers appropriately the adjustment and distributional implications and its contribution to achieving other policy goals."

In one sense it is difficult to isolate the national, macro-level benefits of workplace relations reform from the wider economic and regulatory reforms of the past 10-20 years. There is a symbiotic relationship between reforms to the way we work and reforms to the openness of our economy, the role of taxation in Australia and other changes.

However, there is also a clear national and international consensus on the importance of workplace relations reform. The various ILO quotes cited throughout this submission, along with those in the attached ACCI Workplace Relations Reform *Blueprint* (especially the introductory sections) demonstrate the very real gains workplace reform has delivered to working Australians, their employers and the economy as a while.

A clear conclusion can be drawn from this. Whilst it may not be possible to isolate the exact dollar, GDP or employment contribution directly attributable to workplace relations reform this has clearly been one of the major national reforms in the Australian economy during the past two decades and has secured significant gains in competitiveness and efficiency.

Workplace relations reform should be identified as one of the key areas where further competition gains can be secured to build on achievements to date. The evidence of the importance of reform in this area is very clear and should lead to this being identified as a principal competitive challenge for Australia during coming years.

There is no doubt that Australia has substantially boosted its labour productivity growth over the last 10 years. However, the fact is that recent OECD projections on labour productivity growth for 2003 have Australia at 2.2 % growth, running below the OECD average and less than major countries such as the US and the UK - and well behind 5 % in South Korea.

Further, there are other problems facing Australia. For example, despite good recent numbers there are still over 574,000 Australians unemployed. The youth unemployment rate is still around three times the level of general unemployment.

It remains true, as Mr Ted Evans, the former Secretary to the Treasury once said, that the level of unemployment in our country is a matter of our choice. Further workplace relations reform can significantly help here.

Australia is, at best one decade into our transition from the nine-decade-old centralised system. We believe that if Australia were to implement the suite of reforms in the *Blueprint*, a decade

from now this system will lead to higher living standards.

In particular we believe that it will lead to a lowering of the unemployment rate closer to the average that Australia achieved during the 20 years between 1950 and 1970, when the award system acted more as a safety net system than anytime since. The average rate of unemployment during that time was a remarkable 1.9% and the highest annual rate reached during the entire period was 3.2%.

Just by way of illustration, the economic benefits of a return to unemployment rates of around that level would be astronomical. There would be 400,000 less unemployed. The savings on the Commonwealth Budget would be in the order of $3.6 billion in annual terms. And GDP would be boosted by $26.4 billion.

However, we recognise that there will be other factors that may affect just how low the rate could go. For example, the interaction of the labour market with the social welfare system will also be important. However, the rate would fall significantly.

Distributional Considerations and Workplace Reform

The Terms of Reference for this inquiry require a consideration of distributional considerations in assessing options for a next generation of competition oriented reforms.

This is a welcome focus in considering the role further workplace relations reform can play in further unlocking Australia's competitiveness. Despite protestations from some quarters, workplace relations reform in Australia has yielded higher real wages, greater access to higher wage outcomes for more employees and scope to more creatively distribute the gains of greater efficiency and productivity (e.g. gain-sharing, performance pay, bonuses etc). Mass inequality and unfair-distribution has simply not come to pass.

To the extent that some industries and workplaces are not enjoying the gains of some others, this is best addressed by ensuring the system does all it can to encourage and support bargaining in more workplaces. It is not an argument to wind back bargaining to date, nor to deny more Australians the benefits bargaining can bring.

ACCI would of course also point out that the best thing any workplace relations system can do to further the fair distribution of incomes and opportunities in any society is to provide greater access to jobs. Workplace reform in Australia, allied with wider economic management and other labour market measures, has led to significant job creation and a massive fall in joblessness in Australia. We have no doubt that the fact we are now experiencing unemployment rates or around 5.6 percent, the lowest for over 20 years is a direct result of previous workplace relations reform.

Contribution of Workplace Reform to Achieving Other Policy Goals

The importance of further fundamental reform to the way we work also cuts across other considerations for the Commission in undertaking this inquiry.

The Issues Paper (pp.11-14) examines areas in which competition reforms could play a role in meeting escalating public demand and in particular increasing competitiveness, flexibility and adaptability.

