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SUBMISSION ON “MEASURES TO EXTEND AUSTRALIAN INDUSTRY PARTICIPATION” CONSULTATION PAPER

DECEMBER 2011

TABLE OF CONTENTS

SUMMARY	2
DETAILED COMMENTS	6

SUMMARY

This submission is made by the Minerals Council of Australia (MCA), for and on behalf of the Australian minerals industry, in conjunction with State representative bodies of the industry. It has the support of the Chamber of Minerals and Energy of Western Australia, the Queensland Resources Council, the New South Wales Minerals Council, the South Australian Chamber of Mines and Energy, the Victorian Division of the MCA, the Tasmanian Minerals Council and the Northern Territory Division of the MCA.

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry (nationally and internationally) in its contribution to sustainable development. Many MCA members are experienced participants in the Enhanced Project By-law Scheme (EPBS) and the associated Australian Industry Participation (AIP) Plan requirements.

Mining Projects Already Generating Large Benefits for Australian Industry

It is important that the Working Group advising the Australian Government on the implementation of new measures has an appreciation of the extent to which mining projects are already generating large benefits for Australian industry.

Market realities dictate that the Australian minerals industry has a strong interest in the development and maintenance of a vibrant and competitive local supplier industry. The exploration, mining and processing of minerals underpins vitally important supply and demand relationships with, *inter alia*, domestic manufacturing, construction, financial, legal and other professional services, process engineering, property and transport sectors.

MCA member companies already make substantial purchases locally on major projects and generally achieve high levels of Australian content. In 2009, the mining industry's total demand for goods and services was \$85.7 billion, of which \$75.8 billion (88%) was supplied by local industry. Within this total:

- 53.3% of iron and steel used by the mining industry was locally supplied;
- 64.6% of structural metal products used by the mining industry was locally supplied; and
- 71.7% of sheet metal products used by the mining industry was locally supplied.¹

More recent data from major mining states highlights further the degree to which both local business opportunities and broader societal benefits are being generated by the mining sector in Australia. For example, in 2010-11 the Queensland resources sector purchased \$20.5 billion in goods and services from employing QLD businesses, up from \$18.8 billion in 2009-10. Around 80% of QLD postcodes benefited directly from this expenditure.

A recent internal study for Western Australia's resources industry shows a continuing high level of local industry participation in mining sector supply chains with 86% of spending sourced domestically in the construction phase and 95% in the operations phase of WA projects. With the large expansion of WA mining projects, operations expenditure has increased substantially providing sustained opportunities for local suppliers.

General Comments on the Consultation Paper

The proposed changes to the EPBS and AIP Plans will add further administrative complexity and compliance costs onto MCA member companies in the absence of a compelling public policy rationale. In relation to the EPBS, the proposed measures would actively deter companies from taking the voluntary steps required to participate in the Scheme.

The MCA considers that the Consultation Paper proposes a series of regulatory changes which:

- have not been grounded in sound economic analysis;
- would expose companies to having to reveal commercially sensitive information;
- would open up companies to commercially unrealistic ambit claims by third parties with a vested interest in overturning normal commercial decision-making;

¹ *Maximising Australia's Resources Boom*, A report prepared for the Australian Steel Institute prepared by the National Institute of Economic and Industry Research, July 2011, pp. 40-42.

- are highly complex and likely to result in considerable compliance costs; and
- would, in some cases, duplicate existing measures and result in additional and costly regulatory overlap with other Federal and state government processes.

Specifically, the MCA regards the proposed changes to the EPBS as unnecessarily complex and counter-productive, especially in light of recommendations to government only a year ago that made a strong case for streamlining the scheme.

1. Poor economic underpinning

Overall, the MCA views the measures proposed as lacking firm underpinning in economic analysis. The premise of the paper is that there is a “trend towards greater use of established supply chains by investors (which) can create significant impediments to Australian industry participation in major projects”. Yet nowhere is this trend explored with any empirical evidence. Equally, nowhere in the paper is there a cogent, economy-wide case made for extending and tightening what are already complex processes around AIP Plans and access to tariff concessions under the EPBS.

Productivity Commission Chairman Gary Banks made some pertinent remarks in this context recently, referring to a spectrum of measures from border barriers through explicit local content rules to “initiatives to ramp up conditionality requirements on large projects’ access to tariff concessions”.

Local content rules, to the extent that they are successful in diverting purchases from the lowest cost sources internationally, merely reduce a nation’s purchasing power. While some local firms may do better, others will do worse as their competitiveness is eroded. Productivity and prosperity are both impaired.²

Mr Banks observed that the very use of the tariff concession indicates that imports (including of heavy machinery) “have been officially recognised not to be available locally”.

