Response to the Reforming Australia’s Shipping Discussion Paper
1. Introduction

1. The Australian Industry Group (Ai Group) has prepared this submission in response to the request for comment on the discussion paper *Reforming Australia’s Shipping – A Discussion Paper for Stakeholder Consultation* released on 1 December 2010 by the Hon. Anthony Albanese MP, Minister for Infrastructure and Transport (“the Discussion Paper”).

2. This submission deals with those aspects of the Discussion Paper which relate to the workplace relations arrangements applicable to Australian Shipping.

3. Ai Group represents numerous companies which are extensive users of shipping to transport raw materials, components and finished products. The Australian Government needs to keep the interests of all stakeholders foremost in mind when considering changes to the existing arrangements governing workplace relations in the shipping industry. Such stakeholders include the users of shipping as well as Australian consumers. The views of the maritime unions and Australian shipping companies are just two amongst many views which the Government needs to take into account.

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

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

5. Ai Group supports the Australian Government’s efforts to revitalise the coastal shipping industry but not at the cost of making employers in other industries less competitive and productive, and threatening the jobs of workers in other industries.

6. In this submission Ai Group argues that:

• The existing cabotage arrangements are too costly and inflexible;
• The more restrictive cabotage regime proposed in the Discussion Paper is highly inappropriate and would be damaging for industry and employment in Australia;
• We would welcome the opportunity to be involved in a consultation process aimed at identifying an appropriate solution to address the problems which industry is currently experiencing with the existing cabotage arrangements.

7. Generally speaking, the workplace relations proposals in the Discussion Paper are steps in the opposite direction to what is needed.

2. About Ai Group

8. Ai Group is the leading industry organisation representing employers in the manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, labour hire, printing, defence, mining equipment, aviation and other industries.

9. Ai Group is closely affiliated with more than 50 other employer groups in Australia and directly manages a number of those organisations.
10. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

3. **Ai Group’s position on cabotage in Australia**

11. For the purposes of this submission, Ai Group has defined “cabotage” as the “the limiting of access to a country’s coastal trade to national ship operators or national flag vessels with national crews”. ¹

12. There is of course an economic argument that cabotage should be abolished because it is economically inefficient and increases costs for users of shipping (including a large number of Ai Group member companies). We note that New Zealand abolished coastal cabotage in 1994 and has not re-introduced it.

13. However, given that the *Fair Work Act* and the *Seagoing Industry Award 2010* apply to Australian-registered ships, Ai Group understands the argument that such ships should not be exposed to unfair competition from overseas shipping companies.

14. In Ai Group’s view an appropriate balance needs to be struck which takes into account the interests of Australian companies (shipping companies as well as companies which use shipping to transport their goods), Australian workers (those employed by shipping companies plus those employed by the users of shipping) and Australian consumers (who will be forced to pay the higher prices associated with increased transport costs).

15. Ai Group submits that the current cabotage arrangements are overly restrictive and costly, and need to be amended.

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4. Australian cabotage developments

16. There have been a number of important developments over recent years regarding the application of Australian workplace relations laws to foreign-flagged ships. Some key issues are:

- In 2002, the Australian Industrial Relations Commission roped CSL (registered in the Bahamas and operating with a Ukrainian crew) into the Maritime Industry Seagoing Award. CSL appealed to the High Court but lost in a unanimous High Court decision.

- From 27 March 2006, the Workplace Relations Act 1996 excluded "persons insufficiently connected with Australia" from the application of the Act (s.12(1)). The Workplace Relations Regulations defined the following persons as "persons insufficiently connected with Australia":
  
  o "A person who:
    (a) is a non-citizen; and
    (b) is a member of the crew performing duties on a permit ship"; and

  o "A foreign corporation in the capacity as the employer of a person who:
    (a) is a non-citizen; and
    (b) is a member of a crew performing duties on a permit ship"; and

The following definitions applied under the Workplace Relations Act:

"Non-citizen has the same meaning as in the Migration Act 1958"; and
"Permit ship means a ship:

(a) to which a permit has been granted under section 286 of the Navigation Act 1912 for a single voyage or as a continuing permit; and

(b) for which the permit is in force."
• The original *Fair Work Regulations* which came into effect on 1 July 2009 extended the operation of the *Fair Work Act* to ships with an Australian licence, ships with an Australian permit and majority Australian-crewed ships operating in Australian waters.

• The Australian Government accepted that the original *Fair Work Regulations* were too restrictive and, in December 2009, the *Fair Work Regulations* were amended to provide that the *Fair Work Act* applies to:

  - “licensed ships, where the licence is in force or is issued on or after 1 January 2010;
  - permit ships that have been issued with a continuing voyage permit that is in force or is issued on or after 1 January 2010;
  - permit ships that have been issued with a single voyage permit on or after 1 January 2010 and:
    - the ship has previously been issued with at least two single voyage permits over the previous 12-month period; or
    - the ship was issued with a continuing voyage permit in the 15-month period immediately preceding the date the current single voyage permit was issued;
  - Australian majority-crewed ships.”

