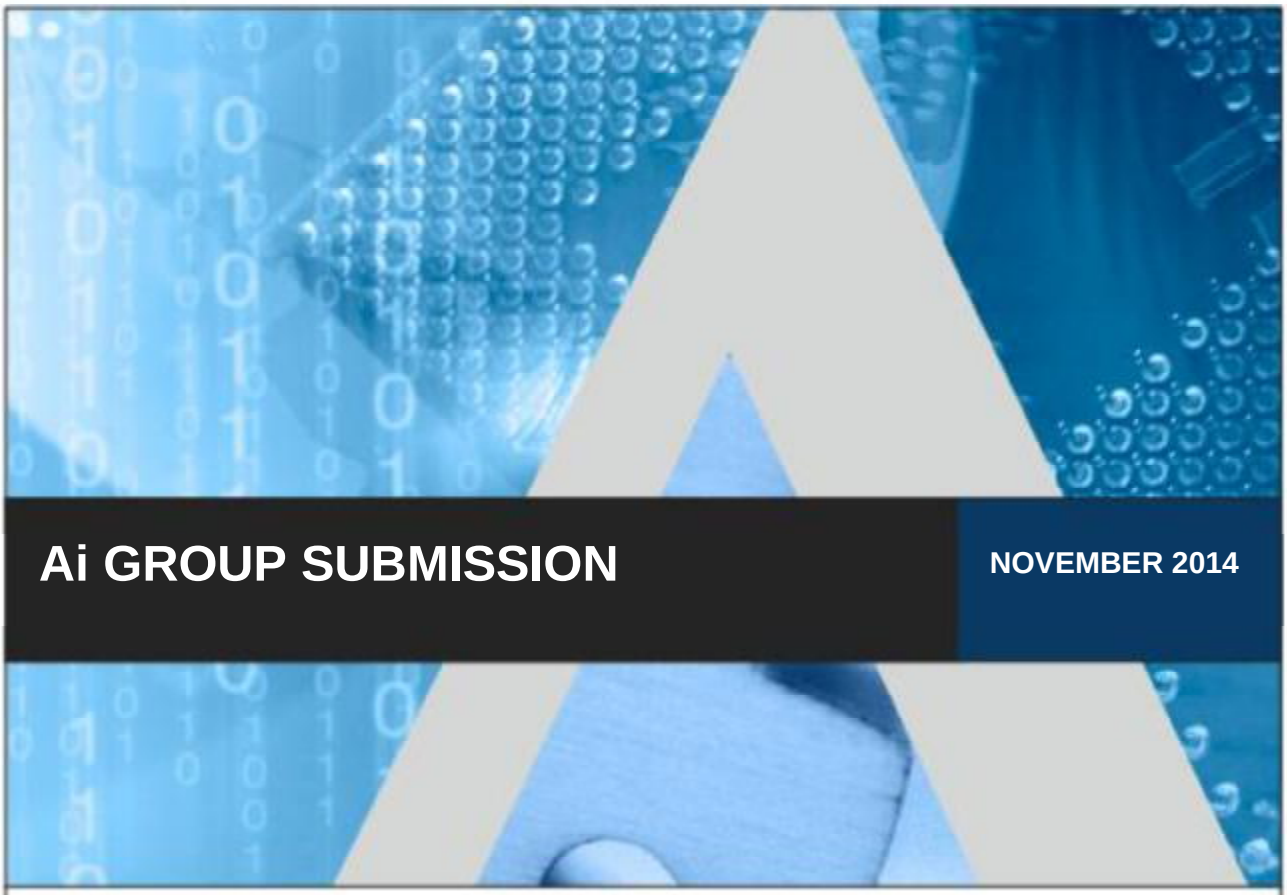

# Ai GROUP SUBMISSION

NOVEMBER 2014

## Ai Group Second Submission to the Competition Policy Review

## 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 opportunity to comment on the Draft Report from the Competition Review Panel led by Professor Ian Harper. The Australian economy 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 approach taken by the Harper Panel, which is evident throughout the Draft Report.

In Ai Group's view, a major factor behind the need for a full scale review of competition policy is the rapid deterioration in Australia's international competitiveness over the past decade, as Australia has become a high-cost country and as the burden of regulation on businesses has risen, with no commensurate improvement in our national productivity. This has happened to a relatively greater degree in Australia than in other countries. Meeting the challenges presented by these developments requires confronting these twin barriers of high costs and low productivity.

Ai Group believes that the Panel's Draft Report and its 50+ recommendations have a sensible focus on reforms that would improve economic efficiency, growth and innovation, while ensuring competition laws and regulations are clear, predictable, and reliable for industry. As set out in our first submission to this Review, Ai Group agrees with the broad objectives of the Review, including the promotion of transparent, consistent, balanced and effective competition law for Australian businesses, the public sector and, ultimately, for consumers.

In this second submission to this Review, we provide Ai Group's detailed responses to the draft recommendations contained in the Harper Panel's Draft Report. For ease of reference, our responses are listed in order and within the chapter headings contained within the Draft Report.

In summary, we reiterate our arguments that the boundaries between competition law and industrial relations law should be redrawn. The existing arrangements are imposing unacceptable barriers to competition and competitiveness. The *Competition and Consumer Act* (CCA) and the *Corporations Act 2001* should govern relations between businesses and in particular should ensure that unions cannot block or impede businesses supplying and acquiring goods or services. The *Fair Work Act* should govern relations between employers and employees and should not govern relations between businesses.

In some instances, these two Acts appear to be working at cross-purposes and with the fundamental regulatory objectives of encouraging competition and improving productivity across the economy. In particular, industry-wide pattern agreements need to be outlawed under both the *Competition and Consumer Act* and the *Fair Work Act.* These agreements are nothing more than massive price-fixing schemes that fix the price of labour across entire industries. Secondly, clauses in enterprise agreements which prevent or hinder the acquisition or supply of goods or services between two businesses should be prohibited under both the *Competition and Consumer Act* and the *Fair Work Act.* These include clauses which impose restrictions on businesses' ability to engage independent contractors (including contracting firms) and use labour hire services.

