Ai GROUP SUBMISSION

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Ai Group Submission to the Competition Inquiry

Contents

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia and directly manages a number of those organisations.

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Executive summary

Ai Group welcomes the Government's root and branch review of competition policy, which we see has the potential to make a real difference in improving the way our economy works. In Ai Group's view, a major factor behind the need for a full scale review of competition policy is the rapid deterioration in our competitiveness over the past decade, as we have become a high-cost country and as the burden of regulation on businesses has risen. Meeting the challenges presented by these developments requires confronting the twin barriers of high costs and low productivity.

Action is needed on a broad front: in consolidating national and state budgets; upgrading infrastructure; addressing shortcomings in our workplace relations framework; lifting the skills of the workforce; raising Australia's innovation performance and our business capabilities; reducing regulatory burdens; ameliorating price rises in energy markets and meeting our emissions reduction and renewable energy targets at least cost to the Australian community.

A major focus needs to be put on lifting the performance of Australia's trade-exposed industries. These industries require rapid recapitalisation; their productivity growth needs to accelerate and they need to search for and develop competitive opportunities locally and in export markets. This rebalancing is critical to building up the strength of our national economy and its resilience.

Ai Group believes the mechanisms and broad architecture in place through the **National Competition Policy framework** such as the establishment of the Australian Competition and Consumer Commission in 1995 have largely served Australia well. However, there is potential for refinement to ensure they meet their objective without unnecessary burden on industry. The two main points Ai Group would encourage the panel to consider is simplifying the existing law, the *Competition and Consumer Act 2010*; and boosting the role of the ACCC in the economy. Ai Group would support any moves to simplify competition and consumer laws to ensure that unnecessary time and resources are not spent by industry over competition matters, and would encourage the panel to examine how this could be practically be done.

The Ai Group fully supports the principle of **free trade** and the negotiation of multilateral, regional and bilateral trade agreements which advance the national interest. However, it is our view that the terms of the Korea and Japan agreements have not been sufficiently evaluated with respect to the wider economy, and hence the national interest. Negotiations should be carried out within the context of this broader framework and should take into account the views of all sectors. The secrecy of negotiations should be mitigated and industry consultations should be widened.

Ai Group believes this Review presents a timely opportunity for detailed consideration to be given to the boundaries between anti-competitive practices outlawed under the *Competition and Consumer Act 2010* (CC Act) and anti-competitive practices permitted by **workplace relations laws** and exempted from the CC Act. The existing boundaries are imposing unacceptable barriers to competitiveness and commerce, and need to be re-drawn.

There are a number of significant anti-competitive arrangements in **freight transport** that need to be addressed, including in the Road Safety Remuneration System; and coastal shipping arrangements. Road and sea transport affect almost all goods freight across Australia, so any improvement to competitive arrangements and costs in these areas will have flow-on benefits to a wide range of other Australian businesses.

Within the broad area of **education services**, Ai Group has consistently supported a balance between the individual demand-driven model and the needs of industry and the economy. It is irresponsible to leave the provision of training for the needs of industry and the broader economy to market forces alone. Competition policy has recently become relevant to demand driven funding models in the Higher Education and Vocational Education and Training (VET) sectors. At the outset it is important to proceed with caution when considering competition policy and market-oriented approaches in education and training. These are not areas of human activity that lend themselves easily to such considerations, in part because price is not always the main or key indicator of choice and it is often difficult to accurately describe the market for such areas of human endeavour. Of particular concern is whether the introduction and even the expansion of the demand driven system will better meet the needs of industry. Australian businesses will require more high skilled labour in the decades to come. Education providers must be responsive to the changing skill requirements of industry, if their training is to be relevant and productive.

Although the **energy sector** has made great strides in competitiveness since the early 1990's, the cost of energy has become a serious issue for Australian industry. Despite depressed wholesale electricity prices, the rise in network charges ensures that retail electricity prices remain very high. Natural gas prices have also risen dramatically as a result of the looming start of gas exports from Queensland. These prices represent a significant threat to the competitiveness of many businesses. Ai Group believes that there are numerous opportunities for the Federal Government to assist industry through enhancing the competitiveness of the energy market.

Promoting genuine competition in the highly emotive and essential service of **water** is a challenge for all levels of government in all countries. Indeed, a fully competitive urban water market does not currently exist anywhere in the world. Nevertheless, Governments can institute reforms to encourage greater competition and hence greater efficiency and reliability in water supplies.

The competitive arrangements surrounding tenders for **major public projects** in Australia is a fraught issue for construction companies and other potential suppliers to major projects. The Productivity Commission recently found there are outdated and onerous requirements imposed by governments on tenderers that are unnecessarily adding to major project costs. Adopting the PC's recommendations to improve tendering process and better define government projects before tendering would help alleviate unnecessary design costs on unsuccessful tenderers that currently add to the cost of all projects across the country. Governments could also achieve savings by bringing their tendering requirements into line with private sector commercial projects. This would help to achieve better value for money for tax payers and reduce unnecessary costs.

Summary of recommendations

Competition and regulatory reform

- Simplify the existing law, the *Competition and Consumer Act 2010*;
- Boost the role and profile of the ACCC in the economy; and
- Streamline existing state-based regulators into the ACCC, or better co-ordinate the roles of each.

Competition issues in international trade

- Trade agreement negotiations should be carried out within the context of the broader economic policy framework and should take into account the views of all sectors;
- The secrecy of trade agreement negotiations must be mitigated; and
- There must be a substantive dialogue between trade negotiators and all industry sectors.

Industrial relations regulation

- Industry-wide pattern agreements need to be outlawed as recommended by the Cole Royal Commission. This should be done under both the CC Act and the FW Act, through:
    - An amendment to the CC Act to prescribe that industry-wide pattern agreements do not fall within the exemption in section 51(2)(a) of the Act. This section provides:

      "(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45E, 45EA or 48 has been committed, regard shall not be had:

      (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;"
    - An amendment to the FW Act to prescribe that an enterprise agreement which reflects an industry-wide pattern agreement cannot be approved by the FWC; and
    - An amendment to the proposed Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 to ensure that enterprise agreements which reflect an industry-wide pattern agreement breach the Code.
- Provisions in industrial instruments which prevent or hinder the acquisition or supply of goods or services between two businesses need to be prohibited under the CC Act and the FW Act. Ai Group proposes that:

- Sections 45E and 45EA of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business falls within these sections;
- Section 51(2)(a) of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business does not fall within the exemption in this section; and
- Clauses in enterprise agreements which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business should be "unlawful terms" for the purposes of section 194 of the FW Act.

- Consistent with the recommendations of the Cole Royal Commission, the Australian Building and Construction Commission (ABCC) should be given shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts involving building and construction industry participants.

Transport regulation

- The *Road Safety Remuneration Act* (RSR) should be repealed and the Road Safety Remuneration (RSR) Tribunal should be disbanded without delay.
- Coastal shipping arrangements should be restored as near as possible to the regulatory regime that was in place between March 2006 and June 2009. This would require:
  - Enabling foreign ships to apply for single voyage licences, multiple voyage licences or continuing licences through a simple system that does not impose an unnecessary regulatory burden on them; and
  - Excluding "persons insufficiently connected with Australia" from the application of the FW Act and modern awards (see section 31 of the FW Act), with this term defined in an appropriate and workable manner through the Fair Work Regulations 2009.

Education regulation

- In the higher education sector, Ai Group considers that a student demand based funding system is potentially a more effective mechanism for meeting industry's demand for skills and qualifications than the previous method. However, there is a need for close monitoring of the alignment of student demand to industry need, the impact on skill shortages, the impact on the VET sector and the establishment of quality arrangements.
- In the VET sector, Ai Group has been concerned by the introduction of demand-driven funding approaches by some jurisdictions when these are not related to industry needs. The VET system needs to remain responsive to industry needs. These negative effects

detract from the overall positive approach of moving away from supply-driven training to a more industry demand driven system,. They need to be addressed as a matter of urgency.

Energy regulation

Ai Group recommends that competition and efficiency in energy markets be improved through:

- demand side participation, including the introduction of genuine demand-side participation in the wholesale energy market;
- improved management of peak demand through cost-reflective energy pricing and the further rollout of smart meters;
- energy asset sales that attract a good price for taxpayers and have appropriate safeguards;
- privatisation and competitive arrangements for all aspects of energy markets, including network service providers;
- reforms to Australian gas markets including:
    - greater transparency in access and pricing;
    - 'use it or lose it' principles for both gas tenements and pipeline capacity;
    - Gas pipeline trading capacity; and
    - Reforms to joint marketing arrangements for gas suppliers.

Water regulation

- national water policy and water competition must be de-politicised;
- Government should establish minimum security of supply requirements for water and then reassign the responsibility to supply and distribute water to private sector utility businesses;
- Government should consider privatising water treatment and distribution assets;
- A national review of the regulatory and governance framework for water utilities.

Waste management

- actively pursue waste policy harmonisation through the National Waste Policy;
- Effective enforcement of existing waste management regulations;
- Long-term planning for future waste management requirements;
- Encourage voluntary product stewardship across all product supply chains.

Industry access to major public projects

- Government agencies must identify and remove all outdated and onerous requirements imposed by governments on tenderers that are unnecessarily adding to project costs;
- government agencies must implement an approach to major projects that shows a commitment to the following five procurement principles:
    - value for money;
    - transparency of processes;
    - full and fair access;
    - full and fair opportunities for local suppliers; and
    - Supporting Industry through Effective Planning and Communication.
- Governments need to lead the way in coordinating infrastructure projects and reducing any uncertainty surrounding major projects.

The case for reform

Ai Group welcomes the Government's root and branch review of competition policy, which we see has the potential to make a real difference in improving the way our economy works.

Australia has benefitted from the National Competition Policy reforms put in place following the Hilmer Report in 1993. The Hilmer Review was underpinned by the belief that competitive markets generally best serve the interests of consumers and the economy and we welcome the similar viewpoint of the Harper Panel.

Since the 1993, significant changes have taken place in the Australian economy and within competition law, which means the Harper Review is a timely examination of existing arrangements. Indeed it is imperative to examine if existing arrangements are still relevant as well as undertake further reform to boost competitiveness and productivity to ensure Australia can confront the challenges the economy now faces.

In Ai Group's view, a major factor behind the need for a full scale review of competition policy is the rapid deterioration in our competitiveness over the past decade or so as we have become a high-cost country and as the burden of regulation on businesses has risen.

The most recent Global Competitiveness Survey by the World Economic Forum highlights that Australia has slipped in relative competitiveness as perceived by both Australian and foreign business respondents. In 2013-14, Australia sat at 21st place in the world, down from a place of 16 in 2010-11. It is also clear Australia has slipped substantially with regard to the burden of regulation, falling to 128th place in 2013-14 from an already worrying 68th place last decade.

Table 1: Australian rankings in key WEF Global Competitiveness Indicators

Year	Overall competitiveness ranking	Burden of Government regulation	Flexibility of hiring & firing practices	Flexibility of wage determinations
2007-08	19	68	63	87
2008-09	18	66	62	90
2009-10	15	85	46	75
2010-11	16	60	79	110
2011-12	20	75	97	116
2012-13	20	96	120	123
2013-14	**21**	**128**	**137**	**135**

Source: WEF Global Competitiveness Reports and database.