(Source: Extract from the Explanatory Statement for the *Fair Work Legislation Amendment Regulations 2009 (No.2)*).

• Fair Work Australia (FWA) has developed a Part B for the *Seagoing Industry Award 2010* which from 1 January 2011 has covered permit vessels. The background to this development is set out in the Tribunal’s Stage 4 Award Modernisation Decision ([2009] AIRCFB 945):

  “Maritime industry - Seagoing

  *Seagoing Industry Award 2010*

  [159] An award for the seagoing industry was originally a matter to be dealt with in Stage 3 of the award modernisation process. In June 2009, the Minister advised that new regulations were to be made extending the application of the *Fair Work Act* to ships which had been granted a permit under the *Navigation Act 1912*. Those regulations were made in August 2009. On 17 August 2009 the Minister varied the consolidated request to include the following:
47. When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian crewed shops (as defined in item 1 of Schedule 2 to the Fair Work Amendment Regulations 2009 (No.1)) and their employees.

48. The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.

49. As well as giving consideration to the modern awards objective in s576A of Part 10A of the Workplace Relations Act 1996, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may be in Australia for relatively short period or who are regularly moving in and out of the Australian jurisdiction.”

[160] In light of these developments the Commission considered it appropriate to provide interested parties with an opportunity for further consultation and that the modern award for the seagoing industry would be considered in Stage 4 of the award modernisation process, rather than in Stage 3 as originally planned. We were subsequently informed that on 26 October 2009 the Minister indicated that relevant amendments were to be made to the Fair Work Regulations 2009. Those regulations, we were told, would deal with the circumstances in which a vessel which has been granted a permit, whether a single voyage or continuing one, would come within the scope of the Fair Work Act.

[161] With our statement of 25 September 2009 we published an exposure draft of a seagoing award. We addressed the issue of award coverage of permit ships and made a provisional decision to deal with such ships in Part B of the modern award. Our decision included the following:

“[155] Conscious of the variation to the consolidated request we have decided to divide the award into Part A and Part B. We have tentatively described Part A as applying to non-permit vessels, which are essentially the respondents to the existing award. Part B will apply to permit vessels.
The specific provisions applicable to Part B vessels will also require substantial consideration. While we will be better informed by the further submissions of interested parties, including in the public consultations in October 2009, our preliminary view is that Part B conditions will need to pay due regard to conditions applying internationally, including what has been referred to as the ITF agreement. We also note that cl.l.28 to 35 of the consolidated request govern the manner in which modern award provisions can interact with the NES. Proposals which relate to the effect of the NES on crew covered by Part B of the modern award will need to be framed with those provisions in mind.

The lack of certainty as to the applicable legislation has resulted in some difficulties for the parties in putting submissions to us. Indeed, some parties pressed us not make any award until the intention of the Parliament is clear.

Several employer groups have submitted that conditions of employment for some or all permit ships should reflect those found in what are termed ITF (International Transport Federation) agreements. We understand that there is no single ITF agreement. There is a range of different standard instruments, which are adopted or modified in agreements applying to a particular enterprise. It was said that there are currently 6500 agreements based on ITF instruments. Not surprisingly, given the fluidity of the legislative environment in which they found themselves, no party provided a specific set of conditions that could apply as Part B.

We have also noted that the unions oppose any differentiation of provision between vessels. Their position is said to be strengthened by the proposed regulations which, if made, will point to the Parliament’s intention that certain types of permit vessels should have the same conditions applied to them as apply to licensed and majority Australian-crewed ships.

We have decided, for now, to maintain two parts to the award. Part A will apply to all ships other than those operating under a permit and remains unchanged from the exposure draft. Part B will apply to ships operating under the permit system. In all of the circumstances we are not able to make an award that would establish a final set of appropriate conditions for foreign ships operating under the permit system. Notwithstanding the limitations in the material before us we have decided to include some basic conditions in Part B which we consider are consistent with some accepted standards in ITF agreements and which are capable of ready application to permit ships.

In respect of minimum wages we have set them out as weekly rates and utilised the broad methodology which was used in the award simplification process. We regard the
integrated rating as the key classification and we have then maintained established relativities.

[167] We are conscious that the provisions in Part B have been formulated while the legislative arrangements in relation to permit vessels have not been finalised and, as described earlier, for various reasons there has not been comprehensive consultation or debate on critical issues. For these reasons we have decided that while the modern award will commence on 1 January 2010, Part B will not come into operation until 1 January 2011.