Ai Group welcomes the recommendation that the existing secondary boycott laws be retained and potentially strengthened, and that State Courts be empowered to hear secondary boycott claims. We also believe that consistent with the recommendations of the Cole Royal Commission into the Building and Construction Industry in 2003, the Australian Building and Construction Commission (ABCC) should be given shared jurisdiction with the Australian Competition and Consumer Commission (ACCC) to investigate and prosecute secondary boycotts in the building and construction industry.

Ai Group appreciates that the Panel has recognised requests that the misuse of market power provision contained in s46 of the CCA be strengthened. We also acknowledge the complexities around introducing an effects test. However, we do not share the Panel's view that it has found a workable way to address concerns with over-capture.

Ai Group also strongly supports the Panel's recommendations that state and federal governments be required to review regulations in their jurisdictions to ensure that all unnecessary restrictions on competition are removed. The findings of Ai Group's National CEO Survey – *The Burden of Government Regulation* (2014) together with the annual World Economic Forum's 2014 Global Competitiveness Report highlight the urgency of reducing the burden of regulation on business. Both of these recent research reports are summarised in this submission. In short, they show that in 2014, the need to boost Australia's global competitiveness is stronger than ever. Australia's ranking on the Global Competitiveness Index (CGI) has deteriorated since 2009-10, dropping continuously from a peak ranking of 15th place in 2009-10 to 22nd place in 2014-15. We must act now to ensure the economy can reposition itself towards new sources of economic advantage as the recent impetus from the resources sector fades.

Ai Group thanks the Panel for this opportunity to comment on the Draft Report, and welcomes any further discussions on the issues raised here.

# Competition Policy

- **Draft Recommendation 2 — Human services**

*Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.*

*The guiding principles should include:*

- *user choice should be placed at the heart of service delivery;*
- *funding, regulation and service delivery should be separate;*
- *a diversity of providers should be encouraged, while not crowding out community and voluntary services; and*
- *innovation in service provision should be stimulated, while ensuring access to high-quality human services.*

*Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.*

**Ai Group response:**

Ai Group supports the careful extension of competition to the provision of human services by or on behalf of Government. This measure should lead over time to increased quality and efficiency in the delivery of the services the community requires. Many relevant services are currently delivered or mediated by government agencies. Encouraging delivery by a wider set of entities as well as separating the regulatory and delivery functions associated with these services may have important benefits. However, it will be important to ensure that diversity and restructuring do not inadvertently lead to fragmentation and confusion during or after the implementation of greater competition in these welfare and human services.

With regard to extending competition policy to other areas of Government activity, Ai Group notes that Chapter 10 of the Report of the National Commission of Audit made some sensible recommendations on potential reforms for the delivery of government information and services more widely, through:

- greater emphasis on e-government,
- reform of information technology use and procurement, and
- consolidation of responsibility for digital government matters at a senior Ministerial and official level.

Delivering services 'digitally by default' will be crucial to maintaining visibility and connectedness with a wider array of players in the market for each service. If care is not taken, however, opening up these sectors could compromise efforts to make digital delivery coherent, accessible and interoperable across providers. The implementation of the Review's recommendations on human services should be coordinated with the Government's response to the Commission of Audit.

- **Draft Recommendation 3 — Road transport**

*Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety. To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.*

**Ai Group response:**

Ai Group believes the government should more actively consider imposing user charging for infrastructure, so as to create revenue streams to attract private sector finance to build and operate transport infrastructure. In doing so, Government should ensure that the patronage risk is appropriately compensated. As discussed in our submission to the Productivity Commission on Public Infrastructure in 2013, road pricing is a sensible concept to explore for road projects that have been subjected to a thorough and transparent cost-benefit analysis.

Cost-reflective road pricing, if well implemented, could also encourage the more efficient use of both road infrastructure and public transport. The greatest gains are likely to be from dynamic pricing, where the level of charge depends on actual levels of road use and congestion rather than fixed zones or time periods. Also, care would need to be taken to ensure that costs were not increased significantly for road transport companies and the many industries which use road transport. However, despite considerable advances in information technology generally and road management in particular, such pricing systems are complex projects and present significant implementation and public understanding challenges. Trials and other investigatory work are necessary.

Ai Group's first submission to this Review identified the anti-competitive arrangements being imposed by the *Road Safety Remuneration Act 2012* and the Road Safety Remuneration Tribunal (together the Road Safety Remuneration System – RSR System). In our first submission we warned that the RSR System is likely to lead to significantly increased transport costs without delivering any tangible improvement in safety.

The powers of the Road Safety Remuneration Tribunal to make orders to regulate both the road transport industry and the broader supply chain will have major impacts on road transport companies, on businesses which use road transport and on Australian consumers.

The RSR Tribunal is currently considering the imposition of minimum rates for owner drivers and employee drivers across the road transport industry. This will have a major impact on competition, and will have damaging effects on the road transport industry and the numerous industries which use road transport.

Ai Group urges the Panel to recommend that the *Road Safety Remuneration Act 2012* be repealed and the Road Safety Remuneration Tribunal disbanded without delay.

- **Draft Recommendation 5 — Coastal shipping**

*Noting the current Australian Government Review of Coastal Trading, the Panel considers that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.*

**Ai Group response:**

Ai Group welcomes the Panel's views that reforming coastal shipping regulation should be a priority.

Ai Group reiterates the recommendation made in our first submission that coastal shipping arrangements similar to those that were in place between March 2006 and June 2009 be introduced on a permanent basis. These former arrangements were operating very satisfactorily. Ai Group believes there are no demonstrable public interest benefits to retaining the competitive restrictions imposed on coastal shipping from 2009. In practice, this reform would involve:

- 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

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

- **Draft Recommendation 7 — Intellectual property review**

*The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission. The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets. The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.*

**Ai Group response:**

Ai Group supports this recommendation. Intellectual Property (IP) is an increasingly important foundation of modern Australian economic growth. IP expenditure accounted for around 16% of total business investment by the private sector in 2013-14 and grew by 5.7% in real terms in that year (including investment in R&D, exploration, software and artistic IP products). A deeper examination of its evolving role in fostering competition, growth and productivity would therefore be useful.

