Submission by the

Housing Industry Association

Limited ACN 004 631 752

on the Competition Policy Provisions of the *Trade Practices Act* 1975

24 June 2002

Table of Contents

Summary **2**

Recommendation: 2

Introduction **3**

About HIA 3
Housing Industry Size and Structure 3
Employment *3*
Sales Revenue *3*
Firms 3
Performance *3*
Workers, Employees, And The Subcontract System. *4*
Relationship with commercial construction sector 4

Competition and the Building Industry. **5**

Free market place competition in housing. 5
Partial competition in commercial construction. 5
Pattern Bargaining. 5
Industry Agreements Not Subject to the TPA. 7
Role of the ACCC. 9
Scrutiny of Certified Agreements. *9*
Enforcement of Existing Sections 45D-45EB of the TPA. *9*
Recommendation. 9

SUMMARY

Competition operates very effectively in the housing industry in Australia, but less so in the union-dominated commercial building industry. Trade contractors provide the great bulk of the workforce, but are prevented from fully and fairly competing on price through uniform 'pattern' enterprise agreements between the building industry union and major head contractors.

Part IV of the ***Trade Practices Act 1974*** (TPA) does not apply to industrial enterprise bargaining agreements, and the ACCC is powerless to intervene if these involve restraint of trade or significant lessening of competition. In effect, the TPA and current industrial laws allow collective agreements in restraint of trade to be immunised against the operation of the Act if one of the parties thereto is a trade union. This is clearly anti-competitive and against the public interest.

As a result, the commercial building industry operates on two levels – those sub-contractors who have or are willing to sign enterprise agreements with unions, and can work on major projects, and those who are not, who are excluded and disadvantaged. It is timely to reconsider existing laws which legally allow agreements restricting competition in cases where a union is party to such agreements. Such laws add to the cost of building and are detrimental to the Australian economy as a whole.

While these considerations apply across all industries, they have special significance for the building and construction industry as (by and large) buildings cannot be imported. In the absence of import competition for buildings, there is no market mechanism limiting cost increases in this industry.

HIA considers that the Trade Practices Act should be amended to give the ACCC a role in scrutinising 'pattern' enterprise agreements for anti-competitive aspects, and that without ACCC approval such enterprise agreements cannot be certified and should have no legal effect. HIA has made recommendations to the Royal Commission into the Building and Construction Industry in the same terms as in this Submission.

RECOMMENDATION:

HIA **RECOMMENDS** to the Committee of Review that it advise the Government that –

- The ***Trade Practices Act* 1974** (TPA) be amended to allow the Australian Competition & Consumer Commission, on the application of the proposed parties to an Enterprise Bargaining Agreement in an industry which the Employment Advocate has declared is engaging in pattern bargaining, to scrutinise that agreement; and that the Australian Industrial Relations Commission (and likewise State IR Commissions) be prevented from certifying a Certified Agreement (or State EBA) in that industry, unless the ACCC, has after due investigation issued a 'ruling' that a particular EBA is not anti-competitive or otherwise against the public interest; and
- The ***Workplace Relations Act 1996*** (WRA) be consequentially amended so that if the Employment Advocate is of the opinion that pattern bargaining is occurring in an industry, he or she should be empowered to make a 'declaration' (ie. an administrative determination) to that effect. Prior to making such a declaration the Employment Advocate would require industry parties to "show cause" as to why such a declaration shouldn't be made. This enables a Government agency to "stay" the removal of competition from an industry pending a determination by the ACCC.

INTRODUCTION

ABOUT HIA

The Housing Industry Association Limited (HIA) is an association of approximately 30,000 businesses. It is the peak national industry association for businesses operating in the residential, building, renovation and development industry in Australia.

HIA maintains offices in every State and Territory and actively promotes the interests of its members in a variety of ways, including representation, advice and assistance, adoption and maintenance of member Codes of Conduct, development and marketing of standard form contracts, and provision of associated services such as Home Owners Warranty Insurance.