[168] An additional reason for caution is that permit ships have hitherto never been subject to Australian industrial regulation.

[169] Finally, we observe that Fair Work Australia will have the power to vary the award to achieve the modern awards objective. The delayed operative date in relation to permit vessels will provide an opportunity for interested parties to better inform Fair Work Australia in this regard. In relation to Part A of the modern award, it must be said that the circumstances attending the making of the award have not been ideal and it is likely that in due course the terms of Part A will also require review."

5. The existing cabotage arrangements are too costly and inflexible

17. It is evident that the existing Cabotage arrangements are too costly and inflexible for Australian industry.

18. Since the new arrangements under the Fair Work Act came into effect Ai Group members have expressed concern that the arrangements are deterring foreign ships from operating in Australian waters and are leading to large price increases for goods transported by foreign ships.

19. This issue has received some media attention as evidenced by the attached front page article of 12 July 2010 in The Australian.
20. On 1 October 2010 Ai Group wrote to Senator the Hon Christopher Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations to express our concerns about the cabotage arrangements after having earlier had discussions about the problems with a Senior Adviser to the former Minister, the Hon Simon Crean MP.

21. A relevant extract from the letter to Senator Evans follows:

Various Ai Group members have expressed concern about significant increases in shipping costs due to the Fair Work Regulations which extend the operation of the Fair Work Act to foreign-flagged ships.

The original Fair Work Regulations which came into effect on 1 July 2009 extended the operation of the Fair Work Act to ships with an Australian licence, ships with an Australian permit and majority Australian-crewed ships operating in Australian waters. The Government accepted that the original Regulations were too restrictive and in December 2009 the Regulations were amended to provide that the FW Act applies to: ships with an Australian licence; and foreign-flagged ships issued with at least two single voyage permits in the past 12 months or ships issued with a continuing voyage permit in the past 15 months.

The amended Regulations are still not appropriate because it is evident that foreign ships are being deterred from transporting goods between Australian ports and those which are prepared to do so are charging high prices. The increased shipping costs are having a big impact on some companies in the food, packaging and other industries.

22. Freight costs have already increased as a result of the existing cabotage arrangements. For example the following announcement was issued by Swire Shipping in June last year:

3rd June, 2010

AUSTRALIAN COASTAL CARGO SURCHARGE

FAIR WORK ACT LEGISLATION – 1st JULY, 2010

As a result of changes to award conditions for vessels undertaking the carriage of cargo along the Australian Coast, it has become necessary to introduce a coastal cargo surcharge to cover the increases imposed by the Fair Work Act Legislation (2009).

With effect from 1st July 2010, Swire Shipping will be introducing a surcharge for all coastal cargo carried on the South East Asia northbound service as follows:

AUD $600 / TEU For cargo loading in Newcastle, Brisbane & Townsville
AUD $30 / RT For cargo loading in Newcastle, Brisbane & Townsville
This surcharge will be effective for all coastal cargo loaded on the Pacific Mariner V24N, which has an ETA Newcastle of 4th July, 2010.

23. The extension of the Seagoing Industry Award 2010 to cover permit ships from 1 January 2011 will exacerbate the problems which industry is currently experiencing.

6. Any more restrictive cabotage regime would be damaging for Australian industry and workers

24. The Discussion Paper indicates that the Australian Government is considering a more restrictive cabotage regime, involving:

- Two forms of licence:
  - A General (Unrestricted) Licence which would require that licensed ships be Australian operated and flagged as well as crewed by Australian residents; and
  - A new category of Temporary Licence providing time-limited access (2 years) to the Australian coastal trade. This would be based on an assessment of a business case, which supports the long term interests of a competitive Australian Shipping Industry, including explicit consideration of the employment of Australian seafarers and numbers of vessels in the Australian trading fleet, and taking into account the proposed operations of both the individual ship and the applicant’s broader fleet;

- The abolition of Continuing Voyage Permits;

- A reduction in Single Voyage Permits, e.g. their limitation to circumstances of an urgent or emergency nature where there is a broad, national or community interest such as where the non-delivery of cargo or passengers creates a significant risk;
• Making it an offence for a licensed ship to be in receipt of a subsidy from a foreign Government;

• Ensuring that seafarers are covered by the *Fair Work Act* when working in coastal trade.

25. Ai Group submits that the proposed more restrictive cabotage regime is highly inappropriate and would be damaging for industry and employment in Australia. The implementation of such a regime would most likely:

• Substantially increase shipping costs for Australian companies;

• Decrease the competitiveness and productiveness of Australian companies operating in industries which use shipping;

• Reduce employment levels in the industries which use shipping;

• Increase congestion and maintenance costs on Australia’s road and rail networks;

• Increase the number of road accidents due to a significant increase in the percentage of goods transported on roads;

• Increase Australia’s greenhouse gas emissions as a result of replacing shipping with more carbon-intensive forms of transportation (eg. air transportation).