The Deterioration of Australia's Competitiveness

Australia has become a high-cost country as the economy has been powered by high commodity prices fuelling a mining investment boom, over the past decade. Currency movements, the escalation in energy costs and the rise in our relative unit labour costs – due to the combination of relatively slow productivity growth and relatively high wages growth - have meant many Australian producers are at a disadvantage in global markets. Meeting the challenges presented by these developments requires confronting the twin barriers of high costs and low productivity.

As it stands, Australia is not in a strong position to overcome the national income-sapping impacts of lower commodity prices and the retreat of investment from resource and energy projects. We now urgently need a strong and concerted effort to lift productivity and competitiveness across the economy, including through better use of labour, capital and energy. Where inefficiencies exist, we must remove them, while insuring we do not hamper industry through unnecessary regulation.

Action is needed on a broad front: in consolidating national and state budgets; upgrading infrastructure; addressing shortcomings in our workplace relations framework; lifting the skills of the workforce; raising Australia's innovation performance and our business capabilities; reducing regulatory burdens; ameliorating price rises in energy markets and meeting our emissions reduction and renewable energy targets at least cost to the Australian community.

A major focus needs to be put on lifting the performance of Australia's trade-exposed industries. These industries have been squeezed and undermined by cost and productivity pressures. Yet these same industries have a critical role to play in rebalancing the economy. These industries require rapid recapitalisation; their productivity growth needs to accelerate and they need to search for and develop competitive opportunities both locally and in export markets.

Put simply, investment, employment and production need to lift in other parts of our economy if we are to improve incomes and living standards across the community. This rebalancing is critical both for the strength of the economy and its resilience. Australia's exposure to volatile commodity prices has already increased and is set to rise further as mineral and energy exports rise. Similarly, our exposure to conditions in a handful of commodity purchasing countries has climbed and is on a path to climb further.

Australia's high level of regulation

As the WEF survey cited above shows, the regulatory burdens faced by Australian businesses are high relative to those faced in other countries and this relative position has worsened in recent years and has been a major factor in the deterioration of our overall competitiveness ranking.

This deterioration makes it more difficult for Australian businesses to compete globally, but it also adds to our growing international reputation as a high cost country in which to do business and detracts from Australia's attractiveness as a destination for business investment and collaboration.

In an Ai Group survey of businesses undertaken last year, we found that 40% of large business (those that employ 100 staff or more) said regulations relating to competition and fair trading are burdensome.

The Productivity Commission examined the issue of regulatory effects on small to medium enterprises in its 2013 report on *Regulator Engagement with Small Business.* The Commission included in its report the results of a Council of Small Businesses of Australia (COSBOA) survey of 87 SMEs, which showed that 82% of the respondents felt that SMEs face disproportionately high

compliance costs, while 44% indicated that they do not have the skills or capacity to understand their compliance obligations (Chart 13). These results agree with the findings in Ai Group's surveys that suggest that many regulatory arrangements place proportionally higher costs on SMEs than on larger businesses. In addition, the Commission noted that "*Australian studies have found that small businesses [alone] spend, on average, up to five hours per week on compliance with government regulatory requirements and deal with an average of six regulators per year*".

Around 40% of small businesses surveyed by Ai Group in 2011 found dealing with the ACCC specifically as imposing a high or medium burden, but saw many other areas of regulation related to competition such as industrial relations as highly burdensome (Table 2).

Table 2: Perceived Levels of Red Tape

*Question: How do you perceive the level of red tape surrounding your dealings with the following regulatory authorities?**

	High	Moderate	Low
IR, Employment, Work Cover	29.7	30.5	39.8
Infrastructure and building	22.9	29.6	47.5
OHS	22.7	35.3	42
ATO	20.9	41	38.1
EPA	18.1	33.3	48.6
Local government	16.7	20.5	62.8
State revenue	15.9	30.8	53.2
Road and transport	9.9	25.9	64.2
ACCC	9.7	31.4	58.9
Natural resources	9.1	29	61.9
Fair trading	8.7	24.7	66.7
ASIC	8.2	23.4	68.4
Food safety	7.4	26	66.5

* The costs associated with each regulator are only based on the responses of businesses that have engaged with them. Source: Ai Group (2011)

Small businesses also reported that they find processing delays, a lack of involvement in the development of new regulation, and finding information to be among the most challenging aspects of the regulatory process. In fact, close to 30 per cent of businesses reported that information relating to regulation is typically difficult to find or does not exist.

When asked to identify the changes that would have the greatest impact on reducing their regulatory compliance burden:

- 25 per cent of small businesses requested the "establishment of reliable electronic and web-based reporting."
- "Reduce the frequency of reporting requirements to a minimum" was the second most common response;
- "developing a single location or website for all regulatory information and announcements" was also prominent;
- Avoiding information duplication and overlap between regulators was also an important issue for business.

Competition and regulatory reform

Ai Group recommends:

- **Simplify the existing law, the Competition and Consumer Act 2010;**
- **Boost the role and profile of the ACCC in the economy; and**
- **Streamline existing state-based regulators into the ACCC, or better co-ordinate the roles of each.**

Ai Group believes the mechanisms and broad architecture in place through the National Competition Policy framework such as the establishment of the Australian Competition and Consumer Commission in 1995 have largely served Australia well. However, there is potential for refinement to ensure they meet their objective without unnecessary burden on industry. The two main points Ai Group would encourage the panel to consider is simplifying the existing law, the *Competition and Consumer Act 2010*; and boosting the role and profile of the ACCC in the economy.

The *Competition and Consumer Act 2010*

Australia's core competition law provisions are contained in the the Competition and Consumer Act 2010, which is largely the Trade Practices Act 1974 with updates.

Australia's core competition law provisions are contained in Part IV of the act, outlining the misuse of market power, exclusive dealing, resale price maintenance, mergers. However, the rest of the Act has expanded over the years and the current law now sits at over 1,500 pages. The largest expansion was in 2011 when the Act was expanded to include Australian Consumer Law, which outlines consumer guarantees, unfair contract terms, unsolicited selling and enforcement powers on consumer protection matters. In addition, separate prohibitions have been created in relation to anti-competitive conduct in the telecommunications industry and as well as the national access regime for access to essential facilities.

Former ACCC head Professor Allan Fels wrote in the *Australian Financial Review* that the competition laws have become unwieldy, which has prevented their efficacy in encouraging completion. He advocated a rethink of the laws to shorten them in line with laws in North America and Europe.

> *Court determinations too often revolve around legal technicalities, distracting from the core economic issue of whether the behaviour in question has substantially lessened competition and harmed the economy.* The Australian Financial Review, 1 April 2014

Ai Group would support any moves to simplify the laws to ensure that unnecessary time and resources are not spent by industry over competition matters, and would encourage the panel to examine how this could be practically be done.

Australian Competition and Consumer Commission

Funding of the ACCC

The ACCC is the statutory authority charged with responsibility to monitor breaches and enforce the provisions of the Competition & Consumer Act 2010. However, liaison with Ai Group members indicates many are unaware of the role or services of the ACCC, or how to access their services, and they have little contact or awareness of the ACCC. There is also a sense among members the ACCC has become less active in pursuing cases in recent years and has not been proactive in pursuing competition breaches.

According to a briefing of the ACCC to Ai Group, the body has a small business team of five people in Victoria, one in NSW, WA and Queensland each. This team is responsible for liaising with business groups, and giving guidance to industry through online education programs. While the current fiscal environment is undoubtedly tough, there is an argument to be made to boost this team to educate and liaise with industry.

The role of the ACCC

Ai Group members have commented that confusion appears to exist between the role of state-based regulators particularly around consumer law. For example, many find it difficult to understand the roles and purposes of organisations like the NSW Department of Fair Trading and Consumer Affairs Victoria, compared to the ACCC. It is clear that duplication and confusion exists over many areas of regulation in Australia, and Ai Group would encourage the panel to consider any ways the law could be simplified into a single national framework with national oversight.

Incentive payments for national reform of competition policy and regulation

Ai Group supports the use of well-designed intergovernmental reform payments to give impetus to the implementation of agreed multi-jurisdictional reform programs. If well-designed, reform payments can align the interests of the states and territories with achievement of results and lift the likelihood that results will be achieved. Too many intergovernmental agreements, formal or otherwise, start out with goodwill and good intentions but do not deliver the desired results as promptly as desirable and sometimes do not deliver the results at all.

Further, reforms implemented by the states and territories often carry political risks and costs for state and territory governments. Yet, to the extent to which reforms lift productivity and economic activity, disproportionate benefits will be realised at the federal level in the form of additional company and personal income tax collections (as well as the kudos for the better performance of the national economy) and only modest (and diluted) benefits will be realised via the allocation of GST revenue and by increased state and territory own-source revenue. Reform payments can therefore reduce the misalignment of costs and benefits that stems from Australia's high degree of vertical fiscal imbalance and the perception that aggregate economic performance is firmly the responsibility of the federal government.

A counter-argument put by some officials assisting in the Review is that reform payments should not be necessary and are little more than "bribes" made for initiatives that the states and territories should take for the common good. But this view is less an argument than a combination of a semantic trick and a normative position. The semantic trick is to conflate the two meanings of "bribe" – a corrupt payment and something given to persuade or induce. There is clearly nothing corrupt about a transparent reform payment given to induce the achievement of outcomes. In the same sense, a good proportion of payments can be seen as "bribes". These include pocket money for children paid in return for doing household tasks, bonuses for out-performance by active funds managers and tips for waiters.

Ai Group takes a more pragmatic view of such payments: reform payments should be made if their design is effective (i.e. they contribute to the delivery of the outcomes) at costs (including costs associated with monitoring and reporting) warranted by the benefits derived.

Harmonisation of product standards

Australian and International standards are ubiquitous and apply to the public and private sectors across all industries. Standards boost economic prosperity by providing efficiencies, addressing information asymmetries and generating cost savings that directly impact productivity and global competitiveness.

For business, standards facilitate trade, ensure product safety, promote innovation, improve energy efficiency and provide a framework for addressing environmental responsibilities. With appropriate alignment and maintenance of standards, businesses that design, manufacture, produce, distribute as well as those who provide services can benefit greatly.

Ai Group recognises the importance of international trade in contributing to the prosperity of the Australian economy. We understand that participation in the global market requires adherence to International Standards wherever possible. Ai Group supports the World Trade Organization's requirements that technical regulations: "*are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade."*[1]

Ai Group recognises that Standards Australia is a signatory to the WTO Technical Barriers to Trade Annex 3 *The Code of Good Practice for the Preparation, Adoption and Application of Standards* and supports the use of International Standards as a basis for Australian standards wherever this is effective and appropriate as required by this Code.

Ai Group also recognises that the development of national Australian standards may be required where *international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems*[2]. For example, compatibility with existing infrastructure or maintenance of consumer expectations around performance and safety may be required.

[1] World Trade Organization Agreement on Technical Barriers to Trade Annex 3: Code of good practice for the preparation, adoption and application of standards
[2] Ibid

Benefits of harmonising product regulations and standards

Harmonised regulation and standards facilitate trade and promote competition as they provide a "level playing field" in the market place. Conversely, unfair markets are created when gaps and weaknesses exist in conformance frameworks. Where regulation and standards are required, they must be effective and apply across the board to create a truly fair competitive market environment.