HOUSING INDUSTRY SIZE AND STRUCTURE

Employment

- 300,000 – 3.5% of total national workforce. There are 483,000 taxpayers in the industry who hold an ABN (and are presumably contractors), of whom 350,000 are registered for GST.

Sales Revenue

- $33 billion which is 4.4 per cent of GDP.

FIRMS

There were more than 150,000 firms in the construction industry in 2001/02.

- Nearly two-thirds of them were suppliers of specialist trade services – plumbers, electricians, carpenters, bricklayers, concreters, tilers, plasterers.

- Of the remainder, more than 40,000 were residential builders.

- There are more small firms in construction than any other industry.

- More than 98 per cent of firms in the construction industry are small, and small construction firms account for 19 per cent of all small businesses.

- The largest 100 housing firms in Australia command some 40 per cent of the market; by contrast, the 100 largest commercial construction firms command over 90 per cent of the market.

Performance

The Australian building industry is one of the most efficient and cost effective in the country (McKinsey Study finding). It has -

- Low operating costs;

- Low profit margins; and

- High consumer satisfaction.

Workers, Employees, And The Subcontract System.

Independent contractors in the housing and building industry, by and large, are persons genuinely in business for themselves. Head contractors and trade contractors prefer the subcontract system for the following reasons:

- Higher levels of productivity;
- Guaranteed higher quality of work;
- Payment by results which leads to predicability of costs;
- Capacity to organise work to suit themselves.

The efforts of these contractors have served to make Australia's housing industry among the most successful, cost effective and innovative in the world, a status which is widely recognised and undisputed.

RELATIONSHIP WITH COMMERCIAL CONSTRUCTION SECTOR.

There is an overlap between the activities of the commercial construction sector of the building and construction industry and the housing industry. The construction of medium and high-density housing projects shares much practice and technology with commercial construction, and is often subject to the same industrial relations pressures. Trade contractors may work in both housing and commercial construction, depending on where work is available, and as outlined below, often have industrial problems as a result. These problems will occur, in HIA's experience, when they deal with the commercial sector for the first time. Such problems include:

- A non-negotiable demand to sign a union-devised pattern Enterprise Bargaining Agreement (or equivalent) under Federal or State law (EBA);
- A demand to make contributions at the EBA standard rate to union sponsored redundancy funds;
- A demand to make contributions at the EBA standard rate to union sponsored superannuation funds
- A demand to take out union sponsored workers compensation "top up" insurance

Additional pressure will also be put on trade contractors by head contractors who impose a number of the above demands as a condition of contract as part of their "managing" the industrial relations on site.

This interaction of the commercial construction industry practices within the housing industry has led to many problems for HIA members, and has led HIA to adopt policies which seek to protect its members.

COMPETITION AND THE BUILDING INDUSTRY.

FREE MARKET PLACE COMPETITION IN HOUSING.

The Australian housing industry is characterised by a large number of small to medium sized firms, operating in a marketplace which is defined but not dominated by a handful of major home builders (some of whom have franchised their operations to smaller businesses). While a house or apartment is not a completely generic product, "like with like" comparisons are easily made and value for money easily assessed. By and large, the consumer is well informed (and well protected) by state based licensing and domestic building laws and the housing market operates efficiently. The housing industry, although highly regulated in terms of consumer protection, is extremely competitive, and operates almost exclusively through the use of contract labour, with contractors competing between themselves for available work.

PARTIAL COMPETITION IN COMMERCIAL CONSTRUCTION.

By contrast, in the commercial construction sector, national major construction companies play a far more dominant role, while the building unions have a monopoly on the supply of labour (see Productivity Commission, *Work Arrangements on Large Capital City Building Projects* 1999, and references cited therein). The commercial industry has a number of characteristics not generally found in the housing industry. These include:

- Very high levels of union membership and coverage;
- The price of labour being fixed by successful industry wide negotiation (pattern bargaining) rather than individual site or workplace negotiation;
- The capacity for these pattern agreements to be easily approved by the industrial tribunals;
- Major builders enforcing industry wide agreements as a condition of contract;
- Major builders undertaking to use their "best endeavours" to ensure union membership which leads to a defacto " no ticket no start" arrangement on major building sites in capital cities, despite Freedom of Association laws.
- A desire by some for commonality of conditions for all work performed on a particular site or project.
- The apparent willingness of some employer associations to enforce union requirements by carrying out site 'time and wages book' audits, "safety" audits and specifying only union sponsored safety or induction courses ("green cards") as a pre-condition for site entry.