There is a link between workplace relations reform and the administrative and competition policy reforms identified in this section of the issues paper.

Labour costs, labour productivity and the role of labour in securing improvements are major considerations in areas such as education and training, health, community services such as, age, disability and child care, public housing, justice and emergency services, in particular in regard to labour costs.

Measures to improve competition in these areas and to further implement competition principles, will to a significant extent rely for their success on the cultural change and cooperative focus which workplace reform yields. People will be the important mediator and determinant of fundamental change and reform in such areas.

Therefore, it is not sensible in policy terms to pursue measures to unlock further competitive reforms in these areas without also pursuing the necessary reform to the way work is undertaken.

There is also a reference in the Issues Paper to the importance of user choice in securing major further public infrastructure and efficiency reforms. User choice and competitiveness go to the heart of what workplace relations reform should be about in Australia during the next decade.

a. Employer and employee users of the workplace relations system need to have options for regulation and agreement which meet their choices and preferences in their workplaces – and which do not unjustifiably privilege the interests of persons and institutions unrelated to the workplace relationship concerned.

b. There is no reason why the notion of competition and the benefits it can yield cannot be applied to the field of workplace relations. Just as Australian enterprises have to compete for clients and custom (and in which our public entities increasingly face competitive pressures) institutions, approaches and regulation in workplace relations should need to compete against other choices and approaches.

    i. This is the key to understanding the importance of providing a proper range of agreement making options for example, including agreements with and without unions and on both a collective and individual basis.

    ii. It is also important that the workplace relations system make Australian unions compete for the hearts minds and wallets of Australian employees. Measures which privilege unions or deny employees choice of union and non-union approaches must continue to be eschewed by our workplace relations system.

Thus, two of the concepts at the heart of the Commission's consideration of competition reform also lie at the heart of ACCI's proposals for workplace relations reform.

Links of Workplace issues to NCP reforms to date

The interaction between the existing NCP framework and workplace reform[14] appears a complex one, however:

[14] Productivity Commission (2004) *Review of National Competition Policy – Issues Paper* (April 2004), p.14 (Top paragraph of questions).

a. Fundamental workplace reform will create the foundations for State agencies and their competitors to further reform the way they work, their labour costs, and their capacities to deliver flexible, competitive levels of service in key infrastructure areas.

b. Where reform has progressed to date in key areas such as electricity, gas, water and transport, capacities to now move to address workplace and labour issues appear essential to extending and building on those reforms.

c. This is true both for State and Territory agencies and those competing with them under the competition frameworks introduced under NCP.

d. Enhanced scope for competition in labour is the next step in unlocking additional competitive gains in the wake of the NCP process to date.

The important consideration here is the regulatory framework under which those delivering key national infrastructure in the areas of resources and transport etc operate. Be they State based or national, they are likely to operate subject to dual systems of Federal and State employment regulation. Action by the Commonwealth Parliament to deliver further fundamental workplace reform would deliver additional capacities to compete and innovate – whether these were taken up at a State or Territory level would be a matter for their determination (and for competitive pressures).

What this is not about

This should not be interpreted as ACCI advocating a race to the bottom on wages and conditions of employment in areas such as gas, water, electricity and transport. Far from it. Bargaining and reform have delivered such industries significantly higher wage outcomes in particular than were available under previous, even more centralised approaches.

The industries at the forefront of NCP reform do appear to have much more to gain (and to deliver to employees) than has been secured to date. Providing a framework of labour market regulation which better allows them to do so will be important.

Industrial Law and the Trade Practices Act

It is also appropriate that this review consider the economic and labour market issues arising from the (emerging) intersection between competition policy and workplace relations regulation in Australia.

The relationship between industrial law and trade practices law is matter of importance – but surprisingly low level debate.

Under current law, for some purposes industrial and employment matters already fall within the framework of the Trade Practices Act (TPA). For other purposes they do not. The question that should be posed is, should the TPA apply more extensively to industrial and employment matters, and if so where should the line be drawn?

The critical provision of the TPA raised in this debate is the exemption provided for in s51(2)(a).