One issue relates to non-conforming products, those products which do not meet regulatory, Australian or industry standards; are not fit for their intended purpose; are defectively made or not of acceptable quality; contain false and misleading claims; do not meet performance claims (whether intentionally or unintentionally) or are intentionally counterfeit. Ai Group surveyed members in our *The Quest for a Level Playing Field: The non-conforming Building Products Dilemma* found that 92% of 222 respondent companies reported non-conforming products in their supply chains. This raises important questions about quality and safety and it poses serious commercial challenges for the businesses that do play by the rules. Almost half of businesses surveyed (45%) reported lost revenue, reduced margins or lower employment numbers due to non-conforming products in the steel, electrical, glass and aluminium, and engineered wood product sectors.

CASE STUDY

The glass and aluminium product sector market is valued at $4 billion annually. Ai Group's report "*The quest for a level playing field: the non-conforming building products dilemma*" found that 81% of sector respondents reported non-conforming product in their supply chains and 65% had reduced margins, revenue and employment numbers. Sector participants reported very low profit margins (less than 3%) and an inability to now innovate and invest in new product lines. Companies also advised that there had been retaliatory action and boycotting of their businesses when action had been taken to report non-conforming product to regulators.

The report identified gaps and weaknesses in the building and construction conformance framework allowing non-conforming product onto the market. These include inadequacies of: surveillance; audit checks; testing; first party certification; and enforcement. The product conformance framework, that is collectively made up of the regulators, regulation, codes of practice and standards, does not operate effectively.

The end result is an uneven playing field, companies, including importers, manufacturers and fabricators that are playing by the rules are adversely affected by suppliers of non-conforming products paying scant regard to the standards and requirements set by Governments and industry. Manufacturers and suppliers conforming with relevant standards and regulations are at a competitive disadvantage when the price at which competing product is sold reflects lower levels of attention to the quality that is required under Australia's conformance framework.

These unfair market conditions are leading to reduced competition as legitimate suppliers reduce their investment and withdraw from the market.

Benefits to consumers of regulatory harmonisation, coordination and streamlining

Ai Group members have highlighted that the current regulatory approach adds costs to their businesses resulting in: reduced profits able to be used for research and innovation; and costs passed on to consumers via higher product pricing.

Suggestions to address these issues include:

- Streamlining of registration and reporting requirements. All levels of Government should implement a policy and system requiring businesses and citizens to provide their information/ registration/ reporting only once for all governments purposes;
- Effective regulatory schemes that create fair markets;
- Harmonised regulation across all jurisdictions that will reduce duplication and uncertainty (one current example is the lack of harmonised electrical safety laws between states causing additional administration and product marking requirements)
- Applying regulation at the point of product manufacture (importation at worst) and not at retail level. Imposing requirements are retail level penalises product manufacturers who must retrospectively modify products in order to meet regulatory change requirements. A recent poor example is the implementation of regulation 90 under the Australian Consumer Law requiring mandatory warranty wording to be included in product warranty statements;
- Sufficient time to implement regulatory changes is required by product manufacturers. When insufficient implementation time periods are forced by regulators, businesses must divert resources from normal duties and opportunity costs result;
- Coordination between different regulators must occur so that companies are not forced to make multiple incremental changes to products in quick succession resulting in tooling investments not being recovered over the expected tool lifetime. A solution would be to plan with industry and well in advance, the time frames and coordination necessary to include proposed changes in normal product cycle scheduling. As an example the water heater industry is currently awaiting decisions and responding to seven regulatory change proposals conducted by three federal government agencies and there does not appear to be coordination within each department let alone between departments. Imposition of changes from any one of these proposals will have a major impact on industry. Attempting to undertake several changes at once would likely be stifling for industry.

Competition issues in international trade

Ai Group recommends:

- **Trade agreement negotiations should be carried out within the context of the broader economic policy framework and should take into account the views of all sectors;**
- **The secrecy of trade agreement negotiations must be mitigated; and**
- **There must be a substantive dialogue between trade negotiators and all industry sectors.**

The Ai Group fully supports the principle of free trade and the negotiation of multilateral, regional and bilateral trade agreements which advance the national interest. The negotiations for the Korea and Japan free trade agreements have focused on market access, in particular market access for Australian agriculture. They are significant achievements for access for Australian agricultural products to potentially very large markets.

However, it is our view that the terms of the Korea and Japan agreements have not been sufficiently evaluated with respect to the wider economy, and hence the national interest. Free trade agreements are significant policy tools, for both trade policy, industry policy and broader domestic economic policy. Negotiations should be carried out within the context of this broader framework and should take into account the views of all sectors. The secrecy of the negotiations must be mitigated, as it is in the United States. The content, conduct and progress of negotiations must be made available to qualified industry representatives with access to the views of SMEs as well as big business. There must be a substantive dialogue with all industry sectors. It is of vital importance for the negotiations with China and in the Trans-Pacific Partnership that negotiators have the benefit of the experience of business in dealing with China and businesses hands-on knowledge about trade practices and barriers.

Ai Group endorses the provisions in the Korea FTA which address anti-competitive practices. These provisions should assist in ensuring that anti-competitive practices do not undermine trade and investment liberalisation. Both sides will need to ensure that these commitments are upheld and enforced.

Trade negotiations have also begun to address non-tariff barriers to trade and investment as an important element in freeing up international trade. Technical rules and standards are commonly listed as non-tariff barriers, where they raise barriers to imports which do not apply to domestically produced goods. Standards Australia is a signatory to the WTO TBT Annex 3: Code of good practice for the preparation, adoption and application of standards. Australian technical rules and standards are not applied to imports in a discriminatory manner – they apply to all goods and services. Australian sanitary and phyto-sanitary requirements are subject to WTO scrutiny and quarantine measures are enforced on import whereas other regulated and non-regulated goods are not routinely tested at the border. For example, all building products must comply with the performance outcomes of the National Construction Code, but conformity is verified post-

installation. Imported materials may not be subject to quality control in the producing country, nor are they are examined for conformity at the Australian border. This, combined with weaknesses in Australia's conformance framework, results in products that do not comply with regulations and standards appearing on the market.

E-commerce raises many important questions of trade competition. On the one hand it is the perfect example of competition. On the other hand, there are issues of unfair practices affecting domestic business, including tax avoidance, data protection, intellectual property and enforcement of consumer protection. Australian Standards have become the benchmark for quality expected by the Australian community. Standards Australia does not have a direct role in ensuring the compliance of imported products or services with these standards. While a consumer affected by defective imported goods which do not meet Australian Standards may have a remedy under the Australian Consumer Law it may be too difficult and/or too expensive to enforce a judgment against a trader who has no assets in Australia.

Arguments are raised that anti-dumping and countervailing duties are being used as non-tariff barriers to trade with Australia. In examining the potentially anti-competitive nature anti-dumping provisions, it needs to be recognised that these are legitimate trade remedies to address unfair export practices provided for under the GATT and monitored by the WTO.

Industrial relations regulation

Ai Group recommends:

- **Industry-wide pattern agreements need to be outlawed as recommended by the Cole Royal Commission. This should be done under both the CC Act and the FW Act, through:**
  - **An amendment to the CC Act to prescribe that industry-wide pattern agreements do not fall within the exemption in section 51(2)(a) of the Act. This section provides:**

    "(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45E, 45EA or 48 has been committed, regard shall not be had:
    (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;"
  - **An amendment to the FW Act to prescribe that an enterprise agreement which reflects an industry-wide pattern agreement cannot be approved by the FWC; and**
  - **An amendment to the proposed Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 to ensure that enterprise agreements which reflect an industry-wide pattern agreement breach the Code.**
- **Provisions in industrial instruments which prevent or hinder the acquisition or supply of goods or services between two businesses need to be prohibited under the CC Act and the FW Act. Ai Group proposes that:**
  - **Sections 45E and 45EA of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business falls within these sections;**
  - **Section 51(2)(a) of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business does not fall within the exemption in this section; and**
  - **Clauses in enterprise agreements which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business should be "unlawful terms" for the purposes of section 194 of the FW Act.**
- **Consistent with the recommendations of the Cole Royal Commission, the Australian Building and Construction Commission (ABCC) should be given shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts involving building and construction industry participants.**

It is timely for detailed consideration to be given to the boundaries between anti-competitive practices outlawed under the *Competition and Consumer Act 2010* (CC Act) and anti-competitive practices permitted by workplace relations laws and exempted from the CC Act. The existing boundaries are imposing unacceptable barriers to competitiveness and commerce, and need to be re-drawn.

The CC Act (and the *Corporations Act 2001*) should govern relations between businesses and should ensure that unions cannot block or impede supply and acquisition between businesses. The CC Act should only contain reasonable exemptions for anti-competitive practices permitted by workplace laws – not wholesale exemptions which permit highly anti-competitive arrangements to be imposed across entire industries in the form of industry-wide pattern agreements.

The *Fair Work Act 2009* (FW Act) should not govern the relations between businesses. The FW Act should govern the relations between employers and employees and should not give rights to unions or employees which have the effect of blocking or impeding supply and acquisition between businesses.

Discussion Paper 13 – *Trade Practices Act Implications of Activity in the Building and Construction Industry*[3] of the Royal Commission into the Building and Construction Industry (Cole Royal Commission) provides a very useful analysis of many of the key issues.

There are a number of key problems that need to be addressed without delay:

- Industry-wide pattern agreements need to be outlawed as recommended by the Cole Royal Commission. This should be done under both the CC Act and the FW Act.
- Provisions in industrial instruments which prevent or hinder the acquisition or supply of goods or services between two businesses need to be prohibited under the CC Act and the FW Act.
- Consistent with the recommendations of the Cole Royal Commission, the Australian Building and Construction Commission (ABCC) should be given shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts involving building and construction industry participants.

These issues are discussed below.

Industry-wide pattern agreements

Industry-wide pattern agreements negotiated between construction unions and some State-based employer groups have a major negative impact on competition and commerce. With each bargaining round, a raft of costly and uncompetitive provisions are included in these pattern agreements which are implemented across the industry through unions coercing employers to sign pattern enterprise agreements which reflect the industry-wide agreement.

[3] http://www.royalcombci.gov.au/docs/complete%20discussion%20paper13.pdf

The supporters of industry-wide pattern agreements argue that they create a level playing field for the employers and workers covered by the agreements. Such a playing field benefits unions and those employers who are unable or unwilling to negotiate more competitive arrangements, but the playing field operates very unfairly for innovative employers and their employees who are capable of, and want to, negotiate more flexible and competitive provisions aligned to the needs of their enterprise, their employees and their customers. Of course the playing field also operates very unfairly for consumers and businesses which must pay the higher prices and suffer the reduced service levels which the terms of the pattern agreement impose.

The award system sets a floor price for labour in each industry and this is appropriate to prevent unfairness to workers in the industry. However, it is not appropriate to set over-award prices for labour across an industry. Paid rates awards were abolished many years ago for good reasons. Industry-wide pattern agreements are a massive price-fixing mechanism to fix the price of labour across an industry. Such mechanisms are not in the community's interests and need to be stamped out.

Ai Group does not negotiate pattern agreements.