A legitimate rationale for such rules would require that there be ‘information failure’ or other possible sources of disadvantage experienced by local suppliers. However this is hard to sustain. If anything, local firms typically have significant advantages over foreigners, related to greater proximity and familiarity and fewer transaction risks. This is in fact the main rationale for the existence of Austrade and the support it provides to Australian firms seeking to sell in foreign markets. When large firms operating here source inputs overseas this will typically be because it makes financial sense for them to do so. In such cases, it will generally make sense for Australia’s economy too.³

The MCA considers that the Australian Government should address these points directly prior to advancing solutions in search of a problem.

2. Exposure to release of commercially sensitive information

The Consultation Paper treats too lightly the potential for proposed changes to stray into the domain of companies’ commercially sensitive information. For example, the proposed approaches for estimating local content and for reporting on outcomes could be used by competing firms (domestic and international) to obtain a competitive advantage. Moreover, in a relatively small market such as Australia, with a limited number of suppliers for some specialised equipment items, such data could be used to determine commercial sales terms and ultimately, company cost data. This is especially the case if the requirement is to report on anything other than a highly aggregated level of value-added (for example, in terms of discrete activities).

3. Focal point for third party actions

Whatever the intended consequences, and notwithstanding the absence of official targets or penalties around estimated or actual local content, the proposed measures provide additional opportunities for non-commercial factors to play a larger role in business decision-making. Past experience suggests that such measures are likely to be a focal point for third party actions designed to lessen the role of commercial factors.

² “Industry Assistance in a ‘Patchwork Economy’”, Address to the ACCI Annual Dinner, Canberra, 23 November 2011.

³ Ibid.

As well as being commercially unrealistic, given early lodgement of the AIP, upfront disclosure of local content ambitions invites behaviour from third parties that has the potential to undermine an open bidding process. From an economy-wide perspective, the MCA would stress that the role of the Australian Government is to resist such pressures.

Any new measures should align as far as possible with standard commercial practice. For example, mineral resource companies are experienced and well-placed to manage the dissemination of information around AIP Plans. Indeed, companies regard maintaining control over this information as important to avoid any misrepresentation. As such, the MCA does not support moves to externalise publication of AIP Plans within the bureaucracy.

4. Added complexity and compliance costs

According to one MCA member company, the single measure of requiring project proponents to report more regularly on AIP Plans and their outcomes for large EPBS projects is likely to increase reporting demands by up to 200%.

Added complexity and compliance costs of this order can only result in higher overall cost structures, potential delays and, ultimately, lost economic opportunities for Australia.

5. Even more regulatory overlap and duplication

Alignment of Federal and state initiatives around local industry participation is critical, both to achieving underlying policy objectives and to minimising regulatory costs on business.

Under existing programs and schemes, Federal and state government agencies already impose significant reporting requirements on companies. In Western Australia alone, for example, mineral resource companies are already stretched in responding to a range of initiatives including:

- existing AIP and EPBS requirements;
- the new Buy Australia at Home and Abroad forum;
- the Prime Minister's Manufacturing Taskforce;
- the WA Government's recently released Local Industry Participation Framework;
- existing local content reporting obligations for WA State Agreement Act (SAA) projects which capture the majority of major WA projects;
- recent amendments to SAA such that proponents are now required to develop and implement forward looking Local Participation Plans; and
- the extension of local content reporting requirements to 35-40 additional non SAA projects.

In Queensland, the state government has recently proposed requiring plans for local supplier content and local workers as part of project approvals. The changes will require major project proponents, such as mining companies, to develop Local Industry Participation Plans and Workforce Development Strategies as part of the Environmental Impact Statement (EIS) process. As the Queensland Resources Council has stated, mandatory plans as part of the EIS process will only add to the complexity and slow the pace of the approvals process.⁴

The new measures proposed by the Consultation Paper will add to costs arising from regulatory overlap and duplication. Moreover, they run counter to the Federal Government's own "best practice" regulatory guidelines and to repeated Government statements about its commitment to streamlining regulatory processes as part of a "seamless national economy".

Proposed Changes to the EPBS: A Backward Step for Policy Coherence

The MCA is particularly concerned by the seeming lack of policy coherence around the EPBS given it is only twelve months since a major review of the scheme was conducted. Hence the proposal to "further tighten the administration of the Enhanced Project by-law Scheme" can only be seen as the result of political pressure, rather than considered policy development. Notably, as recently as December 2010, Access Economics issued a review

⁴ "Resources projects provide \$21 billion stimulus to Queensland suppliers", Queensland Resources Council Media Release, 29 November 2011.

paper to the Australian Government on the EPBS the main finding of which was that the scheme needed to be more streamlined.