The IP aspects of recent trade agreements are also of considerable importance to Australian growth and competitiveness and would benefit from the attention of the Productivity Commission.

Preparation and disclosure of specific analysis of relevant provisions in proposed trade agreements is sensible, and reiterates a point made in Ai Group's initial submission to this Review. That is, 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.

- **Draft Recommendation 8 — Intellectual property exception**

*The Panel recommends that subsection 51(3) of the CCA be repealed.*

**Ai Group response:**

We note the existence of other arrangements, such as notification or authorisation to ensure arrangements of public benefit do not breach competition law. However, Ai Group supports the repeal of s51(3) of the CCA. This is appropriate for two reasons:

- the exemption limits the scope for the Australian Competition and Consumer Commission to regulate anti-competitive conduct in areas where copyright or patents may be used to engage in such behaviour; and
- the provision's intended effect – to ensure that that beneficial IP licensing arrangements are not undermined by competition law – can be achieved by existing copyright and competition law without the exemption.

Intellectual property protection is integral to promoting competition and innovation in the marketplace. It is also important that businesses do not use such protection to decrease the scope for fair competition. While the intent of the current provision is clearly to ensure that businesses are able to make commercial returns on investments in innovation and creativity, the potential for it to encourage exploitation of market power, combined with the effectiveness of other existing law in Australia, means repeal offers little risk and perhaps significant benefit.

- **Draft Recommendation 9 — Parallel imports**

*Remaining restrictions on parallel imports should be removed unless it can be shown that*

- *they are in the public interest; and*
- *the objectives of the restrictions can only be achieved by restricting competition.*

**Ai Group response:**

Ai Group does not support the recommendation. Parallel importing occurs when importers will bring in branded goods although they are not the authorised local distributor. The authorised distributor is responsible for marketing and warranty expenses, while the parallel importer does not need to cover these costs and so can undercut on price. On occasion, parallel importers can get caught out as they can end up buying counterfeit product, as in the recent example of retailer Target selling counterfeit MAC cosmetic products in 2012.

Companies also adapt products to suit individual markets and so can be surprised to find variation between the same branded good in one market. Given the damage to the brand value the local distributor has invested in and the fact that the consumer experience is not improved, Ai Group does not support this recommendation.

- **Draft Recommendation 10 — Planning and zoning**

*All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.*

*The principles should include:*

  - *a focus on the long-term interests of consumers generally (beyond purely local concerns);*
  - *ensuring arrangements do not explicitly or implicitly favour incumbent operators;*
  - *internal review processes that can be triggered by new entrants to a local market; and*
  - *reducing the cost, complexity and time taken to challenge existing regulations.*

**Ai Group response:**

Ai Group supports draft recommendation 10. Planning and zoning restrictions can risk stifling competition when they fix existing land uses – and users over extended periods. Incorporating competition considerations is sensible and will potentially reduce the cost, complexity and time taken to challenge existing regulations. It is a worthy reform.

Ai Group members frequently cite site planning issues as a major challenge facing their businesses. We also recognise the difficulties that Governments – particularly at the state and local level – face in delivering fair and equitable land planning outcomes. The operation of the planning system is complicated by the multiple levels of government that are involved or have an interest in the outcomes of planning regimes.

Often well-intentioned efforts to address the concerns of local resident stakeholders have led to planning regimes becoming overly burdened with objectives such as social inclusion, health and liveability, and housing affordability. Too often this has led to planning processes becoming battlegrounds. The instinct to resist unwelcome or unsightly industrial development has created tensions between the priorities and desires of local communities and the needs of society as a whole. In the absence of an effective process for assessing the merits of these issues in a timely and transparent manner, critical pieces of infrastructure can be delayed or stopped altogether. Ai Group notes that these planning issues can affect businesses that are well established and not just those that are seeking to relocate or expand. In some instances for example, the strong pressure on state and local government to release or rezone more land for residential purposes has seen established industrial facilities pitted against new neighbours who have different priorities for their local environment, including for example, with regard to local noise, odour and traffic flows. can be particularly problematic for essential waste services, recycling facilities, transport facilities and industrial processes that benefit a whole community, but that may be resented by new

residential neighbours living in close proximity – this is the essence of the NIMBY phenomenon. This typically happens on the urban fringe when new suburbs are being created alongside existing industrial zones, but it can also affect established businesses in urban industrial areas that become desirable as residential areas, at the encouragement of local government.

- **Draft Recommendation 11 — Regulation review**

*All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.*

*Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that: they are in the public interest; and the objectives of the legislation or government policy can only be achieved by restricting competition.*

*Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators. Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.*

*The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.*

*The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.*

**Ai Group response:**

Ai Group supports this recommendation and stresses the urgent need to reduce regulation, which harms Australian business through its impost on the resources of the business that could be better used to expand businesses and improve processes.