This is not an exemption for all industrial matters from the whole of the TPA. It is only an exemption from part IV prohibiting restrictive trade practices, and even then it is not an exemption from sections 45D, DA, DB, E, EA or 48. This is crucial – it is not an exemption

from the secondary boycott laws, nor from laws prohibiting anti-competitive conduct in the supply or acquisition of goods or services, nor from laws relating to resale price maintenance. Nor is it an exemption from part IVA dealing with unconscionable conduct. Nor is it an exemption from the consumer protection provisions in part V.

This means that on the face of it there is already much that the TPA can do which impacts on industrial matters.

Over many years ACCI has been one of the leading proponents in the community arguing that secondary boycott laws must remain in the TPA. The Modern Workplace: Modern Future 2002-2010 Blueprint makes our position clear: "*Secondary action should be prohibited through the TPA…the restoration of these secondary boycott remedies has been a very effective contribution to historically low levels of industrial disputation since the commencement of the Workplace Relations Act 1996*" (Blueprint 6.3)

By and large, our campaign has succeeded. They were inserted there by the Fraser government. For the life of the Hawke government they remained in the TPA. The Keating government took them out between 1993-1996, but they were rightly reinstated in 1996.

The framework for this debate is very broad. Rather than just debate whether industrial law should be more exposed to trade practices law, we need to consider the prospect of policy being moved back the other way and secondary boycott disputes being regulated solely through the industrial system and the more benign processes of conciliation and arbitration. This would be a retrograde step to say the least.

Would it succeed? So far the Senate has displayed a worrying double standard. It is happy for the Australian Competition and Consumer Commission (ACCC) to be given powers to take class actions on behalf of small business against larger businesses for breaches of part IV, but is refusing legislation (twice in fact, now a double dissolution trigger) which gives small business access to the same enforcement rights of the ACCC when taking actions against large unions under part IV. Small business should not be any more vulnerable to unlawful conduct by big unions than it is to unlawful conduct by larger competitors.

ACCI supports the pro small business legislation that has been rejected by the Senate and urges its reconsideration in the interests of those businesses exposed to secondary union boycotts and which need the resources of the ACCC to act on their behalf as a group.

The difficulty in getting this Bill through the Senate illustrates the magnitude of the task for those who argue that the TPA should extend further into industrial matters. If the Senate won't allow parallel enforcement rights in areas where there is already an overlap between industrial and trade practices policy, then how will the Senate be persuaded to allow additional rights?

Secondary boycott laws protect innocent small businesses from strikes involving third parties. But other aspects of the TPA which already impact on the employment relationship are not as benign to employers. Some of them open up new causes of action against employers. In the hands of adventurous and litigious lawyers and activist judges, the consumer protection provisions of the TPA could be used to add to the regulation of employment. Already we have seen the Federal Court apply the false and misleading conduct provisions of the Act in such a way as to bind employers to promises or claims made to prospective employees during employment interviews, even where they are made by a temporary agent of the employer such as a recruitment agency.

It is also possible the unconscionable conduct provisions of part 4A could over time be interpreted or extended into aspects of industrial law – including contractor/employer or contractor/union dealings.

The terms of the exemption in 51(2)(a) also qualifies its application. The more qualified its application, the more that industrial matters can already be governed by the competition provisions of the Act.

Based on court decisions s51(2)(a) does not "*remove altogether from the TPA any acts done or any contract, agreement or arrangement that may in any way relate to an employment contract. Rather the statutory protection is directed at agreements or arrangements or acts done in relation to them but only to the extent that those agreements or arrangements or provisions in them relate to employee conditions"* (Hill J, 1991 Adamson's Case). And on appeal, *"if one thing about the paragraph is clear, it is that the exclusion from the operation of s45 which it confers is limited to conduct relating to remuneration, conditions of employment and hours of work or working conditions of employees.*" (Wilcox J, 1991).

As a consequence, it is quite possible that even now any conduct or agreement which is not relating to remuneration, conditions of employment, hours of work or working conditions – or which is collateral to them – is already capable of being put under the trade practices microscope to see if it breaches prohibitions on anti competitive conduct.

This is significant – because we know that many agreements in the industrial world – both those that are certified and those that are not certified and not intended to be certified – contain some provisions that go beyond these exempted subject matters. For example some agreements do specify that employers and employees shall use goods made by union labour, or goods supplied by one supplier, or that union membership shall be compelled or encouraged, or that payments will be made to particular third parties and the like. Are these lawful agreements?