The outlawing of industry-wide pattern agreements is consistent with the recommendations of the Cole Royal Commission. In Volume 5 (p.53) of his Final Report, Commissioner Cole identified the following reasons for his rejection of the contentions of those who argue that pattern bargaining is justified in the building and construction industry:

- Pattern bargaining is, by its nature, imposed in a compulsory manner without the involvement of the employer or employees in the employment relationship;
- It denies employers the capacity for flexibility, innovation and competitiveness in respect of a major aspect of project cost;
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements;
- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;
- It assumes that third parties such as unions or employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are;
- It assumes that employees are not capable of negotiating satisfactorily on their own behalf; and
- In areas other than major centres, where pattern bargaining does not occur, there is nothing to suggest that the industry operates inefficiently or that the working conditions are not satisfactory for the employer or the employees.

The industry-wide pattern agreement which is periodically negotiated between the Communications, Electrical and Plumbing Union (CEPU) and the National Electrical and Communications Association of Victoria (NECA) highlights the problems. This pattern agreement has traditionally been the first of the major construction industry pattern agreements to be negotiated each bargaining round, with key provisions flowing across the construction industry. Many hundreds of Victorian electrical contracting companies adopt the terms of the pattern agreement directly, and key provisions influence the terms of other pattern agreements in the industry.

When the last CEPU / NECA pattern agreement was negotiated in 2010, the 200 page document contained a new series of costly and highly restrictive provisions. Ai Group challenged three clauses in the pattern agreement in cases before Fair Work Australia (now the Fair Work Commission) and in the Full Federal Court. The relevant clauses provided for:

- Very tight restrictions on subcontractors and labour hire which, in effect, prevented the engagement of subcontractors and labour hire providers that did not have an agreement with the CEPU;
- Expansive union entry rights which undermined the right of entry provisions in the FW Act; and
- A requirement that employer parties to the pattern agreement actively encourage union membership, with exposure to penalties if they did not.

Ultimately, Ai Group did not succeed with its arguments that the above clauses were "unlawful terms" under the FW Act, nor did the Full Federal Court accept that the terms of the agreement breached section 45E and 45EA of the CC Act. The Court proceedings are discussed in more detail below.

The current NECA / CEPU pattern agreement expires on 31 October 2014. Negotiations between these parties over a new industry-wide pattern agreement is about to commence.

While the FW Act contains important provisions outlawing industrial action in pursuit of pattern bargaining, industrial action in pursuit of pattern bargaining has not been a significant problem over the past decade; the problem has been the pattern agreements willingly reached by unions and some State-based employer groups, and imposed on hundreds of individual employers and their employees.

Industry-wide pattern agreements need to be differentiated from project-specific framework agreements developed by head contractors for major projects (typically in the form of greenfields agreements). Commonly head contractors and subcontractors support the use of project-specific framework agreements on major projects as industrial risk is reduced and working conditions can be aligned with the needs of the project. There is nothing unlawful or inappropriate about a head contractor developing a greenfields agreement for a project, and then making that agreement available to subcontractors to adopt as an enterprise agreement should they choose to do so. It is unlawful under the FW Act for a head contractor to coerce a subcontractor to make a particular type of enterprise agreement, but provided that the adoption of the project-specific agreement is genuinely voluntary the law is not broken.

Provisions in industrial instruments which prevent or hinder the acquisition or supply of goods or services between two businesses

As mentioned above, in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 ("The ADJ Contracting Case") the Full Federal Court dismissed Ai Group's application for judicial review of a decision of a Full Bench of Fair Work Australia (now the FWC). The case related to whether a number of clauses in a union pattern agreement negotiated between the CEPU and NECA were unlawful under the FW Act and the CC Act.

Section 192 of the FW Act provides that the FWC may refuse to approve an enterprise agreement if the FWC considers that compliance with the terms of the agreement may result in a person committing an offence against a law of the Commonwealth or being liable to pay a pecuniary penalty under such a law.

Amongst other arguments, Mr Stuart Wood SC on behalf of Ai Group argued that compliance with a clause in the pattern agreement which imposed very substantial restrictions on the engagement of contractors (including contracting firms) would breach section 45EA of the CC Act.

Sections 45E and 45EA of the CC Act prohibit contracts, arrangements and understandings being reached with a union for the purpose (or for purposes including) preventing or hindering a business from acquiring goods or services from another business with which it is accustomed to dealing. These provisions of the CC Act are directed towards ensuring that trade unions, through the exercise of significant power, do not prevent or hinder business dealings.

Ai Group argued in the case that:

- The enterprise agreement made between ADJ Contracting Pty Ltd and the CEPU (which reflected the CEPU / NECA pattern agreement) operated as an arrangement or understanding, within the meaning of ss.45E and 45EA of the CC Act.
- At least one of the purposes of the arrangement or understanding was to prevent or hinder ADJ Contracting from acquiring services from existing contractors.

In rejecting Ai Group's arguments, Justices North, McKerracher and Reeves held:

> **"CLAUSE 4.3(B)(V) CONTRAVENTION OF THE CC ACT (GROUND 4 AND GROUND 5)**
>
> **68** AIG argues that compliance with the First Impugned Clause might in terms of s 192 of the FW Act result in a person, namely, ADJ or the CEPU being liable to pay a pecuniary penalty in relation to a contravention of s 45EA of the CC Act. FWA fell into jurisdictional error, AIG says, in concluding that the Agreement and the conduct antecedent to the approval should not 'be considered [or 'categorised as'] an arrangement or understanding in terms of the CC Act' because 'the making of an enterprise agreement does not comfortably fit within the terms of s 45E'. Section 45E of the CC Act is directed towards preventing union conduct through exercise of significant power from threatening companies dealing with other companies who do not possess the qualities that the union seeks or requires. AIG says the First Impugned Clause contains such a provision. AIG contends that both the First Impugned Clause and the conduct antecedent to the inclusion of the clause in the Agreement amounted to making an unlawful arrangement or reaching an unlawful understanding within the meaning of s 45E of CC Act.
>
> **69** Regardless of the intricacies of supply and acquisition on which there is no specific evidence, the argument for AIG fails at five levels:
>
> - First, the Agreement itself is not with a union in the s 45E sense.

- Secondly, the Agreement has statutory force – it is not the consensual type of agreement, arrangement or understanding to which the CC Act is directed.
- Thirdly, s 192 of the FW Act is concerned with agreements not arrangements or understandings.
- Fourthly, the Agreement is not an arrangement or understanding with CEPU.
- Fifthly, there is no evidence of CEPU's involvement in the antecedent conduct which could suffice to establish the elements of s 45E of the CC Act.

70 To expand on these points a little, for this argument to succeed, AIG must overcome the difficulty of the absence of evidence. AIG does not and cannot contend that a contract with CEPU arose by ADJ agreeing to the Agreement. It relies upon the fact that ADJ and the CEPU 'would have to have made' an arrangement or at least reached an understanding as to those terms so as to give rise to creation of the Agreement. But there is no cogent evidence of this.

71 In any event, s 192(1) of the FW Act deals with the consequences of a failure to comply with the terms of an 'agreement'. It is not dealing with compliance with any anterior arrangement or understanding as that is known for the purposes of the CC Act.

72 Further, not only is the Agreement not an agreement with a union for the purpose of s 45E of the CC Act (which AIG concedes), but it cannot operate in itself as an arrangement or understanding. The Agreement has statutory force. It is neither a contract, arrangement or understanding within the meaning of the CC Act, but a creature of statute. The anterior process of negotiation is not the reaching of an agreement or understanding for the purpose of s 45E of the CC Act.

73 The AIG argument that the statutory instrument is less binding and less formal than a formal contract (and therefore an agreement or understanding) must also be rejected. The statutory instrument has more formality and greater consequence than any contract arrangement or understanding could have. Sanctions for its breach are greater and apply to persons whether they voted for it or not, whether they were in the relevant employment at the time when it was approved and even if they were completely unaware of its existence.

74 As to s 45EA of the CC Act, the argument necessarily fails if the argument under s 45E fails. As s 45E is not contravened, s 45EA cannot be breached.

75 AMMA also raised an additional ground of review not raised by AIG in relation to potential contravention of s 45 of the *Building Construction Industry Improvement Act 2005* (Cth) (the BCII Act). This argument was raised before the Full Bench and rejected. At [44] of the majority decision, Senior Deputy President Harrison and Commissioner Roe said (endnotes omitted):

> [44] AMMA raised a challenge to clause 4.3(b)(v) which it conceded was not raised before Her Honour. It submitted that compliance with the clause may result in [ADJ] being liable to pay a pecuniary penalty under the *Building and Construction Industry Improvement Act 2008* (sic) for a contravention of s.45 of that act. The submission has little immediate attraction. It is not at all clear how compliance with the clause would constitute an act of discrimination as provided for in s.45(1)(a)(i) or (ii). Compliance with the clause requires no consideration to be given to the kind of industrial instrument covering the contractor nor which person the industrial instrument is made with. This is not a matter raised by the grounds of appeal and we are not inclined to consider it further. The point was not developed in any detail and it is relevant to note does not appear to have been raised below by the Australian Building and Construction Commissioner (ABCC) who appeared before Her Honour. The challenge made by the ABCC to clause 4.3(b)(v) was referable to s.354 of the FW Act and was dismissed by Her Honour at paragraphs 29 and 30 of her decision.

76 The Full Bench was correct to reject this submission for the reasons it did. Section 45 of the BCII Act relevantly prohibits discrimination on the basis of a person's employees not being covered by a particular kind of industrial instrument or industrial instrument made with a particular person. The operation of the First Impugned Clause does not contain any discriminatory content within any of the reasons set out in s 45 of the BCII Act.

77 Each of these grounds for AIG and AMMA must be dismissed."

(Emphasis added)

There is no logical reason why a less formal arrangement or understanding entered into by a union which prevents or hinders supply or acquisition of goods or services between businesses should be outlawed under s.45E and s.45EA but an enterprise agreement should not.

Several years ago the ACCC pursued a successful case against the CEPU for entering into an arrangement with a contractor in the Latrobe Valley to only use subcontractors that had an agreement with the CEPU.[4] The union paid over $300,000 in fines and ACCC costs. The following extract is from the ACCC's media release which warned employers about the consequences of agreeing to union claims for arrangements requiring contractors to have an agreement with a union:

> "Companies should be aware that certain arrangements with a union which prevent them from acquiring goods or services from or supplying goods or services to another person are illegal under the Act," ACCC Chairman, Mr Graeme Samuel, said today.
>
> "This case should serve as a warning to companies that they risk the imposition of substantial penalties if they accede to pressure which a union may exert upon them to enter into such arrangements."

In a subsequent media release when the Court's decision was upheld by the Full Court of the Federal Court, the ACCC said:

> "ACCC Chairman, Mr Graeme Samuel, welcomed the Full Federal Court's decision. The Full Court's decision should serve as a clear warning to unions that they risk the imposition of substantial penalties for being involved in contraventions of the secondary boycott provisions of the Act. This case demonstrates that the court, notwithstanding the non-commercial nature of unions, is prepared to impose significant penalties in respect of unions flexing industrial power that affects commercial activities contrary to the law."