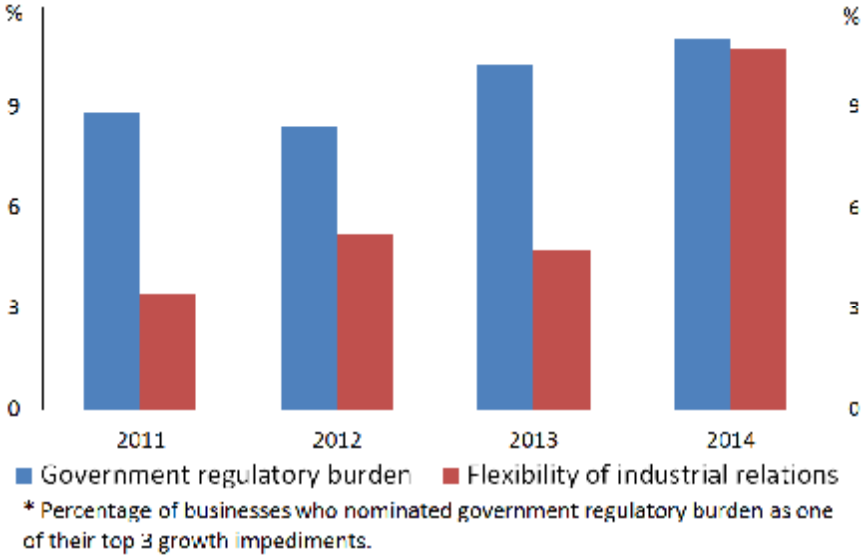
Ai Group's research and consultations with Australian business indicate that the burden of government regulation has been rising for some time. It has become an increasingly prominent issue over the past two to three years, including in our own surveys and reports and in the annual World Economic Forum reports on global competitiveness, for which Ai Group is the official Australian research partner organisation.

Australian governments at all levels – federal, state and local – impose regulations on business activities and processes. The Productivity Commission recently estimated that there are about 130 national government regulatory agencies in Australia, with another 350 operating in state and territory jurisdictions and a further 560 within local councils. Individually, government regulations can have a myriad of worthwhile objectives, such as the promotion of environmental, safety and health benefits. The business community supports and actively promotes many of these

objectives. However, the aggregated burden for the businesses and other organisations that are subject to all of this regulation is significant - and is significantly higher than it needs to be.

Ai Group surveyed CEOs earlier this year about the level of burden they face across a range of key regulatory areas and agencies in our report titled *National CEO Survey – Burden of Government Regulation 2014.* The levels of estimated burden due to government regulation this year are far higher than we have seen in our comparable surveys in previous years (see Chart 1). The results point to a clear need to lift efforts to reduce the regulatory burden for Australian businesses.

**Chart 1: the rising regulatory burden on Australian business**

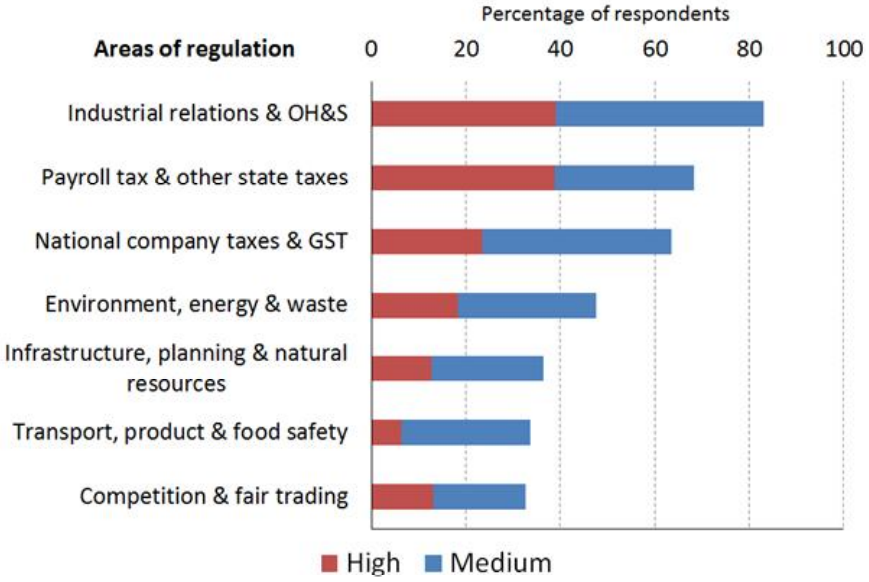



This year's survey indicated that Australian CEOs generally expected various government regulations to place a medium to high cost on their businesses in 2014 (see Chart 2). In particular:

- The areas of industrial relations, employment, Workcover and OH&S were expected to place the largest burden on businesses in 2014, with 83% of CEOs stating the associated regulatory cost burden in these areas is medium or high.
- Compliance with payroll and other state taxes (68%) as well as national company taxes and GST compliance (64%) was also assessed as placing a medium or high cost on business.
- Regulations on environment, waste and energy place a medium to high burden on almost half of all businesses (48%).
- Around one-third of respondents experience a medium to high burden from complying with laws on infrastructure, planning and natural resources (36%), transport, product and food safety (34%).
- A third of businesses said the burden from competition and fair trading regulation is medium to high (33%). This is a lower proportion of businesses reporting a burden than for other areas of regulation, but at a third of businesses, it represents a very significant minority.

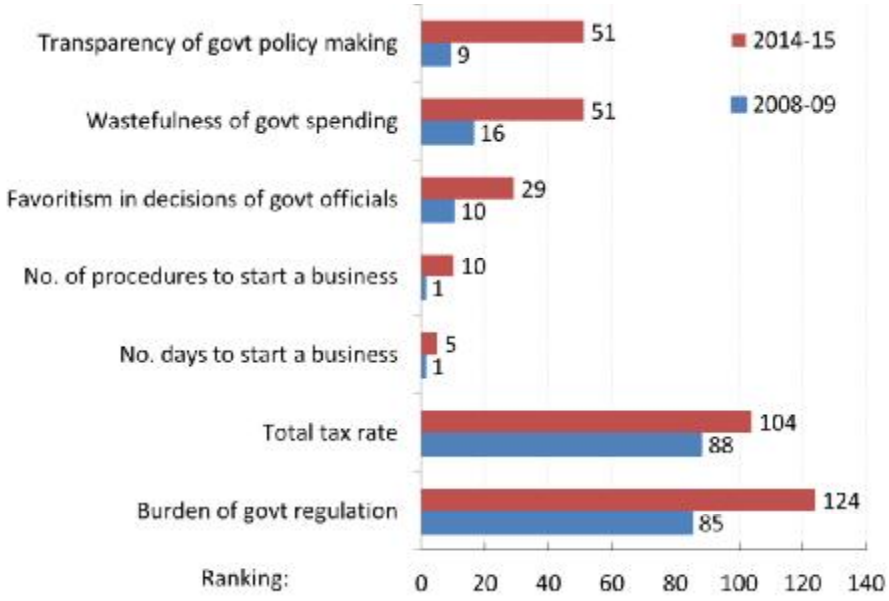
Furthermore, 'government regulatory burden' was one of the top three growth impediments that was expected in 2014 for 11% of businesses, while another 11% nominated 'flexibility of industrial relations' as a key growth inhibitor for this year (see Chart 1).