There is a real risk that further regulatory “tightening” will result merely in companies opting not to be part of what is a voluntary scheme. The unintended consequence would be to lessen the opportunities arising from the scheme. In the words of one MCA company representative:

The current EPBS has generally not been taken up based on a cost/benefit analysis.

Given that the local content of our capital projects can be significant, with the relevant imported component lower and given the onerous nature of the application process required in relation to the current EPBS, it has not been worthwhile to participate.

On some occasions, we have been able to utilise existing tariff concession orders (TCOs) to reduce our customs duty. This will most likely continue to occur especially where the proposed EPBS is predicted to increase the level of documentation required.

A Better Approach

Consistent with what the MCA recognises as the policy objective in this area, the Australian Government should refocus its efforts on measures that actually build the capacity of Australian firms (especially SMEs) to participate in major project supply chains, including in the resources sector. The focus should be on enabling actions, with a focus on unlocking synergies between private sector and government investments, rather than on imposing greater regulatory complexity and costs on companies.

Areas where enabling actions either have or could prove fruitful include:

- jointly funded studies of resource sector supply chains to identify areas of opportunity for local industry and to understand how these opportunities can be realised;
- collaborate R&D initiatives that would assist local industry in capturing higher value areas in resource supply chains; and
- innovation programs designed to address particular knowledge and technology gaps among suppliers to the Australian mineral resources sector.

The MCA stands ready to be part of a constructive approach to ensuring even wider benefits flow to Australian industry from a period of strong mining investment.

DETAILED COMMENTS

Introduction

The Minerals Council of Australia (MCA) appreciates the opportunity to respond to the “Measures to extend Australian Industry Participation” Consultation Paper released by the Department of Innovation, Industry, Science and Research in November 2011. We understand this submission will be considered by the Working Group and the Department of Innovation, when finalising advice to the Australian Government.

The MCA represents Australia’s exploration, mining and minerals processing industry (nationally and internationally) in its contribution to sustainable development. The MCA’s strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible, attuned to community needs and expectations. MCA member companies produce more than 85% of Australia’s annual mineral output.

Market realities dictate that the Australian minerals industry has a strong interest in the development and maintenance of a vibrant and competitive local supplier industry. The exploration, mining and processing of minerals underpins vitally important supply and demand relationships with, inter alia, domestic manufacturing, construction, financial, legal and other professional services, process engineering, property and transport sectors.

Many MCA members are experienced participants in the Enhanced Project By-Law Scheme (EPBS) and the associated Australian Industry Participation (AIP) Plan requirements. This submission provides both a general view of the changes proposed in “Measures to extend Australian Industry Participation” as well as specific comments on individual measures.

Background

A Working Group has been established to advise the Australian Government on the implementation of the new measures. Submissions to this paper will be made available to the Working Group, who will take stakeholder input into account when providing advice to government. The Working Group will advise the Australian Government on the implementation of the following measures:

- A. Requiring publication of AIP Plans and outcomes;
- B. Requiring more comprehensive evidence of opportunities being made available to Australian industry through all stages of the EPBS;
- C. Requiring project proponents to list details of opportunities for Australian industry to participate in major projects on a public website for large EPBS projects (greater than \$2 billion);
- D. Requiring project proponents to report more regularly on AIP Plans and their outcomes, for large EPBS projects (greater than \$2 billion);
- E. Amending the EPBS guidelines to require approval of eligible goods as an additional step for large projects (greater than \$2 billion);
- F. Extending AIP Plans to projects which receive Commonwealth grants over \$20 million; and
- G. Extending AIP Plans to large infrastructure projects where funding over \$20 million is provided by the Commonwealth through the states and territories, and where a local implementation plan is absent.

1. Publishing Australian Industry Participation Plans and Outcomes

1.2 Implementation

A. Publication of AIP Plans

A key measure announced by the Australian Government is the publication of AIP Plans. The requirement to publish AIP Plans will apply to the EPBS, Commonwealth grants and Commonwealth procurements. Companies will need to ensure that AIP Plans do not contain any commercial-in-confidence information.

There are several options for publishing AIP Plans and outcomes:

- Contracting agency to publish on its website (Commonwealth procurements and grants);
- Company to publish on its website (all programs);
- Contracting agency to publish on its website AND company to publish on its website (Commonwealth procurements and grants);
- Department of Innovation to publish on www.aip.gov.au (all programs); and
- Third party websites, for example the Industry Capability Network (all programs).

Feedback is sought on preferred locations for publishing AIP Plans and outcomes. There are suggested options within other sections of the paper.

The MCA's comments are as follows:

A number of MCA members have shared that they would prefer to utilise their own websites as a medium for publishing AIP details and outcomes as opposed to an external domain. Maintaining control over this information is important to avoid any mis-representation by industry and employee/supplier representative groups and organisations.