It will be very interesting to see how the High Court as currently constituted deals with this question of the limits of the existing 51(2)(a), if it gets to adjudicate on the matter.

Having made the point then that the TPA does already include quite considerable scope for entry into some industrial matters (some good for employers, some not so good), why then don't we already see more activity and enforcement?

In part the industrial relations culture has in itself deterred non industrial and non industrial authorities from getting involved in industrial matters even where they have a legal basis for doing so. Slowly this is changing. Some employers, some contractors and some employer associations are now asking their lawyers, their advisers and ultimately the ACCC and the courts if some of the demands that unions are making on them or if conduct by some union officials or competitors is in breach of existing provisions of the TPA.

Only by taking initiatives like these will we get a clearer view of just how far the exclusion in 51(2)(a) goes. The ACCC itself does take some action – for example, the ACCC initiated action under the secondary boycott provisions of the TPA against the AMWU, AWU and CEPU with respect to alleged secondary boycott action involving the Patricia Baleen gas plant in Gippsland Victoria.

The Patricia Beleen case also highlights another issue – the apparent differential application of the penalty provisions of the TPA when it comes to secondary (anti competitive) conduct by trade unions, compared to conduct by employers. In Patricia Beleen, remarks by the Federal

Court judge (Justice Gray) were critical of an agreed settlement between the ACCC and the relevant (wrongdoing) unions. Gray J. expresses disquiet at the level of agreed penalty $100,000. The observation that this penalty was too high despite the maximum of $750,000 being available under the legislation is contentious to say the least. The rational of his honour is even more curious – it was that unions did not engage in unlawful conduct for their own gain – but for the gain of their members. Given that the unions conduct in this case was clearly designed to cause considerable damage to innocent targeted businesses (the mischief these provisions of the Act seeks to prevent), it is hard to see how unlawful union conduct was any different to unlawful conduct engaged by a corporation seeking to act in the interests of shareholders. On the basis of this case, business is entitled to conclude that there is a clear and apparent double standard in the application of competition law to unions on the one hand and business on the other.

Notwithstanding this decision of Gray J., it is vital that the ACCC act clearly and consistently on all investigations relating to alleged unlawful secondary boycott activities. The ACCC's past practice seems to have developed a qualified or conditional willingness to move on s45D issues – only where there is a significant impact on competition. This is not a criteria of 45D – all unlawful secondary boycotts should be investigated by the regulator.

What then would be the consequences of altering the balance of 51(2)(a) as it currently applies?

It is argued by some that the existing s51(2)(a) allows a wide range of anti competitive conduct (including fixing the price of labour) to be engaged in under the cover of an employment or industrial matter, thereby insulating the industrial system and the labour market from competition laws that apply to all other forms of commercial relationship.

On the other hand, it is argued that the exclusion is necessary because employment and labour services are not simply another commodity, and that an industrial system that separately regulates wages and employment standards and confers rights to collectively organise necessarily conflicts with commercial competition law unless the exemption exists.

As with so much of our industrial debate, generalisations and sloganeering on both sides does it a disservice. There is merit in elements of both of these arguments, but the policy absolutes which both poles of the debate advocate cannot be sustained. In this debate, the public interest lies somewhere in the middle.

It is true that s51(2)(a) has not been amended for many years, despite the industrial relations system changing and enterprise bargaining in individual companies increasingly regulating wages and employment conditions. But it is also true that we still have a very active compulsory conciliation and arbitration system imposing standards of wages and conditions collectively across industries and employers. Given this, it could be argued that there is a role for the TPA and anti competition law in industrial matters, perhaps a clearer role, but the role should still be within defined boundaries whilst the industrial system remains as it is.

It should not be the case that an industrial exclusion for the legitimate policy purpose of allowing for an orderly system of minimum standards and collective bargaining to exist, should be misused by allowing the inclusion in agreements (particularly unregistered agreements) anti competitive provisions that undermine the public interest, or economic efficiency or even the interests of parties affected by the agreement.

Equally, the exclusion should not be so limited that legitimate collective bargaining and legitimate membership of collective organisations and discussions and representation through collective organisations on industrial matters is undermined.