**Chart 2: the regulatory burden on Australian business in 2014**




These results were also evident in the Ai Group survey of Global Competitiveness conducted with the World Economic Forum which shows Australia was ranked 124th among international counterparts on the "burden of government regulation" in 2014-15, compared to 85$^{th}$ in 2008-09. Australia's ranking on specific regulatory measures also deteriorated, including the number of days and procedures required to start a business and the transparency of government decision-making (see Chart 2). This poor performance with regard to Government Regulation has contributed to Australia's ranking on the Global Competitiveness Index (CGI) deteriorating since 2009-10. It has dropped continuously from a peak ranking of 15th place in 2009-10 to 22nd place in 2014-15.

**Chart 3: Australia's international ranking on measures relating to Government regulation**




Source: WEF, Global Competitiveness Report 2014-15 and 2008-09.

Recent research by Deloitte Access Economics reached similar conclusions about Australia's high level of regulatory burden on business. Deloitte found that regulatory compliance from all sources cost business more than $250 billion annually, including $94 billion from direct public sector regulatory administration plus another $155 billion spent on corporate 'self-regulation' imposed in response to the regulatory environment (e.g. corporate rules and procedures that are imposed in order to ensure a business meets all of its accounting, due diligence or regulatory obligations). Indeed, Deloitte calculated that over 1 million people – or 11% of the workforce – are employed on regulatory tasks such as office managers, site inspectors, security personnel or occupational health assessors. Deloitte author, Mr Chris Richardson estimated that "Trimming the cost of rules by a modest 10% would help boost national income by 1.6% of gross domestic product, ranking it with some of the biggest reforms Australia had ever seen, such as the Hilmer competition changes" (Richardson cited in AFR, 29 Oct 2014).

Consequently, we support this recommendation very strongly and believe it should be accorded the highest priority. We applaud the Federal Government's commitment to reduce red tape and to repeal burdensome and unnecessary legislation, with a stated target of removing $1 billion worth of regulatory burden on business. This is an important step in the right direction. But the high and rising regulatory burden faced by Australian businesses requires a policy response from all levels of government that is immediate, effective and ambitious, and that is done in a coordinated and cooperative manner between the various levels and agencies of Government.

- **Draft Recommendation 12 — Standards review**

*Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, the Australian Government's Memorandum of Understanding with Standards Australia should require that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.*

**Ai Group response:**

Ai Group supports this draft recommendation as a matter of principle, noting there are substantial benefits associated with voluntary standards.

Australian businesses (including manufacturers, importers and distributors) frequently face competitive disadvantages arising from deficient or non-existent enforcement of Australian standards as well as misrepresentations made around conformity with standards. These misrepresentations can mislead Australian consumers to the detriment of the public interest.

- **Draft Recommendation 13 — Competitive neutrality policy**

*All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities. The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).*

**Ai Group response:**

Government enterprises play a significantly smaller role in the Australian economy than they have in the past. A new wave of privatisation may be taking shape that will further shrink this role, at least in some states. The major new publicly owned enterprise in recent years, NBNCo, is already the subject of separate consideration of relevant issues via the several NBN reviews and audits commissioned by the Government, and the subsequent ongoing responses. Other initiatives, like the Clean Energy Finance Corporation, have a mandate to pursue wider benefits that may require concessional elements to their activities. So far, these new entities seem to be careful to work with and supplement commercial providers rather than undermine the existing market. Nonetheless, advocating and encouraging strong principles for competitive neutrality remains important, and we support the recommendation for all levels of government to review their relevant rules and practices.

It is also important to ensure that the application of such principles does not itself create unintended distortions. This is a matter that could usefully be considered in the recommended policy reviews.

In the case of electricity distribution businesses owned by the States for example, there have been serious concerns about the impact of state ownership on investment incentives. Electricity distributors are regulated monopolies, and the Australian Energy Regulator (AER) has been obliged to treat State-owned entities as if they face a commercial cost of capital when considering their investment needs and required rate of return. State Treasuries borrow at much lower rates, and extract competitive neutrality charges when passing this finance through to their distributors. The basis for such payments is not obvious, since these monopoly entities do not compete with private providers. In the meantime, the side-effect is that the effective rate of return to the State is much higher than it would otherwise be, as a result of these competition payments than the AER has had to assume. Many energy users have argued that this has been one of the largest factors in encouraging over-investment in public-sector-owned network infrastructure over recent years. Current proposals to partially privatise these assets should help address this problem, by removing the need to artificially assume a 'rate of return'.

Such unintended and distortionary regulatory effects (in energy markets or beyond) require governments to consider the wider effects of their competitive neutrality policies, to ensure they are in the public interest.

- **Draft Recommendation 16 — Electricity, gas and water**

*State and territory governments should finalise the energy reform agenda, including through:*

  - *application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;*
  - *deregulation of both electricity and gas retail prices; and*
  - *the transfer of responsibility for reliability standards to a national framework.*

*The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration. All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:*

  - *economic regulation of the sector; and*
  - *harmonisation of state and territory regulations where appropriate.*

*Where water regulation is made national, the body responsible for its implementation should the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).*

**Ai Group response:**

While energy policy is the focus of the separate Energy Policy White Paper, there is a legitimate role for this Competition Review to consider Australia's energy markets and systems in the light of competition policy. There is considerable speculation that the trends in price and performance of distributed generation and energy storage may introduce meaningful competition into what had been a natural monopoly – the electricity network. This has led to worries of a network 'death spiral' as network desertion concentrates fixed costs on a smaller base of customers, leading to

accelerating further desertion. The emergence of such a situation is far from guaranteed. If it does eventuate, it is unclear whether it would be good or bad for Australia as a whole.