A publicly listed company has a number of ASX disclosure requirements which generally result in the production of quarterly and annual reports. These reports are a strong source for current and topical information relating to their projects and activities. These companies are experienced and well placed to manage the dissemination of information relating to AIP matters.

In Western Australia, the Government reports overall local content levels for projects subject to the State Agreement Act but not on a granular level due to commerciality issues. It is important that similar concerns are taken account of in this context.

Previous MCA commentary "Review of the EPBS, Dec 2010"

A high level of disclosure for projects leads to the potential for industrial action should a decision be made not to award to an Australian company for commercial or technical reasons and is a considerable risk to projects. It can also move this into a political area which would outweigh the benefit offered by the Scheme.

In addition, there is no benefit to publishing projects on AusIndustry's website, if Australian suppliers are looking for project work then it would be more likely that they would look at the individual project's website for supply opportunities.

Further, there are currently a number of additional ways for Australian suppliers to become aware of contract opportunities other than AusIndustry's website. Australian suppliers' business development managers would have access to numerous avenues of information to link themselves to projects and identify such opportunities, including:

- ABARE - BRS;
- Mining News Premium (Online daily subscription);
- Mining News (Online daily subscription);
- Construction Industry News (Online daily subscription);
- Project Connect; and
- REPS (CCI).

B. Strengthened reporting of AIP Plan implementation and outcomes

As an additional criterion in AIP Plans, companies will be required to identify areas of the project where opportunities may be available for Australian industry, and estimate the value and percentage of opportunities for Australian goods and services (see Section 1.2.1).

In the Implementation Report, companies will report on the bidding opportunities made available to Australian producers and the actual value of Australian goods and services used in the project (see Section 1.2.2).

Consistent with Australia's trade obligations, there will be neither a target level of Australian content nor any penalty for low estimated or actual levels of Australian content.

The MCA's comments are as follows:

MCA members have a number of concerns in relation to the upfront "disclosure" of local content "ambitions".

Due to the early nature of the lodgement of the AIP, it may leave applicants exposed from an adverse public perception sense. Although there may not be a targeted level or penalty applied for low estimated or actual level of Australian content, the mining industry is heavily scrutinised and any public disclosure of such information will no doubt be monitored closely.

Although the mining industry generally achieves high levels of Australian content across its projects and on occasion does make this information public, putting quantitative estimates on the value and percentage of "opportunities" can only lead to targeted pressure from those keen to insert non-commercial factors into commercial decision-making. This, in turn, is likely to be a source of confrontation and tension amongst key stakeholders.

A number of specific operational comments are as follows:

- Estimating the value and percentage of Australian supply opportunities or content supercedes an open bidding process and may affect the willingness of domestic and / or overseas parties to become involved depending on what levels have been estimated.
- Full information is not known of packages or supply capability at the Project Acceptance Application (PAA) stage (as it is required to be lodged in advance of formal project commencement now). Again, this will open the door to scrutiny by external parties as early indications will be based on broad assumptions.
- The project needs approval of the Implementation Report prior to the procurement taking place. AusIndustry still reviews individual determination requests in any event and won't grant them where the IR/AIP criteria hasn't been met. The result is a multi-layered and costly approval process.
- From an efficiency perspective, it is critical that companies and individual projects reserve the right to pursue low cost, technologically advanced and compliant tenders but with a full consideration of sustainability and local content factors without further administrative burden and complexity.

We note a comment within the report by Access Economics for the Department of Innovation, Industry Science and Research (December 2010) – *Review of the Enhanced Project By-Law Scheme*, which states:

A danger here is that in “tightening” the scheme, the Administrative burden on proponents is increased to the point where they pursue other mechanisms for tariff relief, to the detriment of the national interest.

Previous MCA commentary “Review of the EPBS, Dec 2010”

The sequential nature that the EPBS application process now takes in respect of the lodgement of the various applications, documents and evidence, has reduced some of the ability for retrospectivity and has created additional burden and pressures on participants. Combining this with other issues such as the duplication of assessment by both local and centralised AusIndustry offices has increased the risk on applicants to achieve a successful outcome.

The nature of new project start-ups is such that a project may be in pre-feasibility indefinitely, during which time it is treated confidentially internally. Furthermore, when the project is approved, the start-up time may be fast-tracked and the ability to comply with the current timing requirements becomes quite difficult.

Some projects take years and significant upfront financial investment to properly evaluate. Some projects may also involve a variety of potential joint venture partners over multiple sites with multiple providers of goods and services (e.g. the selection of a suitable EPC or EPCM). The EPBS requires applicants (project owners) to lodge documents as early as possible which could delay the consideration of these until all aspects of the application are assessment-ready. The requirement of lodging too early in a project does not provide business with sufficient flexibility in its commercial decision-making nor does it provide certainty of outcome. There are also Corporation’s Law and Australian Stock Exchange disclosure rules which must be taken into account.