In HIA's experience compliance with the above arrangements is analogous to the "visa" that a trade contractor needs to gain entry to a commercial construction site. HIA has been active in assisting members to resist these demands (if possible) or alternatively taking steps to ensure that the demands of the commercial sector do not feed back into the Housing Sector.

PATTERN BARGAINING.

One of the major factors limiting competition in the commercial building industry is the ability of commercial competitors to legally agree with the industry union (the Construction, Forestry, Mining and Energy Union) about matters of commercial significance, including significant restrictions on competition for building work by trade contractors. In effect, current industrial laws allow collective agreements in restraint of trade to be immunised against the operation of the ***Trade Practices Act 1975*** if one of the parties thereto is a trade union.

During the long period of centralised wage fixing in Australia by Industrial Commissions (however titled), it was recognised that, in consideration of unions being allowed to combine in restraint of trade, the independent arbitrator would fix Award wages and conditions, having regard to the public interest. This acted as a brake on unsustainable or extravagant wage claims, as even when employers and unions agreed, the Commission might refuse a claim on public interest grounds. It also ensured that industrial instruments having the force of law were made by publicly accountable quasi-judicial bodies, subject to appeal and the rules of natural justice.

When in the 1980s governments turned to enterprise bargaining as a means of restoring flexibility to the wages system, it was envisaged that competition between enterprises would act to restrain unsustainable wage claims, and no public interest test was required to be met before approval by Industrial Commissions of (and thus legal status being given to) enterprise agreements. On that basis, the Australian Industrial Relations Commission (AIRC) was given no discretion whatsoever to refuse certification of an agreement that met the minimum statutory requirements. This arrangement has been incorporated into the ***Workplace Relations Act 1995*** (WRA).

The form of enterprise agreement can therefore contain highly anti-competitive elements against the public interest, cannot be refused certification by the AIRC, yet also be immune from ACCC and court scrutiny.

One of the principal objects of the WRA, Section 3 (d) (i) is to provide the means for

"Wages and Conditions of employment to be determined, as far as possible by the agreement of employers and employees at the enterprise or workplace level"

This object was driven by the government as it attempted to re-structure the economy to be market driven and internationally competitive. Competition between enterprises was expected to ensure that enterprise agreements would be subject to the discipline of the marketplace.

Unfortunately, in an industry like the building and construction industry, this object has been wholly negated by pattern bargaining, by which a strong union will agree only to a single model of enterprise agreement, and has the industrial muscle to force competing employers into such agreements. In fact, there is an incentive for those companies which have agreed with the union to help force the terms of that agreement on all their competitors, in order to maintain a 'level playing field'. In practice, this means that companies which have not agreed with the union are hit by industrial disputation and extra costs while their competitors are not, and in the end have to give in for commercial reasons. Absence of an industry 'policeman' to enforce the law, and restrictions on taking private legal action against the union without consent of the industrial relations commission, means that unions can take illegal industrial action with virtual impunity.

Where, through pattern bargaining, the EBA is one which will effectively be forced on parties such as trade contractors who had no part in its negotiation, there is a very good argument that public interest considerations should be required to be taken into account by an industrial commission or another body before the EBA is approved and thereby given the force of law. If these public interest considerations are not taken into account then pattern bargaining will continue to operate as a de facto form of restriction on competition.

The Trade Practices Act prohibits contracts, arrangements, or understandings in restraint of trade or commerce. Pattern bargaining effectively allows just such arrangements and is at odds with an otherwise deregulated and competitive Australian marketplace.