This potential change in the technological structure of energy markets has much in common with the 'disruptive competition' the Review has considered favourably in other contexts. These matters would benefit from consideration in the competition policy context, rather than a separate energy policy review process that is likely to operate largely within the framework of established sector practices.

# Competition Laws

- **Draft Recommendation 17 — Competition law concepts**

*The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.*

**Ai Group response:**

Ai Group members have commented that confusion exists between the role of state-based and federal regulators, particularly in the area of consumer law. For example, many businesses find it difficult to understand the roles, purposes and relationships of State-based organisations like the NSW Department of Fair Trading and Consumer Affairs Victoria, compared to the federal ACCC. Such duplication and confusion exists in many areas of business regulation in Australia.

Ai Group encourages the Panel to consider all avenues possible for simplifying competition law in to a single national framework, with a single national agency to provide oversight, advice and enforcement.

- **Draft Recommendation 18 — Competition law simplification**

*The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions. The Panel recommends that there be public consultation on achieving simplification.*

*Some of the provisions that should be removed include:*

*• subsection 45(1) concerning contracts made before 1977;*

*• sections 45B and 45C concerning covenants; and*

*• sections 46A and 46B concerning misuse of market power in a trans-Tasman market.*

*This task should be undertaken in conjunction with implementation of the other recommendations of this Review.*

**Ai Group response:**

As noted in response to Draft Recommendation 11 above, the regulatory burden on Australian business is high and rising. It now constitutes a major impediment to Australian economic growth and international competitiveness, second only to labour market inflexibilities. Competition law and related regulation add to this burden, with a third of Australian CEOs citing it as a medium to high burden on their business in 2014. Reducing this load has become urgent.

Ai Group encourages the Panel to consider all avenues possible for simplifying and reducing competition law, so as to reduce this significant regulatory burden from all levels of Government.

- **Draft Recommendation 19 — Application of the law to government activities**

*The CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.*

**Ai Group response:**

As this Review's Draft Report has found, there are many circumstances where the Crown (whether as a department or an authority) undertakes commercial transactions but does not carry on a business. Through commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth, state, territory or local governments) has the potential to impede competition. Draft recommendation 19 considers taking the Hilmer reforms a step further, by subjecting the Crown's commercial or trade activities to competition law.

Ai Group supports this recommendation. We believe it would assist in enabling full and fair access to commercial procurement opportunities by the Government. We support the Federal Government's new 2014 Commonwealth Procurement Rules (CPRs). In particular we welcome the requirement that the procurement framework is non-discriminatory:

> "All *potential supplier*s to government must, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their *goods* and services."

We also welcome the focus on ensuring that *Small and Medium Enterprises* (*SMEs*) can engage in fair competition for Australian Government business by ensuring procurement processes are not unnecessarily onerous or restrictive. In particular that:

> *"*Officials should consider, in the context of value for money:
>
> a. the benefits of doing business with competitive *SMEs* when specifying requirements and evaluating value for money;
>
> b. barriers to entry, such as costly preparation of submissions, that may prevent *SMEs* from competing;
>
> c. *SMEs*' capabilities and their commitment to local or regional markets; and
>
> d. the potential benefits of having a larger, more competitive supplier base."

- **Draft Recommendation 20 — Definition of market**

*The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons located outside of Australia to persons located within Australia.*

- **Draft Recommendation 21 — Extra-territorial reach of the law**

*Section 5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. The in-principle view of the Panel is that the removal of the foregoing requirements should also be removed in respect of actions under the Australian Consumer Law.*

**Ai Group response to Draft Recommendations 20 and 21**

Ai Group supports both of these Draft Recommendations. The proposed amendments would have the benefit of:

- simplifying actions under the CCA, such that it will be no longer necessary to prove that a competitor business has a physical presence located within Australia, as a first step to considering legal action, and
- considerably broaden the scope of businesses that are subject to the CCA and hence help to 'level the playing field' between all businesses that sell goods and services to Australians, regardless of their physical locality.

- **Draft Recommendation 25 — Misuse of market power**

*The Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.*

*To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:*

*• would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and*

*• the effect or likely effect of the conduct is to benefit the long-term interests of consumers.*

*The onus of proving that the defence applies should fall on the corporation engaging in the conduct. The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.*

*Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined.*

**Ai Group response:**

Ai Group appreciates that the Panel has recognised the requests that misuse of market power provisions be strengthened while we also acknowledge the complexities around introducing an effects test. However, we do not share the Panel's view that it has found a workable way to address concerns with over-capture.

In particular we are concerned that:

- The focus on effects will create new areas of uncertainty and expose businesses to a wide range of potential liabilities unrelated to any intentions associated with their business strategies;
- There are inherent difficulties and uncertainties in using abstract, and contestable, economic and organisational theories to establish counterfactual benchmarks against which business decisions and strategies of potentially liable businesses would be assessed;
- Most theories of industry and organisational behaviour struggle to deal with the "creative destruction" of competition (at least in the short and medium terms) that is often associated with substantial outward shifts in the production possibility frontier; and,
- The burden of proof would be on the businesses accused of having the effect or potential effect of substantially lessening competition in a market.

- **Draft Recommendation 31 — Secondary boycotts enforcement**

*The ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved each year. Currently, the Federal Court has exclusive jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA (subsection 4(4) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)). A contravention of these sections may arise in connection with other common law disputes between employers and employee organisations. Such common law disputes can be, and often are, determined within State courts. It is not apparent that there is a particular reason for the Federal Court to have exclusive jurisdiction over disputes arising under these sections, particularly when state and territory courts have jurisdiction in respect of common law actions that often raise similar issues.*

- **Draft Recommendation 32 — Secondary boycotts proceedings**

*Jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA should be extended to the state and territory Supreme Courts.*

Ai Group agrees with the finding of the Panel that "*secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced*". The Royal Commission into Trade Union Governance and Corruption has heard evidence of secondary boycotts by construction unions. It appears that under the current laws and enforcement regimes, construction unions are not being sufficiently deterred by the secondary boycott provisions within the CCA and more needs to be

done.

