



SUBMISSION BY THE
Housing Industry Association

to the

Competition Policy Review Panel

on the

Competition Policy Review

20 June 2014

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HIA:

Housing Industry Association Limited
79 Constitution Avenue
Campbell ACT 2612

Contact:

David Humphrey
Senior Executive Director – Business, Compliance & Contracting
Phone: 02 6245 1300
Email: d.humphrey@hia.com.au

HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85 per cent of all new home building work in Australia is performed by HIA members.



1 Executive Summary

HIA welcomes the opportunity to respond to the Commonwealth Government's review of competition policy.

From the outset, HIA believes that the competition provisions of *Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*) are generally working well and do not need substantial change.

The Act is an essential element in the regulatory infrastructure impacting on Australian housing industry, and the Australian economy more broadly.

Section 2 provides that objects of the legislation is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

HIA notes that it has frequently been emphasised that the *Competition and Consumer Act* is concerned with the protection of the process of competition rather than the protection of individual competitors.

HIA supports this approach.

Whilst competition arrangements in the housing industry are fundamentally sound, HIA is extremely concerned with the use of anticompetitive and unproductive enterprise bargaining agreements that contain provisions that restrict or prevent the engagement of independent contractors in the construction industry.

Urgent reforms are required to both the *Fair Work Act 2009* and the *Competition and Consumer Act 2010* to outlaw such clauses.

The housing industry also remains one of the most highly taxed and regulated sectors of the Australian economy. These high taxes and regulation detrimentally impact on the price that builders are able to offer their products and services to consumers.

In these submissions, HIA sets out a number of recommendations to improve the competitive regulatory environment for participants in the residential construction industry.

2 Competition Policy

What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

Competition is a natural benefit and consequence of Australia's market economy. Greater competition in markets is generally more advantageous. This is because more competitive markets usually maximise economic welfare, with costs being minimised and lower prices being charged to consumers. Under competitive conditions, the level of output in the market is generally higher than it would be under more restrictive market conditions.

Competitive behaviour at its essence sees companies jostle with each other vigorously in the market, trying to obtain a better market position and become the influential player.

Only firms faced with constant competition are pushed to innovate. It is what economist Joseph Schumpeter called the 'creative destruction' of competition that leads to innovation – and value both for consumers and for shareholders of companies.



Competition policy is an integral driver of Australia's market economy ensuring that the process by which firms' offers goods and services is efficient, competitive and fair.

HIA supports a limited role for government in this process.

Although there is a case for government intervention and regulatory sanction for clear cases of market failure such as rogue anti-competitive behaviour or the emergence of monopolies, it is not government's role to pick winners amongst industry or protect falling businesses from competition.

Further, excess regulation brings with high costs and will never be able to produce outcomes as efficient as a well-functioning market. The regulatory process is inherently time consuming to administer and requires considerable expenditure of resources. Regulation is usually accompanied with unintended consequences often detrimental not only to consumers but the public interest.

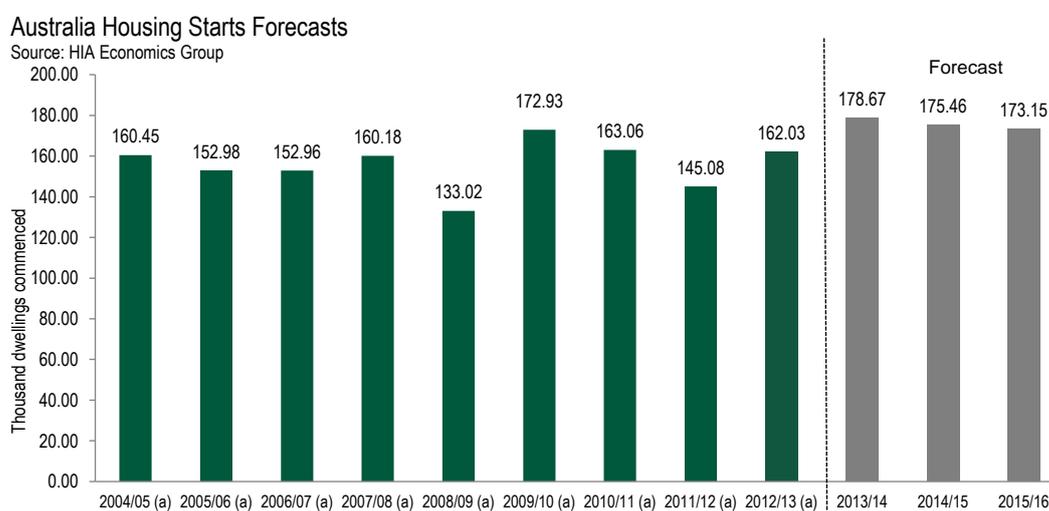
To this end, HIA expresses concern with the emerging trend of industry protectionism focused on 'small business' issues, such as the Government's proposal to extend the current consumer protection laws that regulate standard form contracts to business-to-business contracts.