Further, new requirements for the projects list of “Functional Units” will not improve the two-tier, state and federal level decision making process that presently exists within AusIndustry. Significant time, effort and cost are invested in obtaining state-level approval yet this does not guarantee an outcome. Further assessment and decision is then sought at a federal level by the same agency. Thus project approval often involves a reconsideration of matters already agreed and resolved by AusIndustry itself. Any delays in decision making or uncertainty of outcomes act as a disincentive to potential EPBS applicants.

This particular change does not align with actual practice for a project proponent. Essentially, the stringent timing requirements added to the application process increase uncertainty, add to administrative costs and places pressure on applicants, whilst decreasing flexibility and creating a disincentive to apply.

1.2.1 Estimating Australian Industry Value Added in AIP Plans

The Commonwealth proposes the following template for estimating local content in AIP Plans.

Detail of estimated opportunities and Australian industry-value added		
Expected opportunities for Australian industry	Estimated Total contract value A\$	Estimated Australian industry-value added (as \$ or % value of total contract value) A\$
E.g. printing services	100 000	75 000 (75%)
E.g. steel fabrication	4 000 000	2 900 000 (73%)
E.g. information technology (IT) services	1 800 000	1 600 000 (89%)
Company costs		
Total		

For examples of other methodologies, please see the NSW Government Procurement *Local Jobs First* Plan and the Queensland Local Industry Participation Plan.

The MCA’s comments are as follows:

Feedback from our members indicates that they consider it is not possible to accurately estimate Australian industry content in AIP Plans. Plans due at a PAA/IR stage are generally prior to the staggered tender process having taken place (or been completed) and therefore local supplier capabilities and supplier capacity can be unknown, unsubstantiated and untested.

According to MCA members, the listing of Major Equipment packages and estimated values at the PAA stage could not reasonably occur on large scale projects. Due to the early lodgement timeframes under the EPBS, the project may not yet have received FID status.

In consideration of the suggested methodology, we would question the value of this information as it could mislead or over-promise on local supply opportunities if required and subsequently be made public.

MCA members have made specific comments on this proposed measure which are as follows:

- The reality is that, in some cases, domestic industry will not tender for certain types of work (e.g. high volume packages with low steel fabrication levels). If these packages are then awarded offshore, certain groups may use this for political purposes (e.g. Company A scheduled X% of local content and only X% was achieved).
- Other than contractually requiring a vendor to provide Australian value percentages, the project would not have the capacity to audit such claims. Vendors would be unwilling to provide confidential documentation such as purchase and import details as this would disclose their margin to the project” (e.g. This would impact 2nd and 3rd tier suppliers such as subcontracting EPCM’s operating under lump sum contract terms).

The MCA considers that with the significant expansion in mining investment in Australia there is already substantial evidence of supplier opportunities (often in areas where local suppliers have comparative advantage). Recently released WA State Government figures (November 2011 Local Content Report) for WA projects confirms that there continues to be a very high level of local industry participation in spending in the mining sector, with over 75% Australian spending in construction phase and over 90% Australian spending in operations phase.

It is important also to record that, notwithstanding lower local content in the construction phase of oil and gas projects, operational spend is more in line with the minerals sector, with over 80% Australian spending.

1.2.2 Reporting outcomes – Implementation Report

The Commonwealth proposes the following reporting template to ensure accountability in Implementation Reports. Aggregated Australian content at the time of reporting would be published.

Detail of actual opportunities and Australian industry-value added		
Actual opportunities for Australian industry	Actual Total contract value A\$	Actual Australian industry-value added (as \$ or % value of total contract value) A\$
E.g. printing services	100 000	80 000 (80%)
E.g. construction services	2 500 000	2 300 000 (92%)
E.g. steel fabrication	900 000	350 000 (39%)
E.g. information technology services	1 450 000	1 400 000 (97%)
Company costs		
Total		

Measures to extend Australian Industry Participation – Public Consultation Paper. For another example of reporting outcomes, please see the Victorian Industry Participation Policy Plan Guide, the NSW Government Procurement *Local Jobs First* Plan and the Queensland Local Industry Participation Plan.

Feedback is sought on proposed approaches for estimating local content, and for reporting on outcomes. Alternative methodologies will be considered.

The MCA's comments are as follows:

The MCA would reject the requirement to report on discrete packages and to disclose whole project numbers as this information is likely to be commercially sensitive. Competitors (both domestic and overseas) could use this information for their benefit in supplier negotiations. In a small market such as Australia with a limited number of suppliers for some specialised equipment items, for example, it could be easily determined what commercial sales terms have been negotiated and may also divulge company cost data or spend available for certain packages.