The Cole Royal Commission recommended that the ABCC be given a shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts in the construction industry. We support this recommendation.

We also support the Panel's recommendation that the ACCC develop protocols to enforce and investigate complaints of secondary boycotts, if the ABCC is given a shared jurisdiction for secondary boycotts.

We support the ACCC publishing, in its annual report, the number of secondary boycott complaints that it receives throughout the year and the number of related matters that it investigates and resolves.

The Panel recommends that jurisdiction be extended to State and Territory Courts, in addition to the Federal Court, in respect of disputes arising under sections 45D, 45DA, 45DB, 45E and 45EA. Ai Group supports this Draft Recommendation. This amendment would provide more flexibility and enforcement options to regulators and aggrieved parties. It would also reduce legal costs and delays when different legal actions are pursued concurrently for the same unlawful conduct, e.g. secondary boycott action and tort action.

- **Draft Recommendation 33 — Restricting supply or acquisition**

*The present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation' to deal with, should be removed.*

*The Panel invites further submissions on possible solutions to the apparent conflict between the CCA and the Fair Work Act [FWA] including:*

- *a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and to intervene and make submissions;*
- *amending sections 45E and 45EA so that they expressly include awards and enterprise*
- *agreements; and amending sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act.*

**Ai Group response:**

Ai Group agrees with the Panel's finding that competition principles should take precedence over workplace relations restrictions and that "*businesses should be free to supply and acquire goods and services, including contract labour, if they choose*".

Accordingly, the conflict between sections 45E and 45EA of the CCA and the *Fair Work Act* should be resolved in a manner which favours promotion of competition over restrictions.

The Panel has invited further submissions on possible solutions to this conflict.

Ai Group believes that the most sensible approach would be to:

- Amend sections 45E and 45EA so that these sections expressly include the terms of an enterprise agreement;
- Amend section 51(2)(a) of the CCA 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;
- Ament section 194 of the *Fair Work Act* to ensure that clauses in enterprise agreements which prevent or hinder a business in acquiring goods or services from, or supplying goods or services to, another business are "unlawful terms"; and
- Amend section 253 of the *Fair Work Act* to exclude "unlawful terms" from the operation of this section and hence prevent courts deciding that they have no jurisdiction to deal with "unlawful terms" because the Act includes an automatic remedy.[1]

These changes would overcome the limitations identified by the Full Court of the Federal Court in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108*.* In this case the Court found that sections 45E and 45EA of the CCA did not apply to the terms of an enterprise agreement which imposed major restrictions on the engagement by the employer of contractors and labour hire because, amongst other things, an enterprise agreement has statutory force and therefore is not a contract, arrangement or understanding within the meaning of section 45E and 45EA.

Ai Group also supports the Panel's recommendation that a procedural right be given to the ACCC to be notified by the Fair Work Commission (FWC) of proceedings for the approval of enterprise agreements which contain restrictions of the kind referred to in sections 45E and 45EA, and that a right be given to the ACCC to intervene and make submissions. The ACCC's views on the correct interpretation of the CCA carry great weight and the ACCC's intervention in relevant proceedings for the approval of enterprise agreements would assist the Fair Work Commission (FWC) to identify those agreements that contain terms that could result in a breach of the CCA.

ACCC intervention would also have the wider, preventative benefit of sending a clear message to industrial parties that they need to ensure that the enterprise agreements which they negotiate do not contain terms which would lead to breaches of the CCA. To date, section 192 of the *Fair Work Act* has been rarely used, but this most likely would change if the Panel's recommendation was implemented. Ai Group notes that Section 192 was inserted in the *Fair Work Bill 2008* in response to strong objections by Ai Group and other industry representatives about the abolition of the previous prohibition on enterprise agreement terms that restricted the engagement of contractors and labour hire and was no doubted drafted with the CCA in mind.

In order to ensure that these recommendations can be implemented effectively, the ACCC needs to be appropriately resourced to enable intervention in FWC proceedings in appropriate cases.

While Ai Group supports the first two dot points of Draft Recommendation 33 on page 247 of the Draft Report, we strongly oppose the alternative proposal in the third dot point. That being:

[1] See *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108.

> *"amendments to sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act."*

Such amendments are not appropriate. The proposal would constitute a move in the opposite direction to what is needed and would prevent businesses from having the freedom to supply and acquire goods and services in a productive manner.

# Institutions and Governance

- **Draft Recommendation 39 — Establishment of the Australian Council for Competition Policy**

*The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda. The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories. Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy. The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.*

Ai Group understands and supports the separation of Government policy formulation from Government policy implementation, as a general principle of good policy governance. We do, however, hold some reservations about this Review's Draft Recommendation to establish a new and separate Government agency with oversight of competition policy, as follows:

- There is already a high degree of confusion among Australian Businesses regarding the role and relationship between the various federal and state government agencies with competition law and policy responsibilities. A new policy agency may simply add a layer to this complexity, rather than cutting through it as intended.
- Several existing government agencies appear to have relevant experience and expertise in developing and advocating competition policy options, including the Australian Treasury, the Productivity Commission and the ACCC. It might be preferable to allocate responsibility for national competition policy to one of these existing agencies, in the interests of minimizing government bureaucracy and reducing potential duplication of function.
- Utilising an existing agency for national competition policy could bring the added advantage of building from the reputation and networks that these existing agencies have already developed, instead of starting from scratch. This would include for example, considerable practical experience at Treasury and the Productivity Commission of working within a COAG-style framework of Federal-State policy considerations and responsibilities.
- If a new competition policy agency is to be formed, then its governance arrangements should be as clear and simple as possible. While Ai Group agrees that it is important to obtain the support and contributions of state as well as federal governments in this endeavour, we note that it is equally important to ensure that any new agency can quickly establish an effective level of support and participation from businesses and the wider community. Complex governance structures run the risk of ensuring government engagement, at the expense of business engagement. That is, a COAG-based structure might help to attract and engage state government stakeholders in long-term national

competition policy, but its complexity might also risk the engagement and support of business and community stakeholders.