The cost of building in Australia is an input into the cost of everything we produce and everything we export. Like it or not, the pace of change in the world is increasing. In Australia, the pace must not be slackened – on the contrary, we must quicken it as much as is within our powers and possibilities.

Some have argued that genuine enterprise bargaining is really unsuited to the building and construction industry, and that while competition may be beneficial in all other sectors of the economy, in this special case a return to centralised wage fixing is desirable. HIA does not consider that the scheme of the ***Workplace Relations Act*** in relation to enterprise bargaining is inappropriate for the building and construction industry. On the contrary, it needs to be reinforced and made to work better, if the Australian economy is to become and remain competitive in the world marketplace.

Genuine enterprise bargaining does in fact occur in the housing industry as between head contractors and trade contractors. Negotiation and bargaining in this area effectively sets remuneration rates and conditions of work, and very successfully too. This gives the lie to assertions that the enterprise negotiation model is inappropriate and unworkable in the building and construction industry.

INDUSTRY AGREEMENTS NOT SUBJECT TO THE TPA.

The operation of pattern bargaining is facilitated by the 'statement of intent' or 'industry agreement' mechanism, whereby collective negotiations are carried on between unions and employer associations, leading to agreement on the terms of a 'pattern' EBA, which is the only one which the union will offer for the duration of the agreement. Unlike other industry-wide agreements to fix terms of trade, such agreements are not currently subject to the TPA.

Currently, collective negotiations by industry associations on behalf of their commercial builder members with the union over wages and conditions are engaged in on a (mostly) triennial basis. The basis of the negotiations is to agree on the terms on which the union will enter into registered enterprise industrial agreements with subcontractors to each of the large commercial builders. There is an acceptance or understanding by the large commercial builders that the union's practice is that all such agreements will be of an identical or highly similar pattern. While such an agreement solely between commercial builders would be caught by the ***Trade Practices Act 1975***, a pattern agreement, which each commercial builder agrees with the union will be a condition of engagement of any subcontractor, is not.

A prominent feature of those agreements is that 'every effort will be made to ensure that' subcontractors tendering for work from the large commercial builders will sign similar enterprise industrial agreements with the union, including pay rates and conditions, union membership, membership of and contributions to superannuation and redundancy funds, top-up accident insurance, and a range of other measures. Subcontractors will be obliged to undertake these obligations in respect of all their employees wherever situate, not merely those working on the head contractor's building site.

As a result, the commercial building industry operates on two levels – those sub-contractors who have or are willing to sign enterprise agreements with unions, and can work on major projects, and those who are not, who are excluded. This is clearly anti-competitive and against the public interest.

Typically, these agreements are made on an Australia-wide basis and flowed down to the State level, with no consideration of the interests of trade contractors. Even though these agreements are, from the employers' point of view, made on an "opt-in" basis, and do not preclude individual employers negotiating their own EBA outcomes, the role they play in setting the industry standard outcome cannot be underestimated. In practice they represent the minimum EBA outcome that unions will accept. HIA's experience also suggests that in many cases this is the minimum standard that head contractors will accept.

It is worthy of note that the firms who enter into these overarching agreements with unions have very few employees of their own who are covered by the agreements. Those who argue for these sorts of agreements list the advantages as:

- Greater predicability of labour costs;
- Reduced risk through elimination of competing arrangements;
- Cost savings;
- Better outcomes achieved through employers negotiating collectively with a union rather than individually.

HIA is of the view that real competition in negotiation would produce a lower cost and better result for the industry overall, even if some employers were uncomfortable with the outcome.

By contrast the evidence shows that trade contractors compete with one another, are more productive and are at least as well paid as employees. Trade contractors may not legally combine to fix the price of their services but must compete, while employees are legally able to combine to fix the price of their labour, and can exercise that power regardless of the public interest. This anomaly leads to economic distortions when, in spite of laws to the contrary, contractors are not able to freely compete for work in the commercial construction marketplace.