Initiatives should focus on how to strengthen and grow the capabilities of Australian industry to secure market opportunities, rather than provide numerical focal points for non-commercial activity.

2. Australian Industry Participation Plans for Large Commonwealth Grants

This proposal does not typically relate to MCA members and therefore we do not wish to comment.

3. Australian Industry Participation Plans for Commonwealth Funded Major Projects Delivered By State and Territory Governments

This proposal does not typically relate to MCA members and therefore we do not wish to comment.

4. Additional Requirements under the Enhanced Project By-Law Scheme

4.1.1.1 Changes to EPBS

The announced measures are:

1. Requiring more comprehensive evidence of opportunities being made available to Australian industry through all stages of the EPBS;
2. Requiring project proponents to list details of opportunities for Australian industry to participate in major projects on a public website for large EPBS projects (greater than \$2 billion);
3. Requiring project proponents to report more regularly on AIP Plans and their outcomes, for large EPBS projects (greater than \$2 billion); and
4. Amending the EPBS guidelines to require approval of eligible goods as an additional step for large projects (greater than \$2 billion).

These measures will require major projects to make a greater effort to engage with Australian suppliers; provide greater certainty to project proponents regarding which goods are eligible for tariff concessions under the scheme; and provide further transparency of supply opportunities for large projects. These measures will increase the evidence that the objectives of the EPBS are being met and will require increased compliance by large projects.

Previous MCA commentary "Review of the EPBS, Dec 2010"

Difficulty arises in the preparation and implementation of an acceptable Australian Industry Participation Plan (AIP), as the costs associated with complying with an AIP (e.g. holding industry seminars, advertising procurement packages, holding stakeholder forums, engaging the Industry Capability Network (ICN) etc.) all incur significant costs. There is a direct correlation between minimising the time taken to complete an EPBS application and the costs involved.

One suggestion would be to allow an application to be submitted reflecting the procurement practices of a company rather than an individual project. Existing requirements for multiple applications and frequent requests

for “updates” result in double handling, particularly where a project proponent uses a consistent approach to its procurement activity. The current process significantly increases compliance costs and delays.

In particular we note comments within the report by Access Economics for the Department of Innovation, Industry Science and Research (December 2010) – Review of the Enhanced Project By-Law Scheme, as follows:

The framework is overly rigid in handling project changes. For instance, project scope can change markedly well after project conception – for example, whether an open cut or underground mine will be developed, or new linkages between projects become available. Other development factors can also alter such as specific tenderers or sub-contractors. Each of these changes can have a material (and often uncertain) impact on a project’s capital importation requirements and a proponent’s EPBS application. In many cases, uncertainty regarding these changes and their effects can lead proponents in the TCS.

4.2 Implementation

4.2.1 Requiring more comprehensive evidence of opportunities being made available to Australian industry through all stages of the EPBS (projects)

The EPBS requires an AIP Plan to specify the actions to be undertaken to provide full, fair and reasonable opportunity to Australian suppliers to participate in the project. The AIP criteria are set out in the EPBS Guidelines. In the AIP Plan, EPBS applicants are also required to detail the evidence to be provided in the Implementation Report that will show that each action has been fully implemented.

The actions and evidence must be commensurate with the size and complexity of the project. At the Implementation Report stage, EPBS applicants must produce the agreed evidence of the implementation of their AIP Plan.

In future, EPBS applicants will be required to:

- Provide additional evidence to demonstrate that full, fair and reasonable opportunity has been provided to Australian industry to participate in the project; and
- The evidence to be provided will be agreed with applicants at Project Acceptance stage.

The MCA’s comments are as follows:

Referring back to previous comments regarding the timing of AIP Plan submission, a plan that is put in place years in advance of actual work taking place is going to change. AusIndustry must permit adjustments and demonstrate flexibility without political interference where the outcomes are still positive to local industry.

In the experience of MCA member companies, on occasion, AusIndustry has not fully recognised the independence of engineers, particularly where they may have in the past been engaged by the company behind the project. This fails to appreciate that any reputable engineering firm is likely to have had prior dealings with that of a large multinational company at some time.

Additionally, our members have seen in practice that Functional Unit descriptions that are standard in industry, well recognised and confirmed by engineers have been denied by AusIndustry. This is of concern to MCA member companies who find it difficult to understand the basis of such decisions.

Further, there have been instances where AusIndustry has drilled down on Functional Units to a component level which could be considered outside the remit of the program.

Again, the MCA sees value in government activity that enables suppliers rather than regulatory activity. Areas where enabling actions either have or could prove fruitful include:

- jointly funded studies of resource sector supply chains to identify areas of opportunity for local industry and to understand how these opportunities can be realised;
- collaborate R&D initiatives that would assist local industry in capturing higher value areas in resource supply chains; and
- innovation programs designed to address particular knowledge and technology gaps among suppliers to the Australian mineral resources sector.