7. **The development of a solution**

26. Ai Group would welcome the opportunity to be involved in a consultation process aimed at identifying a solution to address the problems which industry is currently experiencing with the existing cabotage arrangements. Generally speaking, the workplace relations proposals in the Discussion Paper are steps in the opposite direction to what is needed.
IR laws blamed for ship cost rise

The cost of shipping cargo has escalated because of Labor's workplace policy.

Shippers are passing on the costs of regulations that require them to pay local wages to foreign seafarers carrying domestic freight between Australian ports, prompting warnings that this could lead to higher costs for widely used goods such as vegetables and packaging.

London-based Swire Shipping last week started charging a $600 surcharge for each container it loaded in Newcastle, Brisbane and Townsville on its southeast Asia northbound service, citing the need to cover increased costs from the Fair Work Act and award changes.

Shipping Australia chief executive Llew Russell said the costs of carrying domestic containers could rise by hundreds of dollars because of the changes.

The warning came as Infrastructure Australia chairman Rod Eddington told The Australian the waterfront needed to be overhauled by adopting a more national approach to the planning of the most important ports to help the country capitalise on the mining boom.

"We do need national guidelines and we do need national strategy for ports," Sir Rod said.

Under regulations introduced by the Prime Minister when she was workplace relations minister, the Fair Work Act has been extended to certain foreign-flag ships that move cargo between the nation's ports when no local vessel is available. Specifically, it applies to ships issued continuous-voyage or single-voyage permits two or more times every 12 months.

Mr Russell said vessels regularly doing work on the coast should be paid Australian wages. But he argued that the new regulations applied when a ship was largely carrying exports and imports, and was carrying the domestic freight between Australian ports as an "incidental" part of a bigger international trip.

Further, a new award for seafarers would come into force in January, which business feared could also drive up costs. Under the Howard government's Work Choices regime, these were not covered by local industrial law.
Moving cargo on foreign-flagged vessels is cheaper, mostly because of lower labour costs.

Cardboard giant Visy Industries shipped about 6500 containers around the coast in the past 12 months. International shipping lines have told Visy they could stop providing coastal shipping as early as this month. It warns this could force the company to import foreign-produced goods for use in its manufacturing operations or to use expensive road transport. "These effects will obviously impact Australian jobs, not only within our own Australian manufacturing plants but also in the many supporting services Visy's business enables," an internal memo says.

"A move to legislate payroll conditions to a service that is primarily concerned with foreign trade will see knock-on employment reductions across several Australian industries involved in manufacturing and production."

Simplot, which processes vegetables at plants in Tasmania that it sells as Birds Eye and Edgell, estimates its costs would rise by up to $7.4 million a year if it could not ship product to Brisbane and Fremantle via coastal shipping.

National logistics manager Danny Mellon has always achieved "attractive" rates because Simplot "piggy-backed" on foreign-flag ships travelling on international loops but was worried about the impact on services and costs resulting from the Fair Work Act.

Toll Holdings managing director Paul Little said the company, a major freight forwarder within Australia, had been told by a major shipping line that it would have to pay 30 per cent more for moving cargo domestically by sea.

"The two big fears for us are that prices will go up, which will make our customers less competitive," Mr Little said. "The other is the shipping companies will say it is no longer economical to pick up coastal freight. We've already had two international shipping companies, one of which is China Shipping, that have said 'we will no longer pick up coastal containers in the future'."

A spokeswoman for new Workplace Relations Minister Simon Crean said it was government policy that seafarers working on ships regularly in Australian waters should have the benefit of local laws. Under Work Choices, some workers on these ships were paid as little as $200 a week while competing with businesses paying Australian rates of pay. This was "the
equivalent of legislating that Australian trucking companies should be allowed to employ foreign drivers on temporary visas and pay them developing country rates of pay”.

The government had already made amendments to ensure foreign-crewed ships carrying only “occasional” coastal cargoes were not covered by the Fair Work Act, Mr Crean’s spokeswoman said.

Shipping Australia wants exemptions for domestic cargo on journeys also connected with international trade, or for the local wage to apply only to seafarers carrying local freight for at least 60 days a year.

Unions are demanding tighter restrictions on foreign ships on the coast and say powerful shipping conglomerates are trying to exploit low-paid workers.

The Maritime Union of Australia argues there was excessive growth in foreign vessels under the Howard government and this caused the local merchant shipping fleet to shrink by half in the past 10 years.