The complete removal of the exclusion in 51(2)(a) may prevent what is wholly justified and indeed necessary – the capacity of employers to meet together and determine policy, strategy and representation over employment matters that have impacts across industry and across employers or that are imposed by governments, parliaments, unions or industrial tribunals across industry or across employers. And the same applies to unions.

The right to freedom of association, or non-association, is a basic right, and is consistent with Australia's international obligations. It extends to employers and not simply employees. The right to associate can only be effective if it carries with it the right to discuss and determine policy and implement that policy. And the right to collectively associate also carries with it the right to collectively bargain – but not to abuse bargaining rights.

The individual freedom we all have and cherish, in an ordered society is necessarily qualified by its relationship to the collective.

The industrial system should be no different. An industrial system that is all about collectives and not about individual rights is deficient, and vice versa. The high water mark of wiping out the exemption in 51(2)(a) would mean wiping out collectives, and is therefore not an appropriate response in the name of competition. Collectives – whether unions or employer bodies – should be judged on what they do and say and achieve, not what they are.

Whilst we have a system in Australia that allows unions, governments, parliaments or industrial tribunals to impose employment obligations on employers collectively, then there must be a right to collective action by employers. If governments or arms of the state or third parties elect to lawfully regulate the price of labour in this way then the freedom to compete for labour is qualified and hence the prohibitions on anti competitive conduct in the TPA must also be qualified.

These are not novel propositions. The National Competition Council, a body which embraces the principle of extending competition more broadly across the economy, examined these issues in 1999. It decided, on balance, that no case had been made at that time for the removal or variation to the exemption in s51(2)(a). It concluded that the public interest did warrant its continuation, for reasons similar to those above. It was the National Competition Commission saying this – a body without a vested interest in the industrial relations system, not the Australian Industrial Relations Commission.

And it is not just employment matters where appropriate qualifications are justified in the pubic interest from some of the competition principles of the TPA. The TPA already has a range of qualifications which recognise and permit collective conduct in the public interest or for the public benefit.

Just recently a major inquiry was conducted into aspects of the TPA as it relates to conduct between businesses – the Dawson Review – headed by former High Court justice Sir Daryl Dawson. One of the recommendations of that review was that small businesses should have the right to bargain collectively on commercial matters of less than $3 million in value, and in doing so not be in breach of the competition provisions of the TPA. How can public policy on the one hand say that collective arrangements on industrial matters ipso facto offend the competition principles of the Act and should be subject to all of the prohibitions of the Act, whilst at the same time public policy proposes new rights to collective bargaining on other commercial matters should be extended and the operation of the competition provisions of the Act thereby narrowed.

Rather, the appropriate response is to properly and perhaps better define the boundaries of 51(2)(a). If the government and the parliament examined the appropriate limits of 51(2)(a), the focus should be on removing scope for abuses and unintended manipulation of the exemption that have no public benefit - not remove it per se. Throughout this debate policy makers must be careful not to overplay one principle in support of competition at the expense of the other equally valid principle in support of collective association.

Workplace Relations a Vital Competition Policy Issue

Workplace relations reform remains one of Australia's primary policy challenges moving into the second half of this decade.

Australia's very significant workplace relations reform to date has, along with major taxation, competition and regulatory reform and prudent economic management ensured the Australian economy and labour market has weathered various economic challenges. Reforms throughout the past decade have directly delivered Australia's very impressive employment, interest rate and wider economic performance.

This cannot be considered either a static or a completed reform process. Ongoing reform, and a wider scope and pervasiveness of workplace reform is essential if Australia is to cement and not surrender the gains of economic and competition reform to date.

In response to the questions posed in the issues paper:

a. Addressing restrictions on competition in 'input' markets should become a priority for the future as described in this submission and as outlined in detail in the ACCI Reform Blueprint, *Modern Workplace: Modern Future.*

b. The benefits of further fundamental labour market reforms are clear – they include cementing the benefits of reforms to date and further gains in fundamental areas of macro economic resilience and growth, employment gains, unemployment falls, increased productivity, efficiency and innovation and improved living standards for more Australians.

c. The costs of workplace reform are as regularly and shamelessly exaggerated as they are hotly debated. On all available measures, and in particular in net/overall terms, over a decade of workplace relations reform has secured improved outcomes for Australians, not a detriment. Considering the checks and balances in Australia's workplace relations system, and all genuine reform proposals to date, ACCI can identify no particular net costs of further well-managed workplace reform which need be balanced against the obvious and manifest benefits.