4.2.2 Requiring project proponents to list details of opportunities for Australian industry to participate in major projects on a public website for large EPBS projects (greater than \$2 billion)

At Project Acceptance stage, EPBS applicants will be required to specify where they intend to advertise details relating to the opportunities for Australian industry to participate in the project.

For example:

- Online vendor registration systems such as the:
 - Industry Capability Network's 'ICN Gateway' and the Chamber of Commerce and Industry WA 'Project Connect' system may be used.

The EPBS application will also require a:

- List of the major anticipated procurement packages that the applicant intends to promote through that website;
- An estimated total dollar value of those items; and
- The broad timeframe when the items will be listed.

The applicant will be required to ensure that;

- The anticipated opportunities are listed on the agreed website:
 - With sufficient notice for Australian industry to register their interest; and
 - To collect evidence of this as the procurement process progresses.

The MCA's comments are as follows:

The MCA considers that, in most cases, AIP Plans currently indicate the medium by which opportunities are listed (e.g. Project Connect, project website etc.). So, in effect, this is already occurring without further requirements being formally imposed.

The MCA rejects the proposal that an estimated value of those packages be included as it will automatically reduce any negotiating power the project has in its procurement activities. The total dollar value of major anticipated contracts should not be provided as it is in-confidence and publication would reduce the commercial bargaining power of project proponents in the face of often limited supplier competition.

The MCA recommends the following:

- the project should maintain its own list of contracts and press releases/project updates/contact personnel; and

- contracts awarded to Tier 1 companies should be added to this list for Tier 2 and 3 contractors to secure work.

The MCA would support this initiative as long as a flexible approach is taken which allows the project to provide contract details consistent with company practice (or otherwise make use of the industry groups). At the same time, we would draw attention to comments made by Access Economics in its December 2010 Review of the Enhanced Project By-Law Scheme:

The Scheme does not sufficiently recognise the commercial realities of developing major projects and process requirements are often not realistically applied. For example, the timing for lodging an EPBS application can be unaligned with project development timeframes.

4.2.3 Requiring project proponents to report more regularly on AIP Plans and their outcomes, for large EPBS projects (greater than \$2 billion)

For projects over \$2 billion in total project value, interim reports will be provided by the project proponent to AusIndustry at least every six months. The reports will provide updates on the progress of the project, and will seek to:

- A. Encourage adherence to the agreed AIP Plan;
- B. Identify any issues or concerns as the AIP Plan is being implemented;
- C. Facilitate requests for variations to AIP Plan or EPBS project more broadly;
- D. Assist in identifying potential opportunities and any barriers to Australian industry participation in the project
- E. Capture outcomes on procurement processes conducted, opportunities provided, and contracts awarded to Australian companies; and
- F. Where low levels of Australian content result, provide information on the reasons for these outcomes (e.g. where there is lack of Australian capability).

AusIndustry will agree an interim reporting timetable with the project proponent at the Project Acceptance stage

The MCA's comments are as follows:

The MCA considers this to be an overly burdensome requirement that will have a direct impact on the resourcing and associated costs of complying with the scheme. Among specific concerns of MCA member companies are the following:

- AIP update requests in the past have been unstructured, vague and not easily measured.
- A company that achieves 90-95% local content and imports a small number of packages (for which Tariff Concession Orders are held but unavailable due to split shipments) would be forced to provide continual AIP updates at cost due to inflexible guidelines.
- With projects being required to commence EPBS negotiations and submissions effectively during pre-feasibility negotiations, multiple updates are likely to be requested prior to any benefit being received.
- Follow on queries from State and Federal agencies (e.g. AusIndustry) are commonplace. The work involved in providing AIP Plans and updates vastly outweighs the number of determinations sought (for which no guarantees are held).

- Requiring the Project to report 6 monthly would increase the workload on the company and would no doubt require the employment of additional staff to cater for this requirement, further eroding the benefit of the scheme to the organisation.
- On major projects, State and Federal agencies already impose significant reporting measures. Managing this process across agencies has become complex and time consuming. This single measure increases reporting levels by up to 200% against what is currently being required of projects.
- Finally, the suggested financial benefits available to projects (Consultation paper pg.15, para 1 mentions projects typically receive EPBS concessions worth up to hundreds of millions of dollars) are grossly overestimated. A more realistic estimate for EPBS concessions on a \$2 billion mining project would be in the vicinity of \$3 million. To achieve a customs duty saving of \$100 million via EPBS would require the importation of goods to the value of \$2 billion, a figure that would be unprecedented in the minerals sector.