Provisions in enterprise agreements which prevent or hinders a business in acquiring goods or services from, or supplying goods or services to, another business should be outlawed including, for example:

- Clauses which impose restrictions on the engagement of independent contractors (including contracting firms);
- Clauses which impose restrictions on the engagement of labour hire contracting firms or conditions on the engagement of labour hire workers;
- Clauses which impose restrictions on particular types of supplies or suppliers (e.g. a requirement that Australian-made supplies must be used);

[4] *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 2)* [2007] FCA 11; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* (No 3) [2007] FCA 144; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777.

- Clauses which nominate particular suppliers of products or services (e.g. costly income protection products offered by insurance providers which pay large commissions to unions). (Note: Consistent with superannuation legislation, agreements should be able to specify particular complying superannuation funds.

Investigation and prosecution of secondary boycotts

The Cole Royal Commission recommended that the ABCC be given a shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts. Specifically, the Royal Commission recommended:

> **"Issue**
>
> The Australian Competition and Consumer Commission presently has exclusive responsibility for investigating allegations of secondary boycotts in the building and construction industry. It has not been active in doing so. A question arises whether the Australian Building and Construction
>
> Commission should be given a concurrent power identical to that of the Australian Competition and Consumer Commission to investigate and prosecute breaches of the secondary boycott provisions of the *Trade Practices Act 1974 (C'wth)* affecting the building and construction industry.
>
> **Recommendation 181**
>
> The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss45D–45E of the *Trade Practices Act 1974 (C'wth),* but limited in operation to the building and construction industry.
>
> **Recommendation 182**
>
> The Australian Building and Construction Commission share jurisdiction with the Australian Competition and Consumer Commission in investigating and taking legal action concerning secondary boycotts in the building and construction industry."

This recommendation of the Cole Royal Commission has obvious merit and should be implemented without delay. The recommendation aligns with the provisions of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* which the Federal Government recently published in advance form. Section 16 of the Code requires that businesses report to the ABCC any request or demand by a union that the business engage in conduct that appears to be for a secondary boycott within the meaning of the CC Act.

Transport regulation

Ai Group recommends:

- **The *Road Safety Remuneration Act* (RSR) should be repealed and the Road Safety Remuneration (RSR) Tribunal should be disbanded without delay.**
- **Coastal shipping arrangements should be restored as near as possible to the regulatory regime that was in place between March 2006 and June 2009. This would require:**
    - **Enabling foreign ships to apply for single voyage licences, multiple voyage licences or continuing licences through a simple system that does not impose an unnecessary regulatory burden on them; and**
    - **Excluding "persons insufficiently connected with Australia" from the application of the FW Act and modern awards (see section 31 of the FW Act), with this term defined in an appropriate and workable manner through the Fair Work Regulations 2009.**

There are a number of significant anti-competitive arrangements in operation in the transport industry that need to be addressed, including:

- The Road Safety Remuneration System; and
- Coastal shipping arrangements.

Road Safety Remuneration System

The maintenance of a globally competitive road transport industry is of crucial strategic importance to the Australian Economy.

In 2011 it was estimated that the industry contributed approximately 1.7 per cent of Australia's total gross domestic product and approximately 2.3 per cent of the total Australian employment.[5] However, the significance of the road transport industry is not simply a product of its size but of its linkages with other sectors of the economy. The overwhelming majority of Australia's freight task is moved by road transport at some time.

Any significant increases in road transport costs are likely to damage the competitive position of businesses in the supply chain, particularly those which face international competitive pressures such as the manufacturing and retail sectors which are highly reliant upon road transport services.

Rural and regional areas experience a disproportionate burden when road transport costs increase given their heavy reliance on road transport.

The *Road Safety Remuneration Act 2012* and the Road Safety Remuneration Tribunal (together the Road Safety Remuneration System – RSR System) are imposing anti-competitive arrangements on industry and are distracting Government and industry attention and resources away from the measures which are widely recognised as improving road safety.

[5] Regulatory Impact Statement (p.v) for the *Road Safety Remuneration Bill 2011*.

Under the RSR System the Tribunal is afforded the power to regulate both the road transport industry and the broader supply chain. Its decisions will have major impacts on road transport companies, on businesses which use road transport and on Australian consumers.

Orders flowing from the RSR Tribunal are likely to have the following adverse effects:

- Interfering with normal commercial arrangements between transport companies and their clients;
- Imposing increased costs upon road transport companies;
- Imposing increased transport costs upon the manufacturing, construction, retail and other industries;
- Imposing higher prices for transported goods upon the community;
- Distracting industry and Government attention and resources away from the measures which are widely recognised as improving safety, such as: risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance mechanisms;
- Undermining the National Employment Standards, modern awards and enterprise agreements.
- Imposing an unreasonable compliance and red tape burden upon road transport companies and/or businesses which use road transport;
- Undermining the integrity, objectives and operation of a raft of State laws and initiatives relating to relating to matters such as work health & safety and general transport regulation and industrial/contractual conditions of contractor drivers/owner drivers; and
- Undermining the Heavy Vehicle National Law.

The RSR Act and Tribunal are likely to lead to significantly increased transport costs without delivering any tangible improvement in safety. Improving safety in the road transport industry requires a whole-of-government approach rather than a narrow focus on the method and quantum of remuneration. It requires an approach which has broad support, including the support of the Federal Government, State and Territory Governments, and industry. The RSR System does not have broad support. It is a flawed system which was implemented by the previous Federal Labor Government in response to the Transport Workers Union's *Safe Rates, Safe Roads* industrial campaign.

In contrast to the flawed RSR System, Ai Group strongly supports the Heavy Vehicle National Law and the National Heavy Vehicle Regulator which have the support of the Federal Government, State and Territory Governments and industry, and which were developed following extensive consultation with stakeholders.

Coastal shipping arrangements

Australian companies which rely on shipping need access to sea transportation at reasonable prices in order to remain competitive and productive.

Coastal shipping transportation is very important to avoid increased congestion and higher maintenance costs on Australia's road and rail networks. It is of course vital for Tasmania as an island State.

There is an economic argument that cabotage should be abolished because it is economically inefficient and increases costs for users of shipping. We note that New Zealand abolished coastal cabotage in 1994 and has not re-introduced it. However, given that the FW Act and the *Seagoing Industry Award 2010* apply to Australian-registered ships, Ai Group understands the argument that Australian shipping companies should not be exposed to unfair competition from overseas shipping companies.

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), Australian workers (those employed by shipping companies and by users of shipping) and Australian consumers who pay higher prices when transport costs are higher.

The existing coastal shipping arrangements under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Coastal Trading Act) and the FW Act:

- Are too costly and inflexible for users and suppliers of coastal shipping services; and
- Are having an adverse impact on industry and the broader community.

Between March 2006 and June 2009 the coastal shipping arrangements in place were operating very satisfactorily. Accordingly, we propose that a new regime as near as possible to this successful former regime should be re-established. This would involve:

1. **Enabling foreign ships to apply for single voyage licences, multiple voyage licences or continuing licences through a simple system that does not impose an unnecessary regulatory burden on them**

   The current onerous and restrictive arrangements for the granting of temporary and other licences under the Coastal Trading Act have resulted in increased costs and reduced availability for users of shipping transport, which in turn has resulted in higher prices for Australian consumers. Substantial changes are necessary, for example:

   - Foreign ships should be permitted to apply for a permit / licence for a single voyage, rather than for the existing minimum of five voyages, as was the case prior to the Coastal Trading Act; and

   - The requirements under the Coastal Trading Act that applications for Temporary Licences must be published, with holders of a General Licence or an affected third party (e.g. a union) having the ability to object to the application, should be abolished. These requirements:

- Result in delays in Temporary Licences being granted;
- Deter foreign ships from making applications because of potential union activity against their operations;
- Consequently result in reduced competition in the shipping transport industry.

2. Excluding "persons insufficiently connected with Australia" from the application of the FW Act and modern awards (see section 31 of the FW Act), with this term defined in an appropriate and workable manner through the *Fair Work Regulations 2009*.

Former Regulation 1.1 of the *Workplace Relations Regulations 2006* appropriately defined the following persons as "persons insufficiently connected with Australia" for the purposes of the *Workplace Relations Act 1996*:

"A person who:

(a) is a non-citizen; and

(b) is a member of the crew performing duties on a permit ship"

And

"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"

The following definitions applied under the *Workplace Relations Act 1996*:

"**Non-citizen** has the same meaning as in the Migration Act 1958"

"**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."

Arrangements which as near as is possible model those above should be implemented. The convoluted arrangements in sections 31-35A of the FW Act and in Regulations 1.15B-1.15G of the *Fair Work Regulations 2009* require major modification.

Education regulation

Ai Group recommends:

- **In the higher education sector, Ai Group considers that a student demand based funding system is potentially a more effective mechanism for meeting industry's demand for skills and qualifications than the previous method. However, there is a need for close monitoring of the alignment of student demand to industry need, the impact on skill shortages, the impact on the VET sector and the establishment of quality arrangements.**
- **In the VET sector, Ai Group has been concerned by the introduction of demand-driven funding approaches by some jurisdictions when these are not related to industry needs. The VET system needs to remain responsive to industry needs. These negative effects detract from the overall positive approach of moving away from supply-driven training to a more industry demand driven system,. They need to be addressed as a matter of urgency.**

Education and training is considered in *The Competition Policy Review Issues Paper* in Chapter 4 Potential Reforms in Other Sectors, when it refers to, as an example, education services:

> *"Historically, in circumstances where competitive markets were not seen as feasible, more administered market arrangements developed. Examples of these include health and education services, where governments have traditionally determined what is produced, how much (via budget allocations) is produced and who is the producer. This reflected governments' desire to meet important policy objectives such as equity in both access to and the quality of the service provided."*[6]

Within the broad area of education services, competition policy has recently become relevant to demand driven funding models in the Higher Education and Vocational Education and Training (VET) sectors.

At the outset it is important to proceed with caution when considering competition policy and market-oriented approaches in education and training. These are not areas of human activity that lend themselves easily to such considerations, in part because price is not always the main or key indicator of choice and it is often difficult to accurately describe the market for such areas of human endeavour.

Demand Driven Funding Models in Higher Education

Traditionally the Commonwealth Government operated a supply driven system in which the government allocated student places to public universities with specific imposed limits on the number of bachelor degree places. This arrangement was characterised by a lack of flexibility by universities to respond to changes in demand which led to a gradual relaxation of the capping of places over a number of years.

[6] Competition Policy Review, Issues Paper, 14 April 2014, page 24.

In 2012 the Commonwealth Government replaced this supply driven system with a demand driven system which lifted the imposed limits on domestic bachelor degree students. The new policy had an immediate impact on increasing student numbers by 22% from the 2009 level of 444,000 places to 541,000 places in 2013.[7]

The Commonwealth Government appointed a review panel on 12 November 2013 to consider and make recommendations in relation to the demand driven funding arrangements. In summary, the review found that the demand driven funding arrangements had increased participation, improved access for low socio-economic status students and is more effectively meeting the skills needs of the economy.

The review noted that submissions received indicated general support for continuation of a demand driven system. There has been greater competition for student enrolments and increased opportunity for greater responsiveness to student demand. The review claimed that this initiative had also driven innovation and lifted quality. They found that there was no persuasive case for reintroducing caps and recommended an extension of the system to sub-bachelor level, private universities and non-university higher education providers in TAFE. It was also recommended that a limited introduction of the system occur at the postgraduate level.[8]

This means that a number of benefits have been identified as a result of the introduction of greater competition into the higher education funding model.