This of course takes labour costs (which represent 40 –50% of construction costs) out of the arena in which head contractors compete. The anti-competitive "level playing field" is further reinforced in the commercial building and construction industry by a lack of import competition (unlike other sectors of the economy) as, generally, buildings cannot be imported.

Through the operation of this pattern bargain mechanism, the cost of an employee under union-mandated EBA rates is now some 30 per cent higher than that of an employee under Award rates. Experience of so-called 'productivity offsets' in EBAs over the last ten years suggests that these are mere window dressing, and that EBA employees are certainly not more productive than those employed under Awards – if anything, the contrary is true, having regard to the RDO system. There is no reason why the gap between Award and EBA rates should not continue to increase without a consequential increase in productivity, although this must reduce jobs in the industry in the longer term.

The result of the current system is that commercial construction in Australia costs more that it would in a situation of full competition, and does not represent world's best practice. If the performance of the industry is to be improved, competitive wage pressures must prevail and trade contractors must be allowed to freely compete for work in this sector as they do in the housing sector. While it might be argued that this will undercut existing conditions of employment for employees, it is essential that there be some brake on these as they are so far in excess of the Award.

There is no compelling argument in HIA's view for competition in any market to be regulated other than by the ACCC. It is naïve to promote the instrument of centralised wage fixing (the AIRC) as an appropriate body to ensure a competitive labour market.

The current arrangement is an historical accident, which flows from the view that unions, as a matter of law, are engaged in industrial relations activity rather than in trade and commerce, and so industrial agreements are not caught by Part IV of the TPA. HIA considers that as a matter of economics this view is no longer sustainable.

ROLE OF THE ACCC.

Scrutiny of Certified Agreements.

The role of the ACCC in enforcing provisions of the ***Trade Practices Act* 1974** in the industry is limited because of the use of Certified Agreements (and their State counterparts) to immunise anti-competitive behaviour. As well as the issues noticed above, HIA is also concerned that companies (such as labour hire firms, scaffolding companies, etc) with links to unions are often given preferential treatment under enterprise agreements, to the detriment of fair competition.

If industrial relations laws are allowed to be used to reduce competition through the Certified Agreement mechanism, then such Certified Agreements should themselves be open to scrutiny by the ACCC. Where pattern bargaining is occurring in an industry, industrial commissions should not be permitted to certify agreements without prior clearance by the ACCC so that the proposed certified agreement will not have an adverse affect on competition in the industry. The ACCC should be given additional functions and powers under the ***Trade Practices Act* 1974** to achieve this.

HIA has made similar recommendations in its current submissions to the Royal Commission into the Building and Construction Industry.

Enforcement of Existing Sections 45D-45EB of the TPA.

HIA acknowledges that the Terms of Reference of this Review exclude ss.45D-45BE. However, for the sake of completeness, HIA points out that it has made submissions about these sections to the Royal Commission into the Building and Construction Industry which are designed to reinforce the recommendations it has made below.

RECOMMENDATION.

HIA recommends to the Committee of Review that it advise the Government that –

- The ***Trade Practices Act* 1974** (TPA) be amended to allow the Australian Competition & Consumer Commission, on the application of the proposed parties to an Enterprise Bargaining Agreement in an industry which the Employment Advocate has declared is engaging in pattern bargaining, to scrutinise that agreement; and that the Australian Industrial Relations Commission (and likewise State IR Commissions) be prevented from certifying a Certified Agreement (or State EBA) in that industry, unless the ACCC, has after due investigation issued a 'ruling' that a particular EBA is not anti-competitive or otherwise against the public interest; and
- The ***Workplace Relations Act 1996*** be consequentially amended so that if the Employment Advocate is of the opinion that pattern bargaining is occurring in an industry, he or she should be empowered to make a 'declaration' (ie. an administrative determination) to that effect. Prior to making such a declaration the Employment Advocate would require industry parties to "show cause" as to why such a declaration shouldn't be made. This enables a Government agency to "stay" the removal of competition from an industry pending a determination by the ACCC.

Housing Industry Association

21 June 2002.