- **Draft Recommendation 40 — Role of the Australian Council for Competition Policy**

*The Australian Council for Competition Policy should have a broad role encompassing:*

- *advocate and educator in competition policy;*
- *independently monitoring progress in implementing agreed reforms and publicly reporting progress annually;*
- *identifying potential areas of competition reform across all levels of government;*
- *making recommendations to governments on specific market design and regulatory issues, including proposed privatisations;*
- *and undertaking research into competition policy developments in Australia and overseas.*

As noted above in response to Draft Recommendation 39, Ai Group understands and supports the separation of policy formulation from policy implementation, as a general principle of good policy governance. We do, however, hold some reservations about this Review's Draft Recommendation to establish a new and separate Government policy agency.

Ai Group notes that all of these recommended roles for the new competition policy agency are already undertaken by at least one federal and/or state government agency, including the ACCC, the Australian Treasury, the Productivity Commission, the VCEC, the QCA and other state agencies.

- **Draft Recommendation 41 — Market studies power**

*The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the CCA.*

*The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.*

As noted above in response to Draft Recommendation 39, Ai Group understands and supports the separation of Government policy formulation from Government policy implementation, as a general principle of good policy governance.

Ai Group notes that currently, both the ACCC and the Productivity Commission can and do: undertake studies of markets and market power in Australia; assess market competitiveness; and make recommendations for reform. Some but not all of the state-based competition agencies also undertake market studies and make policy recommendations based upon their findings (e.g. the VCEC). It is not clear to us that a new and separate competition policy agency with similar

investigative research powers would achieve a greater degree of successful policy referrals, amendments or implementations, than do the current government policy research agencies.

With regard to mandatory information-gathering powers, Ai Group strongly believes that legal coercion should not be necessary in undertaking genuinely independent and unbiased market studies. If these market studies are to be effective, then the agency undertaking them should conduct them with the cooperation and support of the industry or community that is being studied. Indeed, without such cooperation, the value of such studies is likely to be limited. The Productivity Commission's experience with its mandatory information powers (and its reluctance to use them over the past decade or more) has shown this to be the case.

We note also that such market or industry studies require a practical as well as a theoretical knowledge of the industry, market or community under investigation, if they are to produce sensible and workable recommendations. This is best gained in a cooperative manner.

If the ACCC, the Productivity Commission or a new policy agency is expected to undertake an increased number of market studies, then it should be adequately resourced to do so.

- **Draft Recommendation 42 — Market studies requests**

*All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue. All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy. The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.*

**Ai Group response:**

As noted above at Draft Recommendation 41, market or industry studies require a practical as well as a theoretical knowledge of the industry, market or community under investigation, if they are to produce sensible and workable recommendations. This is best gained in a cooperative manner. Industry and community co-operation would be much enhanced by enabling businesses to put forward their own suggestions and requests for market studies. This extra avenue for gaining the attention of regulators and policy-makers would be greatly appreciated by smaller businesses, who do not always have the means to take formal, legal action under the CCA or other legislation, and who often feel that their voice and their interests are overlooked in more formalized processes.

- **Draft Recommendation 43 — Annual competition analysis**

*The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.*

**Ai Group response:**

Draft Recommendation 43 proposes a similar 'annual review' role for a new policy agency, as was formerly held by the National Competition Council. If a new agency is established, then it should undertake this annual review process.

Before recommending that a new policy agency be established, this Review should investigate the ability of existing Government agencies to undertake this task, in the interests of minimizing Government bureaucracy and agency costs. The Australian Treasury and/or the Productivity Commission and other Federal agencies should be investigated for their ability to do this analysis.

- **Draft Recommendation 44 — Competition payments**

*The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction. If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform. Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.*

**Ai Group response:**

Ai Group agrees with this Draft Recommendation.

- **Draft Recommendation 45 — ACCC functions**

*Competition and consumer functions should be retained within the single agency of the ACCC.*

**Ai Group response:**

Ai Group agrees with this Draft Recommendation.

- **Draft Recommendation 46 — Access and pricing regulator functions**

*The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:*

  - *the powers given to the NCC and the ACCC under the National Access Regime;*
  - *the powers given to the NCC under the National Gas Law; the functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law;*
  - *the telecommunications access and pricing functions of the ACCC; price regulation and related advisory roles under the Water Act 2007 (Cth).*

*Consumer protection and competition functions should remain with the ACCC. The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.*

**Ai Group response:**

Ai Group is not convinced that these essential functions would be managed better by a new and separate agency, than by the existing arrangements. The case for expanding the number of Government agencies with responsibility for competition policy and enforcement is not strong. Indeed, businesses frequently cite the large number of federal and state-based regulatory agencies as a contributing to their regulatory burden and general confusion in this area.

Access and pricing regulation is challenging and involves large volumes of work requiring strong expertise and resources. Should these functions be removed from their current agencies and handed to a new body, it will be essential that the new body is adequately resourced and carries over existing staff as much as possible, to ensure continuity and corporate knowledge retention. This will be particularly important for the proper conduct of complex multi-year processes such as the quintennial regulatory determinations of the electricity distribution businesses.

- **Draft Recommendation 49 — Small business access to remedies**

*The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement. The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA. Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behavior.*

**Ai Group response:**

Ai Group supports this Draft Recommendation. The ACCC should take a more proactive role in connecting small business to alternative dispute resolution schemes, where it considers complaints have merit but are not a priority for public enforcement given its limited resources. This could include, but not be limited to, existing dispute resolution processes established under individual state jurisdictions. The ACCC should be provided with adequate resources to facilitate this practical referral service.