> *"Competition arises when institutions have the freedom to take differing decisions in relation to the range of matters that affect the delivery of higher education."*[9]

Indeed, the review noted that the uncapping of student places has given public universities a competitive advantage in relation to other higher education institutions which do not have access to Commonwealth supported places and are reliant on full-fees.[10]

The review considered the impacts the demand driven system has had on quality. Whilst, student satisfaction with teaching has continued to increase, quality related questions have arisen as a result of the system being introduced. Every public university has increased its number of Commonwealth supported students between 2009 and 2012. At the same time the required Australian Tertiary Admission rank (ATAR) has been reduced at most universities and is below 50 in some cases. There has been some negative media reaction to this development in terms of concern about quality. The review states that this does not suggest students are of lower quality, but it does place a higher burden on universities to ensure students are retained and complete a degree of satisfactory quality. This has created some pressures on universities when high attrition rates are being experienced.

[7] Review of the Demand Driven Funding System Report, 2014, page 4.
[8] Ibid, pages iii – iv.
[9] Ibid, page 8.
[10] Ibid, page 9.

> "*A major concern is whether the universities can deliver education at the standard required in a context of rapid expansion and lower levels of student preparedness*."[11]

The Tertiary Education Quality and Standards Agency (TEQSA), established as a result of the Bradley Review of Australian Higher Education in 2008[12], is considered to be an important standard-setting, monitoring and enforcement mechanism, and essential for expansions in the demand driven system for higher education. It is essential that TEQSA is supported in its endeavours to implement consistent quality across the sector especially in the current period of rapid expansion. This is important in the context of attempts to promote university autonomy, restrict the operations of TEQSA and characterise their operations as regulatory burden.[13] The recent Commonwealth Budget announced that the Tertiary Education Quality and Standards Agency will be continued to ensure high quality standards are met.

Whether degrees being completed under the more competitive system are of a satisfactory quality is still a matter open to debate. Whilst the review did find that universities are working to support students who are less adequately prepared, the quality of outcomes that universities are able to achieve with their students is still in question by industry - in particular the aspect of generic skills of graduates when entering the workforce. Should the quality of outcomes decline, there are serious implications for individual providers, for industry and for Australia's international reputation.

Of particular concern is whether the introduction and even the expansion of the demand driven system will better meet the needs of industry. Australian businesses will require more high skilled labour in the decades to come. Some of the key indicators include:

- Professional and managerial occupations now make up one-third of all employment and are set to grow faster than average. Access Economics estimate annual growth rates to 2025 will be 1.3 - 2.5 per cent for managerial employment and 1.6 - 2.5 for professional employment, compared with 0.7 - 2.0 percent for total employment growth.[14]

- Access Economics predicts that the average annual change in industry demand for bachelor-qualified workers will be between 2.9 and 4.5 percent every year until 2025.

- The trend toward an economy needing ever-higher levels of workforce skill has been particularly pronounced in recent years. A 2010 ABS report found 54 per cent of jobs created over the previous 5-year period were in occupations usually requiring a degree.[15]

- Recent modeling undertaken by the Australian Workforce Productivity Agency (AWPA) concludes that we are projected to have a deficit of higher-level qualifications (i.e. Diploma

[11] Conor King and Richard James, op cit, page 17.
[12] Review of Australian Higher Education Final Report, 2008
[13] Universities Australia Submission to the Review of Higher Education Regulation, June 2013.
[14] *Economic modelling of demand and supply*, July 2012, Report by Access Economics.
[15] *New Jobs: Employment trends and prospects for Australian industries*, Skills Australia, New Jobs- All Industries Outlook Report 2010, skillsinfo.gov.au

and above) from around 45,000 to 280,000 in 2025.[16]

These indicators suggest that the reforms to the higher education sector following the Bradley Review,[17] which include the introduction of the demand driven funding system, are unlikely to achieve the necessary level of growth.

The significant growth achieved to date due to the uncapping of undergraduate places is driven by student demand. An important issue to monitor as the reform progresses is whether this increased student demand aligns with industry demand. The Government has also introduced the *My University* [18]website to provide greater information about institutions, courses and outcomes to assist student choice. High-quality information is an important factor in the effective operation of a market-based system such as has been introduced in higher education. The effectiveness of the new policy relies on student choices dictating the flow. Prospective students need to understand where employment opportunities lie so they are more likely to make rational and informed choices.

This is closely related to the persistent issue of skills shortages in the Australian economy. Ai Group's survey on *Employer's Workforce Development Needs* focused on the prevalence and location of skill shortages within workforces. Surveyed employers were asked to identify their experience of skill shortages in the past 12 months (2012) by occupational grouping. The results found that there were significant skills shortages in professional (20.4 per cent) and managerial (15.9 percent) skills. These occupation areas occur at the higher end of the skills spectrum. Mismatches between educational supply and workforce demands need to be better monitored as failure to address the supply of skills in these areas can severely risk business productivity and contribute to resource wastage.

The review explored how the demand driven system has assisted with this issue of skills shortages. It concluded that the system has created the flexibility of universities to adapt to meet current shortages. The review, however, was unable to establish the extent of the skills shortages that were reported in some areas or whether students pursued careers in their course fields. Closer monitoring systems need to be established to collect these data.

The Commission of Audit addressed issues raised by the review of the demand driven system. Changes were recommended to the existing arrangements for higher education funding to improve performance of the sector, better account for the private benefits of higher education and to increase competition in Australia's education system. Recommendations included decreasing the average proportion of higher education costs paid by the Commonwealth, and increasing the proportion of costs paid by students; a partial or full deregulation of fees for bachelor degrees; and reducing the cost to the Commonwealth of HELP.

[16] Australian Workforce Productivity Agency (AWPA), 2012, *Future Focus Discussion Paper*, AWPA.
[17] *Review of Australian Higher Education*, (Bradley Review), 2008.
[18] http://www.myuniversity.gov.au

The 2014 - 2015 Commonwealth Budget has subsequently addressed issues within the higher education sector identified through the review. The aim is to strengthen the system and improve educational quality through autonomy for universities to set their own tuition fees. A portion of additional revenue raised will be used for Commonwealth Scholarships. Direct financial support will be provided by the Commonwealth for all students studying education diplomas and associate degrees, as well as bachelor degrees at all approved higher education institutes. The Commonwealth will rebalance its contribution towards course fees for new students, with a reduction of 20% on average. Student debt repayments for HELP will commence at a lower income level.

The Ai Group considers that a student demand based funding system for higher education is potentially a more effective mechanism for meeting industry's demand for skills and qualifications than the previous method. However, this new system has only been fully in place since 2012 and it is difficult to assess the full impact at this stage. There is certainly a need for close monitoring of the alignment of student demand to industry need, the impact on skill shortages, the impact on the VET sector and whether quality arrangements can be established and maintained.

Competition and the VET Sector

Reforms to achieve demand driven VET outcomes have been progressively implemented by the States over recent years. However in response to widespread concerns about the VET sector relating to the quality of programs, providers and graduates, a VET Reform Taskforce has been examining the significant changes as a result of the more competitive arrangements in the sector. The Taskforce was established late in 2013 by the Department of Industry and consulted widely in the early months of 2014.

Key issues were raised through the consultation process which threw up questions around the impact that increased competition may have had on meeting skill needs and quality standards. Industry questioned the flexibility of programs, funding levels and the ability to quickly meet industry needs through programs. Training providers were critical of undue administrative and cost burdens, frequent cycles of change and complex approval processes. The introduction of a risk based approach to regulation was favoured.

The National Commission of Audit, suggested in its recommendations addressing VET, a scaling back of the Commonwealth's involvement, with continued reforms to achieve demand driven VET outcomes to be undertaken by the States. The report commented that given the amount of money spent in VET by all governments, the outcomes achieved are not strong, citing low completion rates as an example. A system of reporting on outcomes and quality assurance at the national level should be a fundamental component of these changes.

Ai Group has been concerned by the introduction of demand-driven funding approaches by some jurisdictions when these are not related to industry needs.[19] These have been based on the twin

[19] Innes Willox, *Make the training system work*, Australian Financial Review, 3 July 2012.

pillars of funding contestability and student entitlement. This approach leads to excessive enrolments in some industry areas with little regard for employment prospects. This has been an unfortunate development in the overall positive direction of movement away from a supply-driven training system. Ai Group has consistently supported a balance between the individual demand-driven model and the needs of industry and the economy. It is irresponsible to leave the provision of training for the needs of industry and the broader economy to market forces alone.[20]

Jurisdictions also need to review their approaches to entitlement. A major issue of the entitlement model is that the VET system is designed to be industry-led and not driven by the individual.[21] The entitlement model is premised on the notion that the consumer makes an informed choice. The VET market however is a very imperfect market and individual consumers are not readily provided with sufficiently adequate information upon which to base a training decision. It is important that individuals are supported to undertake qualifications in areas of need such as skills shortages and foundation skills regardless of whether they have used their entitlement in an original field of study.

> *"Basically people are burning their entitlement to training for a course that doesn't give them a career path, and doesn't give that person proper purpose or direction."*[22]

Some jurisdictions are drastically reducing funding to TAFE. This distorts provision patterns and contributes to the expansion of the more market-oriented private providers of training.[23] TAFE Institutes have been able to cross-subsidise expensive technology-based courses with funds generated from other program areas. This will no longer be possible.

> *"This is where TAFE cuts will impact most, because there is going to be less incentive for TAFEs to deliver these programs that businesses see as being crucial."*[24]

The release of the *Next Steps for Refocusing Vocational Training in Victoria – Supporting a Modern Workforce* acknowledges the issues that flowed from the introduction of vocational training system reforms.[25] These issues include weak price signals, limited and poor quality information, gaps in the quality assurance and regulatory framework, an inconsistent competitive environment and a limited market oversight capacity. In short, the Government has moved to manage the training market and make specific interventions. There is recognition that the market is complex and cannot be left without management due to the risks of market failure and sub-optimal outcomes. The establishment of a market monitoring unit has been central to this.

One of the features of the fully contestable market system and uncapped places is the significant increased activity outside of TAFE institutes. By 2012 TAFE market share had decreased to 42%.[26]

[20] Innes Willox*, Industry and TAFE harmed by VET reforms*, Campus Review, 24 July 2012.
[21] *VET student entitlement schemes flawed*, Campus review, 6 March 2012.
[22] Innes Willox, *Industry and TAFE harmed by VET reforms*, Campus Review, 24 July 2012.
[23] Leesa Wheelahan, *TAFEs on a hiding to nothing*, Campus Review, 15 May 2012.
[24] Innes Willox, *Industry and TAFE harmed by VET reforms*, Campus Review, 24 July 2012.
[25] *Next Steps for Refocusing Vocational Training in Victoria – Supporting a Modern Workforce*, Department of Education and Early Childhood Development, January 2013.
[26] Ibid, Page 6

The number of private providers increased from 201 in 2008 to 445 in 2012. The Government considers this to be a success in terms of expanding the market and choice of providers but this may well have a negative effect on the provision of trade training which is largely delivered by TAFE institutes.