The MCA considers that the duplication of processes, especially between State and Federal requirements/initiatives, must be taken into account before additional levels of administration are added. In WA alone, for example, extensive existing and new State-based local industry participation requirements operate in addition to Federal requirements under the EBPS, the newly established Buy Australia at Home and Abroad initiative, and the new Resources Sector Supplier Forum and associated working groups (to name a few).

WA-specific initiatives include the following:

- The State Government has continued one-on-one dialogue with resource project proponents on local content. This involves both the Premier and Minister for Commerce directly engaging with major resource proponents to understand what measures are being taken to maximise local content in the current wave of construction projects in WA.
- In addition to existing reporting requirements on the percentage of local content (which are tabled in Parliament), those specific projects operating under State Agreement Acts (SAA) are now required to develop forward looking Local Content Plans which may duplicate some areas of the proposed Federal measures. The requirements of the Plans include, but are not limited, to the following:
 - providing a clear statement on the strategies proponents will use, and require a third party to use (i.e. contractors) to maximise local content;
 - providing detailed information on the procurement practices proponents and third parties will adopt in calling for tenders and letting contracts, including how these practices will provide fair and reasonable opportunity for suitably qualified WA suppliers;
 - providing details of the communication strategies proponents and third parties will use to alert WA firms to services and procurement opportunities.
- Via the Department of Commerce's Local Content Unit (LCU), the WA State Government is seeking data on local content spending from approximately 35–40 non-SAA projects to develop a better understanding of industry participation.
- Under the Industry Facilitation and Support Program, the Department of Commerce is offering up to \$25,000 per company to assist local businesses to pre-qualify or increase competitiveness as suppliers of products and services to major resource projects in WA.
- The Department of Commerce will also be publishing local content data on a bi-annual basis based on data gathered from SAA and non-SAA projects. The latest report was tabled in State Parliament in November 2011.
- These initiatives flow from the WA State Government's Local Industry Participation Framework. Also as part of this framework, the Local Content Unit has been strengthened with an addition five staff.

In Queensland, the state government has recently proposed requiring plans for local supplier content and local workers as part of project approvals. The changes will require major project proponents, such as mining companies, to develop Local Industry Participation Plans and Workforce Development Strategies as part of the

Environmental Impact Statement (EIS) process. As the Queensland Resources Council has stated, mandatory plans as part of the EIS process will only add to the complexity and slow the pace of the approvals process.⁵

The new measures proposed in the Federal Government's Consultation Paper will add to costs arising from regulatory overlap and duplication. Moreover, they run counter to the Federal Government's own 'best practice' regulatory guidelines and to repeated Government statements about its commitment to streamlining regulatory processes as part of a "seamless national economy".

4.2.4 Amending the EPBS guidelines to require approval of eligible goods as an additional step for large projects (greater than \$2 billion)

For large projects over \$2 billion, the applicant will be required to:

- Seek formal AusIndustry Delegate approval of the eligible goods as an additional step in the EPBS process.
- The timing will be agreed at the Project Acceptance stage, but would generally be required a minimum of six months prior to lodgement of an Implementation Report.
- A request for approval must be accompanied by appropriate evidence demonstrating that the goods are eligible goods, in accordance with EPBS Guidelines. The AusIndustry Delegate will consider the approval request and advise the applicant whether the eligible goods are accepted, whether the list of eligible goods needs to be amended, or whether further evidence of eligibility is required.

The MCA's comments are as follows:

The MCA cannot support this proposal in its current (vague) form.

The suggested timing of this approval may preclude projects from claiming otherwise eligible items.

Due to the timing of the PAA, it is unlikely that this information will be available as it will in most cases be prior to a procurement list being drawn up and vendors being shortlisted.

The MCA would appreciate clarification whether this indicates that the list of eligible goods can be adjusted after PAA as we consider that the scheme needs to be more flexible to account for design changes post PAA lodgement (e.g. capacity, economic circumstances, optimisation due to cost reduction and/or technological advancement).

As outlined above, the PAA must be lodged and approved before any procurement has commenced. The PAA must include a list of eligible goods which quite often is unquantified at the early stage with which it is required.

AusIndustry has recently been flexible on the actual list of eligible goods at the PAA Stage and has allowed some minimal changes to declared quantities. However, AusIndustry has not allowed complete changes to the equipment list.

To allow for the changes proposed in 4.2.2 the scheme would have to be altered to allow for the addition (or removal) of equipment at the IR stage. If this change does not occur then project proponents will find they have failed to list equipment at the early stage and this could result in large quantities of equipment being deemed ineligible.

5. Australian Industry Participation Plans for Large Commonwealth Procurements

This proposal does not typically relate to MCA members and therefore we do not wish to comment.

⁵ "Resources projects provide \$21 billion stimulus to Queensland suppliers", Queensland Resources Council Media Release, 29 November 2011.