The Commission is invited to conclude that ongoing workplace relations and labour market reform is a first order priority to secure the ongoing economic and labour market gains identified in this Inquiry's terms of reference. In making its recommendations, the Commission should have regard to the ACCI Workplace Relations Reform *Blueprint*, and in particular the priority areas in which workplace relations reform can secure outcomes directly consistent with the terms of reference of this Inquiry.

COMPETITION POLICY AND VOCATIONAL EDUCATION AND TRAINING

Another area into which the NCP should be extended is reforming the provision of training in Australia.

ACCI's quarterly *Survey of Investor Confidence* has been showing for a long period now the increasing concern the employers have in securing skilled staff. The July 2004 survey reported, for the first time in the 14 years of the survey, that the "availability of suitably qualified employees" was the number one constraint on future investment decisions.

This is a problem that is related to the lowest unemployment rates for over 20 years. However, it is more than that and it is also explained by lack of appropriate competition in the vocational education and training (VET) sector.

It is a matter we need to address not least because an ageing population will over time exacerbate the problem.

It is time to refresh the approach to User Choice policy in VET.

There is no doubt that the original notion of User Choice was a timely and critical element of the reforms to the national training system, with the primary objective of increasing responsiveness to the needs of clients. User Choice encourages a direct market relationship between individual training providers and the clients: employers and employees. However, after much fanfare, employers still wait for the things they were promised.

Advancing the Cause of User Choice

Relevant State and Territory Ministers considered the implementation of a User Choice policy in 1997 and agreed that full implementation should take effect nationally from 1 January 1998.

Under User Choice, public funding for training would flow to an individual training provider as selected by the employers involved in New Apprenticeships. This shift in funding arrangements promised to:

- allow employers to select the provider of their choice;
- empower employers to negotiate about aspects of training including content, location and timing; and
- provide a greater level of contestability amongst training providers, therefore improving responsiveness and diversity between public and private providers.

The following nine User Choice Principles were agreed by Ministers in July 1997:

- Clients are able to negotiate their publicly funded training needs.
- Clients have the right of choice of registered provider and negotiations will cover choice over specific aspects of training.

- User Choice operates in a national training market not limited by State and Territory boundaries.

- The provision of accurate and timely information about training options is necessary for informed choice.

- Pricing of training programs by State/Territory Training Authorities should be based on clearly identified State/Territory unit costs benchmarks. Unit costs set for efficient provision may be increased by including a loading for access and equity reasons.

- Training over and above that which is essential to the qualification outcome for the apprentice or trainee, and is above that which is funded publicly, can be negotiated and purchased by the client.

- User Choice would be harnessed to improve access and equity in the VET system and be integrated with existing initiatives.

- Regulatory frameworks and administrative arrangements relating to VET at the national, State and Territory level are to be complementary to the achievement of the objectives of User Choice.

- Evaluation of outcomes of User Choice against objectives is an integral element of a program of continuous improvement. Innovation is required to achieve and maintain a best practice training system.

It is evident that none of the nine principles have been fully implemented across the country or processes have been established which severely limits the opportunities for employers and restricts the desired outcomes. Processes are also different in each State and Territory.

During the last election campaign the current Australian Government reaffirmed support for User Choice and the Minister for Education, Science and training, the Hon Brendan Nelson MP, has confirmed that support.

However, the State and Territory agencies need to implement these arrangements and ensure a flow of information about User Choice to all stakeholders. First, training providers have to be fully briefed about the purposes of User Choice and how it will work. Providers must have detailed information about Training Packages, customisation options and funds transfer. The State/Territory agencies also have a responsibility to inform the clients, by a variety of target marketing approaches, about User Choice in New Apprenticeships and the full opportunities for enterprises and their employees.

Commitments were also made by States and Territories to ensure adequacy of services and choice to clients in rural or remote areas, or in industry sectors where there are fewer clients. In such cases, sometimes referred to as “thin markets”, there is agreement to maximise the available choices for clients by treating these cases as exceptions, and reporting on them annually. It was agreed that risk management arrangements for “thin markets” should not in themselves form any impediment to choice for employers.