Ai Group's recent submission on the effects of the competitive training market on TAFE addressed a number of areas of concern related to the competitive training market. These included:

- the level of funding to the VET sector is inadequate to meet the expanded demand for skills by industry including areas of skills shortages;
- the level of funding to the VET sector is also inadequate in comparison to the schooling and higher education sectors;
- an acknowledgement that TAFE, with its broader community role, is a significant provider of programs that do not necessarily yield high financial returns such as programs for disadvantaged youth;
- the significant impact on regional communities operating in thin markets of the implementation of market-based funding;
- the provision of many courses through the competitive training market that are based on individual perceptions of benefit rather than on industry need;
- the consequent 'burning' of student entitlements through uninformed course selection choices; and
- the reduction of the provision of student services such as counselling, libraries and disability programs.

It is unfortunate that these negative effects detract from the overall positive approach of moving away from supply-driven training to a more industry demand driven system. In order to complete this successful transition these negative impacts need to be addressed as a matter of urgency.

Competition and Trade Skills Recognition

An effective demand driven system for education and training should encourage adjustments to courses offered in order that critical skill needs are met to fuel a competitive Australian economy. As discussed above the higher education and VET sectors have been transitioning to demand driven systems over recent years, however the evolving systems are still facing issues, and in such areas of human activity, a number of factors determine course choices by the market.

The issue of sustained skills shortages facing Australian industry over recent years has driven the continuation of a number of systems for the recognition of trade skills. These systems are designed to assess and recognise overseas qualifications in targeted occupations for skilled workers migrating to or temporarily working in Australia. These programs have allowed businesses

to employ skilled workers in areas of shortage thereby enhancing their competitiveness in the marketplace.

Ai Group supports the continued operation of trade skills recognition programs tied to skilled occupations lists, as a means of supplementing the education and training system with skilled workers and boosting the competitiveness of Australian industry. It is important that a coordinated process for the monitoring and reporting of skill needs in the economy be maintained to inform the current systems.

Energy regulation

Ai Group recommends that competition and efficiency in energy markets be improved through:

- **demand side participation, including the introduction of genuine demand-side participation in the wholesale energy market;**
- **improved management of peak demand through cost-reflective energy pricing and the further rollout of smart meters;**
- **energy asset sales that attract a good price for taxpayers and have appropriate safeguards;**
- **privatisation and competitive arrangements for all aspects of energy markets, including network service providers;**
- **reforms to Australian gas markets including:**
    - **greater transparency in access and pricing;**
    - **'use it or lose it' principles for both gas tenements and pipeline capacity;**
    - **Gas pipeline trading capacity; and**
    - **Reforms to joint marketing arrangements for gas suppliers.**

Energy markets

Although the energy sector has made great strides in competitiveness since the early 1990's, the cost of energy has become a serious issue for Australian industry. Despite depressed wholesale electricity prices, the rise in network charges ensures that retail electricity prices remain very high. Natural gas prices have also risen dramatically as a result of the looming start of gas exports from Queensland. These prices represent a significant threat to the competitiveness of many businesses. Ai Group believes that there are numerous opportunities for the Federal Government to assist industry through enhancing the competitiveness of the energy market.

Demand-Side Participation

Ai Group believes that there are numerous opportunities for the network to more efficiently respond to the demands of peak usage without resorting to costly infrastructure builds. These include greater uptake of energy efficient technologies, the increasing availability and declining cost of dispersed generation – such solar PV– and perhaps most importantly for enhancing competition: the introduction of genuine demand-side participation in the wholesale market. The option for energy consumers to reduce their consumption and then sell the difference on the wholesale market would open an entirely new horizon of competition in the energy sector. As our submission to the Government's Energy White Paper (February 2014) submission put it:

> *This (demand-side participation) would provide more flexibility and more attractive prices for energy users than if they are limited, as at present, to striking demand response arrangements with their retailer only. More demand response would support system reliability, benefit direct participants and eventually shave peak electricity prices. Despite a decline in overall demand, the costs of peak demand remain a serious issue for consumers.*

Establishing an effective demand-side presence in the wholesale market will only become more important for consumers in the medium to long term as energy wholesale prices begin to rise from their current low level. The Federal and State Governments' have already formally recognised the importance of this reform to consumers in the COAG *Energy Market Reforms* Plan (2012). Ai Group would urge the Federal Government to prioritise the implementation of this, and the other reforms contained in the Plan, as important contributions to enhancing competition in the energy sector.

Smart Meters

We agree with the Issues Paper that "improved management of peak demand through cost-reflective pricing and the further rollout of smart meters" are important reforms to pursue. As we highlighted in our submission:

> *Many of the opportunities for innovation and efficiency improvement in the electricity system require modern information infrastructure, with smart meters being a central component. While rapid rollouts have proved unpopular in the wake of the Victorian experience, we agree with the Productivity Commission recommendation that every effort should be made to incentivise the uptake of smart metering technology by consumers.*

Energy Asset Sales

Australian businesses have an open mind when considering proposals to sell publically-owned assets. For assets that can be operated more efficiently by the private sector, this evaluation comes down to whether the taxpayer gets a good price in the sale process; whether appropriate safeguards for consumers and businesses in the regulatory arrangements will apply to the sold assets; and, of course, whether the funds will be used wisely – either in repaying debt or investing in new infrastructure.

Ai Group sees the benefits of privatising publically owned energy infrastructure, in particular we have argued that network service providers (NSPs) offer large potential benefits through privatisation. While energy generators and retailers already operate in a fully competitive environment, NSPs are regulated monopolies. There is a perception that state ownership of these assets not only leads to less efficient outcomes but due to the lower cost of borrowing available to state entities provides a perverse incentive to over-invest in network infrastructure at the expense of energy consumers. A renewed emphasis on efficiency in the operation and investment decisions of NSPs would enhance competition in the sector and lead to better outcomes for consumers.

Competitive Gas

The eastern gas market is experiencing an unprecedented transformation from a purely domestic market to one predominantly orientated towards export. This has introduced entirely new competitive and cost pressures that are already being felt by industrial gas users. Promoting efficient competition within the gas market will be essential to ensuring that domestic users pay no more than necessary. Ai Group would encourage the Government to seriously consider several reforms, including:

The need for greater transparency in the gas market

Transparency is essential if competition is to flourish and many gas users are concerned that despite the rapid changes taking place in the gas market it has retained its traditional opacity. The gas market is relatively immature and dominated by only a handful of large players who sell largely to individual customers through confidential long-term contracts. Although spot markets do exist in the major cities – with another major trading hub at Wallumbilla due to begin operation this year - as yet they have attracted only limited transactions. This issue was recognised as needing reform by the Government in its *Eastern Australian Gas Market Study* earlier this year. Ai Group would encourage the Government to maintain that focus.

The introduction of 'Use-it-or-lose-it'

It has been suggested by many that a 'use-it or lose-it' requirement should form part of leasing arrangements for both gas tenements and pipeline capacity. At a time when the eastern gas market is experiencing supply shortfalls there is an urgent need to utilise all available supply and capacity capabilities. Implementing and enforcing such a requirement would need careful consideration; however it could provide a valuable tool to ensure that much needed supply is not deliberately withheld.

Pipeline-Trading Capacity

To ensure the efficient use of existing gas infrastructure the Government should encourage current efforts by industry to establish a trading market for pipeline capacity.

Reforms to joint marketing arrangements

The dominance of a handful of large players in the gas market was identified by COAG in 2002 as a potential barrier to competition. Competition is reduced still further if multiple operators are permitted to jointly market their gas to consumers. Such an arrangement is approved by the ACCC who overlook the reduction in competition if they are satisfied that the exception will result in a "public benefit" that outweighs the reduction in competition. Ai Group would urge the Government to ask the ACCC that in light of the rapid transformations taking place in the gas market whether such an exception is still relevant.

Water regulation

Ai Group recommends:

- **national water policy and water competition must be de-politicised;**
- **Government should establish minimum security of supply requirements for water and then reassign the responsibility to supply and distribute water to private sector utility businesses;**
- **Government should consider privatising water treatment and distribution assets;**
- **A national review of the regulatory and governance framework for water utilities.**

Water markets

Promoting genuine competition among the natural monopolies of essential service provision is a challenge for all levels of government. With regard to water, the Productivity Commission report *Australia's Urban Water Sector (2011)* found that "a fully competitive urban water market (with 'in-the-market' competition for both customers and bulk water) does not currently exist anywhere in the world." Although Government can institute reforms to encourage what competition does exist, it is more likely that opportunities for improvement are to be found through encouraging greater efficiency.

Depoliticising policy making

Security and availability of water supply is a highly emotive issue in frequently drought-stricken Australia. The perception that one section of the community might gain at the expense of another has provoked intense hostility towards governments and the perceived beneficiaries of their policies – as demonstrated by the controversy that surrounded the Victorian North-South pipeline project and recent long term investments in desalinisation plants.

As the Productivity Commission report outlined, the political sensitivity of the issue combined with the public ownership of water infrastructure has led to a "high degree of political involvement in water issues". This has contributed to outcomes that have undermined competition in the sector:

- Opaqueness and confusion around water policy decision making contributing to consumer and investor uncertainty;
- Inefficient and costly investments in infrastructure projects where the primary focus has not always been on least cost delivery. This has deterred investment from the private sector and added costs to the consumers who must fund these projects;
- The imposition of multiple objectives on agencies which more properly belong to other bodies, such as health or environmental departments, and with inadequate guidance on which to prioritise; and

- Industry has often been forgotten in favour of residential consumers. For example, in Victoria recent dividends from efficiency gains have gone exclusively to residential users as part of the Government's efforts to ease cost of living pressures. This is an inequitable outcome that undermines the incentive for industry to cut their consumption and promote water efficiency.

A sustained effort by Government at all levels to depoliticise water policy would contribute substantially to providing the clarity and certainty in the market that greater competition relies on.

Market Reform

Establish security of supply – Governments are wary of public backlash should they be perceived as having failed to provide adequate water security. Yet, by establishing minimum security of supply requirements and then reassigning the responsibility to retailer-distribution utility businesses, Government could encourage greater competition in the water wholesale market and promote least-cost augmentation.

Privatise water assets – Although Australia compares favourably to other countries in the standard and maintenance of its water assets, at a time of financial stress for Governments, efficiency measures could help stimulate the private sector to fill the investment gap. This could occur through water asset sales to boost Government resources; encouraging greater competition in the design phase of infrastructure projects to reduce the likelihood of private investment being supplanted by large scale government-funded augmentation projects; and instituting reforms to provide opportunities for private operators in bulk water supply.

Economic regulation – As highlighted by numerous bodies, including the National Water Commission, moving towards a price monitoring mechanism – within the context of a strong regulatory and governance regime – rather than outright price control would allow for greater flexibility and competition between retailers. A further welcome reform would be to allow voluntary trade between urban and rural water-users. This would promote efficient water consumption, encourage wholesale competition and potentially postpone expensive augmentation investments.

Opportunities for efficiency gains

Although great improvements have been made since the 1990's there are still numerous opportunities for efficiency gains within the structures of the utilities themselves. For example the recent Independent Reviewer of Economic regulation, governance and efficiency in the Victorian water sector has identified the following efficiency opportunities for the Melbourne metropolitan water sector:

- Greater use of shared services and coordinated procurement;
- Improved allocation of capital and improved use of capital assets;

- Improved identification of trade waste produced by industry and commercial businesses and discharged into the sewerage system;
- Improved revenue collection, and pursuit of new revenue opportunities;
- Greater use of electronic billing and payment processing;
- Better interest rate management to reduce the cost of debt;
- Better planning of maintenance, to make the best use of network assets; and
- Better tendering and procurement processes.

To date, more than $1 billion in savings have been identified. The scale of the efficiencies identified in this review alone confirms the need for reform of the regulatory and governance framework. Ai Group would urge all Governments to ensure that any savings be passed through in an equitable manner that provides relief to both residential and business consumers.

Waste management

Ai Group recommends:

- **actively pursuing waste policy harmonisation through the National Waste Policy;**
- **Effective enforcement of existing waste management regulations;**
- **Long-term planning for future waste management requirements;**
- **Encouraging voluntary product stewardship across all product supply chains.**

Waste Management industry

Like the energy and water sectors the waste sector is one of the most heavily regulated industries in Australia, but it is a far more diverse in its industry composition. Although waste generated from residential homes is a regulated monopoly serviced by periodic tender, industrial and construction sector waste is a highly competitive and evolving market. Operators providing waste management services range from local councils, to small to medium enterprises to large multinational corporations, all offering to carry out an essential service to industry and private residents.

There are several areas where the Federal Government could advance reforms to generate more competitive outcomes:

Actively pursuing waste policy harmonisation through the National Waste Policy

Although the waste policies of the various state governments all endorse the National Waste Policy since its inception in 2009, in practice the policies vary dramatically. Differing attitudes to regulatory mechanisms such as compulsory landfill levies impose costs that are beyond the control of industry; however these costs are leading to market distortions and placing companies that operate within high cost jurisdictions at a competitive disadvantage. Essentially they are domestically trade-exposed industries. So far State governments have been unable to reach a policy consensus and individual Governments and their regulators are rightly concerned about attempting to unilaterally interfere in legitimate trade across state borders. At best Governments can request policy changes by their counter-parts.

We would urge the Federal Government to use its over-arching position to actively encourage greater coordination - and where possible harmonisation - in order to ensure that companies are not competitively disadvantaged by a lack of consensus and regulations beyond their control.

Effective enforcement of regulation

A similar dissonance still exists between the regulatory regimes of most states. Waste that is considered by one jurisdiction as requiring one classification may not face the same requirements in another jurisdiction - for example; certain types of contaminated soil is assessed differently in

Victoria than it is in Queensland. These categories require different methods of disposal which imposes different levels of costs on operators.

Ai Group would encourage the Federal Government as part of their policy of devolving more environmental approval authority to the states to prioritise greater inter-state regulatory harmonisation. This would enhance certainty for companies investing across state-borders and create a more effective competitive environment between jurisdictions.

Long-term Planning

Waste is an industry that requires substantial initial capital investment for an expected future pay off that may not occur for decades. For competition to thrive requires that new investments are encouraged and existing facilities protected. The rapid expansion of urban areas has increasingly meant that the unavoidable impact of the industry on surrounding areas has generated community concern and even hostility. Existing facilities are increasingly finding their buffer zones threatened by urban encroachment and new facilities often face substantial local community opposition before gaining approvals.

Although primarily a state and local government responsibility, Ai Group would encourage the Government to promote long term, multi-decade planning for future waste needs as a priority for state governments.

Encouraging Voluntary Product Stewardship

Product stewardship is aimed at managing waste, and notes that those involved in producing, selling, using and disposing of products have a shared responsibility to ensure that those products or materials are disposed of to ensure the environmental harms are minimized.

The current Government has repeatedly emphasised that in keeping with its broad deregulation agenda that it favours voluntary product-stewardship schemes administered by non-government bodies, which are usually funded by industry through an additional charge on their products. To attract broad industry support transparency and cooperation on setting this charge between businesses is essential to ensure that no company is disadvantaged.

Currently the ACCC is compelled to review such schemes as being potentially anti-competitive. To provide further encouragement for these schemes the Government should consider reforming the ACCC requirements to make voluntary product-stewardship schemes more appealing for industry.

Industry access to major public projects

Ai Group recommends:

- **Government agencies must identify and remove all outdated and onerous requirements imposed by governments on tenderers that are unnecessarily adding to project costs;**
- **government agencies must implement an approach to major projects that shows a commitment to the following five procurement principles:**
    - **value for money;**
    - **transparency of processes;**
    - **full and fair access;**
    - **full and fair opportunities for local suppliers; and**
    - **Supporting Industry through Effective Planning and Communication.**
- **Governments need to lead the way in coordinating infrastructure projects and reducing any uncertainty surrounding major projects.**

One of the key ongoing concerns in the construction industry is the prohibitive tendering costs for major public projects, where businesses may incur high expenses to win work on a project, with potentially no return at all.

In the recently Draft Report of the Productivity Commission's inquiry into the costs of completing major public infrastructure projects, Ai Group provided a submission that highlighted the need for continuing investment in Australia's physical capital, and the importance of completing these projects with maximum productivity and at minimum cost.[27] To this end, Ai Group recommended to the Productivity Commission that governments across the country should change their tendering requirements to be more in line with private sector commercial projects, so as to could also achieve better value for money for tax payers and reduce unnecessary costs borne by construction companies. The Productivity Commission noted **outdated and onerous requirements imposed by governments on tenderers are unnecessarily adding to project costs**. Adopting the PC's recommendations to improve tendering process and better define government projects before tendering would help alleviate unnecessary design costs on unsuccessful tenderers that currently add to the cost of all projects across the country.

Ai Group notes that some of these problems with the regulatory costs of major construction projects have a long history. In 1990 for example, a forerunner to Ai Group, the Metal Trades Industry Association made a submission on this issue to the (then) Industry Commission Inquiry into Construction Costs of Major Projects. Unfortunately, little progress has been made addressing

[27] Productivity Commission, *Draft Report: Public Infrastructure*, Volume 1 and 2, March 2014.

these concerns on how the public sector tenders for major infrastructure projects and whether the public sector adopt less costly approaches taken by organisers of large private sector projects.

The 1990 submission noted the public sector contracts were often awarded on a least cost basis and without regard to ensuring the winning firm had necessary expertise to deliver, meaning that value for outcome was not achieved and/or that other companies could often be contracted to assist the winning company to deliver the project. Governments need to better define the project concept work before putting projects out to tender by engaging and paying a company to perform the design work, rather than requiring tenderers to perform it. This would ensure only those companies that could meet the projects requirements would tender. It is also recommended to partially reimburse external bid costs to encourage contestability and help provide a better overall value for money outcome for taxpayers. While contestability is an important means of ensuring competitively prices bids, mandating a fixed minimum number of tenders is not the optimal way to achieve this. The usual method in the private sector is to invite selective tendering for projects, and this could be adopted in the public sector to ensure better outcomes for all.

Today, construction companies still face far greater costs when they tender for government projects relative to the private sector projects but without better outcomes for either side. The public sector often requires tendering companies to provide more detail and discovery work than necessary, and certainly compared to private sector projects which are better defined. In today's terms, the cost of tendering for major projects can cost in the tens of millions which can amount to a total bill in the hundreds of millions over a year for those large companies tendering for several projects across the country. The requirement by often imposed by government that three companies tender for each project invariably means that two tenderers bear significant expense without a return.

It is vital that Government procurement policy is directed at enhancing private sector access to the Government business market to ensure that there is an adequate level of competition among suppliers when a procurement strategy is executed. Of equal importance is the need to ensure that government agencies implement an approach that shows a commitment to the following five procurement principles:

- **Value for Money:** Value for money looks beyond "least cost" and brings cost-benefit approach that considers quality, after sales servicing and maintenance and ongoing supplier relationships.
- **Clarity, Transparency and Improvement of Processes:** procurement processes should be clear and transparent and be subject to ongoing improvement to reduce costs of tendering and access for domestic suppliers, particularly small and medium sized enterprises.
- **Full and Fair Access:** Procurement processes should ensure local suppliers have full and fair access to supply opportunities under direct government contracts and with prime

contractors for major projects. This includes consistency in relation to conformity with Australian standards and no preferential treatment of offshore suppliers.

- **Full Opportunities for Local Suppliers:** Australian based suppliers should have full opportunity to compete for the provision of goods and services under government contracts both directly and indirectly through supply to prime contractors. For major projects, prime contractors and licence holders should ensure that local suppliers have full and fair access to sub-contracting and supply arrangements.

- **Supporting Industry through Effective Planning and Communication:** Large government purchasing activities and major project plans should be developed in a transparent way to ensure local industry is able to invest sufficiently to participate in major tenders.

Lack of detail on national pipeline

Businesses can be inhibited from participating and incurring the costs of participating in the bidding process when there is a lack of certainty surrounding major projects. A lack of consistency in the pipeline of work can also reduce the willingness of businesses confidence to up-skill their existing workforces and employ more people due to the risks of carrying such costs without a certain and transparent pipeline. Solution: Governments need to shoulder a significantly greater responsibility by leading the way in coordinating infrastructure projects and reducing any uncertainty surrounding major projects.

Supermarket competition

Given the relatively small size of Australia's economy means that some industries will tend towards oligopolistic structures. Although there are relatively new entrants in this industry, the supermarket industry appears to be one of these industries.

While Ai Group does not advocate any moves which would regulate the degree of competition in this industry, there is a role for competition policy to ensure consumer, producer, supplier and retailer opportunities in those markets and their broader value chains.

Ai Group hears often from our members – large and small - about the market power of the major supermarket retailers. It is a complex area with businesses battling over the distribution of profits and risks; the jostle for market leadership with major retailers seeking to undercut other's selling prices and then pushing these lower prices back along the supply chains; increased competition in the face of new market entrants; and advantage from imported supplies where they can help secure cheaper prices and greater market share.

Supermarket suppliers widely report very fierce bargaining over terms and conditions of supply and many feel they have little opportunity to push back on the dominant bargaining power of the larger supermarkets. For example, suppliers feel they have been coerced over time by the major supermarkets into supplying their branded product for supermarket private label product or not at all. This has the effect of negatively impacting suppliers' capacity to innovate in the market, erosion of brand value and intellectual property.

As has been widely reported, the ACCC has recently instituted legal proceedings against Coles alleging that Coles engaged in unconscionable conduct in relation to its Active Retail Collaboration (ARC) program, in breach of the Australian Consumer Law (ACL). In particular, the ACCC alleges that in 2011, Coles developed a strategy to improve its earnings by obtaining better trading terms from suppliers which could result in these businesses being less able to plan and less able to innovate in the market resulting in reduced economic efficiency and consumer detriment.

This current process will investigate the ACCC allegations in court stemming from Coles' alleged undertakings and the findings will be appropriately delivered. If it is found that regulatory mechanisms are insufficient to provide the required supplier protection then amendments should follow to ensure such alleged treatment of suppliers cannot occur in the future. That is why it is important that the ACCC allegations are aired in court and that Coles has a chance to respond.

The key is to ensuring fair competition in the grocery retail environment, throughout the supply chain, where all players have the opportunity to make a profit, and that there's not a misuse of market power by one player against another.

The Ai Group recognises the importance of fair arrangements that prevent activities or outcomes that negatively impact on suppliers' commercial viability.