Significant Market Power

With the flow of public funds to training providers reflecting the choices made by employers, a greater level of market power is released to them. This means not only does the employer have a

choice of public or private provider, but negotiations can also include specific aspects of training to suit the needs of clients. This can include the selection, content and sequencing of competency units, the timing and location of training delivery, assessment and evaluation modes. The client naturally responds more favourably to the provider that is able to deliver those kinds of flexibilities, whilst on the supply side of the coin, a competitive individual training provider will strive to match clients' needs more effectively, and tell everybody loudly about it.

Nevertheless, there must also be an acknowledgement that, between the promises of the User Choice policy and the reality for many employers, there lies a credibility gap. There is an increasing tension building amongst employers, a tension that stems from a perception that, for whatever reasons, employers are not always getting the choices they should have, or the information they are entitled to under the policy. It is the key message from employers for governments to encourage employers to participate in training.

A weakening of the User Choice arrangements, or a failure to fully implement those arrangements will only lead to a lessening of demand. Employers may begin to withdraw from an engagement in training if their role and influence is diminished.

And yet, in many jurisdictions, this is exactly what could happen. Six years after its national introduction, the effective implementation of User Choice arrangements is far from being nationally consistent. Indeed, User Choice has suffered a "freeze" in some jurisdictions, where State/Territory agencies, concerned about the impact of User Choice on existing public providers, have attempted to turn back the tide of reform.

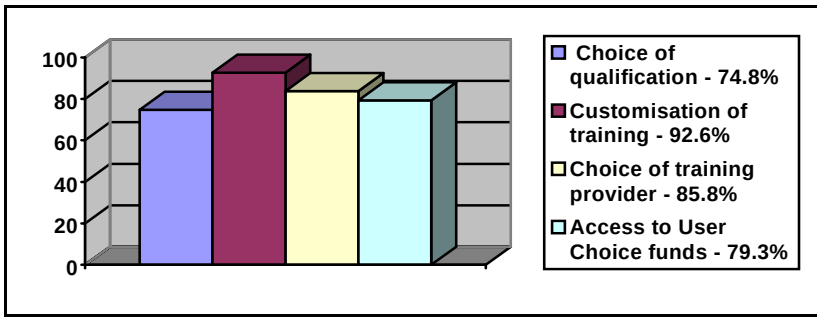
What's the Employer View?

ACCI sees strengthening of User Choice arrangements as a key element in employer engagement in training as well as essential to the on-going performance of the VET system in Australia.

In March 2001 ACCI conducted a survey of around 350 employers from each State/Territory. We actively sought out employers engaged in User Choice. Our respondents were an even spread of small, medium and large business. Half were metropolitan-based, one third regional, 13% operating in both metropolitan and regional areas and 4 % from rural areas only. Two thirds of respondents operated in only one State/Territory.

Respondents were asked to rate four key aspects of User Choice. In the end, all four received a stamp of approval (see Figure 1), with the flexibility now available through *"Customisation of Training"* as the most important reason. More than 90% rated this as important for their business, and when this figure is combined with comments made in "open" questions later in the survey, the concerns of employers are further revealed. Even amongst those employers who had not known that customisation was possible, or those who had not yet been able to arrange it, being able to "mix and match" competencies to ensure specific skill needs of their business were met, sparked a particular enthusiasm. It appears employers see User Choice flexibilities as offering a high level of responsiveness and relevance to changing technologies and future industry skill requirements in the training that is purchased.

Figure 1: Which aspects of User Choice are important for your business?



Amongst the agreed principles of the User Choice policy are requirements to inform and market the benefits of User Choice, especially to employers and employees. The information available is meant to be full and accurate, and provided not just by the Commonwealth but through States and Territory agencies as well. It was very evident through the Survey that employers did not get information on their possible access to User Choice, where available, from training providers and had no appreciation of the significant public investment in providing the off-the-job training element.

The State of Play on User Choice in Training

The implementation of User Choice has become bogged down with States and Territories very resistant to any significant moves on freeing up the training market. Major issues of contention are:

- lack of a clear definition of User Choice and its purpose;
- concerns of the impact of any introduction on TAFE, particularly in regional areas where it is claimed 'thin markets' will threaten the viability of some TAFE campuses;
- need to 'control' training activity through central planning processes or 'managed competition' through select tendering;
- issues over quality of training provided, particularly by small private training providers; and
- fundamental flaws in the pricing system of training through 'nominal hours' allocated to training undertaken by provider rather than a set fee based on outcome.

Towards a New User Choice Policy in Training

Part of the issue around the introduction of User Choice has been the lack of definition and scope of User Choice and how it will be implemented nationally.

It is proposed that User Choice is a transparent process whereby employers have the ability to gain access to a preferred available training provider for their New Apprenticeships.

The following principle must be recognised and agreed for User Choice to operate nationally:

- employer engagement focus;

- recognition that the primary relationship in training provision is between the Registered Training Organisation and employer;

- User Choice is about competition, choice, accessibility, customisation and responsiveness;

- User Choice requires systems to be transparent, with equal treatment of all providers;

- the Australian Quality Training Framework is the primary tool to regulate the quality of the training system and employers prefer quality training arrangements;

- any introduction of User Choice should initially be limited to New Apprenticeships (currently 25% of VET funding);

- the importance of State/Territories in setting their own priorities and funding levels, in consultation with industry. It may be necessary to agree at a national level on some broad parameters for unit costs in a transition period;

- any system requires employers, or those organisations acting on their behalf (eg brokers), to understand their role and influence over training activity (ie employer empowerment);

- the importance and availability of Training Packages in all jurisdictions;

- recognition of 'nominal hours' as a flawed concept and the need to move to a set unit cost for all training; and

- introduction of third party access where all providers can get access to public infrastructure at reasonable rates.

The Key Elements of a New User Choice policy for Training

User Choice requires agreement to establish a new pricing and purchase policy at the State/Territory level linked to each available qualification. This would:

- allow all providers to clearly understand and cost service;

- allow employers to understand the extent of public money flowing to training and to supplement public monies if they seek alternate training arrangements or additional site specific training; and

- a transparent process for States to determine priorities and price setting.

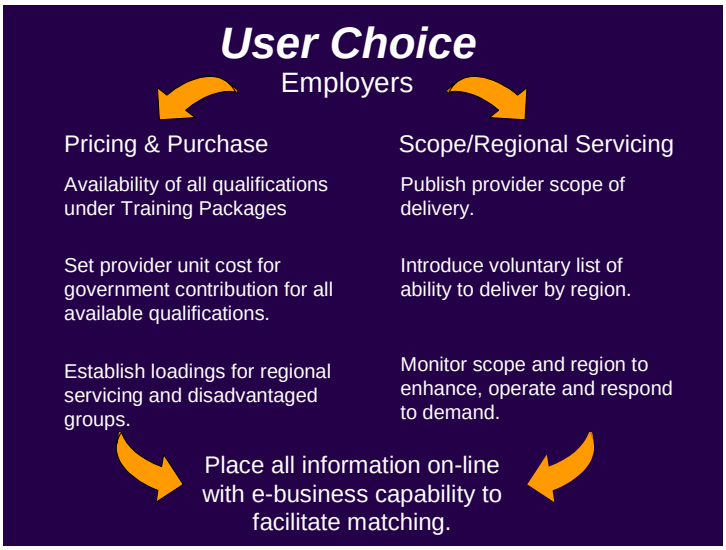
This information then needs to be supplemented with the flexibility to allow training providers to promote their ability to operate in a specific region for their registered Training Package area. This needs to be facilitated through an on-line-matching register for employers or organisations acting on behalf of employers. This would allow:

- employers to approach a range of providers prepared to operate in their region who registered to undertake training in their determined area under the Training Packages;

- providers to approach employers with a range of services to complement the areas in which they are interested; and

- providers to compete for the customer on the same price footing.

The process is presented schematically below:



ACCI and member organisations has been urging State and Territory Governments to begin discussions on taking this forward. It is understood that this new simple arrangement will deliver the goal of empowering employers to better skill their workforce, but also encourage real dialogue across the country between employers and Registered Training Organisations.

Further ACCI is urging the Productivity Commission to include a consideration of User Choice in the VET sector in its review of NCP.