HIA's concerns are elaborated on in greater detail in these submissions.

3 Economic Overview

The housing industry consists of new dwelling construction and renovations activity. During the March 2014 quarter, expenditure totalled \$79.92 billion in annualised terms. This represented about 5 per cent of GDP. Within the housing industry, expenditure on new dwelling construction is estimated at \$49.3 billion annualised, with renovations valued at \$30.6 billion.

During 2013/14, it is estimated that a total of 178,650 new dwelling were commenced. This was an increase of 10.3 per cent on the previous year, and was the highest level of activity in two decades. Stronger building activity was supported by record low interest rates, large population increases over recent years and acceleration in the rate of dwelling price increase. HIA forecasts indicate that constraints around land supply will cause the new home building to edge downwards over the coming years, with a decline of 1.8 per cent in 2014/15 and a further reduction of 1.3 per cent in 2015/16. In 2016/17, just over 170,700 dwelling starts are forecast. This is illustrated in the chart below.

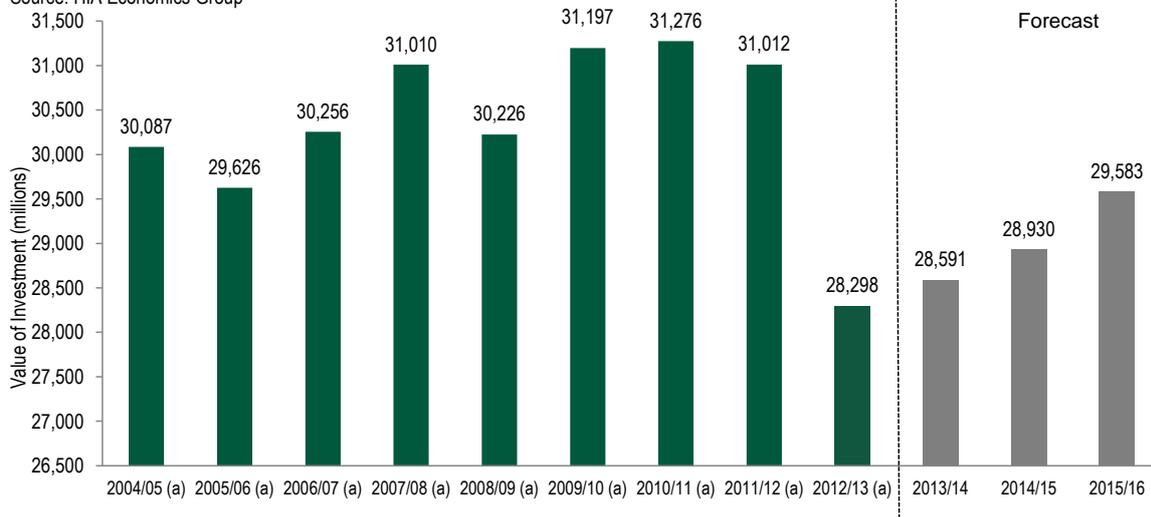




Renovations activity has slumped over the last couple of years, with activity declining by 8.8 per cent in 2012/13 alone. It is estimated that renovations activity increased by 1.0 per cent in 2013/14 and will continue to recover over the next few years. Increases in home prices have been an important driver of the recovery in the renovations market, as well as the fact that interest rates are at such low levels.

Australia Renovations Forecasts

Source: HIA Economics Group



Independent economic research by the Centre for International Economics (CIE) has found that the housing industry's contribution to the Australian economy is substantial. The CIE estimates that each additional \$1 of activity in the housing industry has flow-on impacts of \$5.21 of additional GDP in the economy under a situation of less than full-employment. Residential building activity also supports long-term economic growth through boosting the economy's capital stock and by contributing to greater housing affordability. This enhances the economy's competitiveness.

4 General Issues – Competition in the Building Industry

Competition arrangements in the housing industry are generally sound and working well.

The Australian housing industry marketplace is characterised by a large number of small to medium sized building firms, operating in a marketplace which is defined by a handful of major home builders.

A widely used framework for assessing the competitive structure of an industry was described in Michael E. Porter's *How Competitive Forces Shape Strategy* (1979). Porter saw an industry's scope for providing its participants with sustained profitability as being contingent on five competitive forces. These five forces are:

- Threat of new entrants
- Bargaining power of buyers
- Threat of substitute products or services
- Bargaining power of suppliers
- Rivalry among existing firms

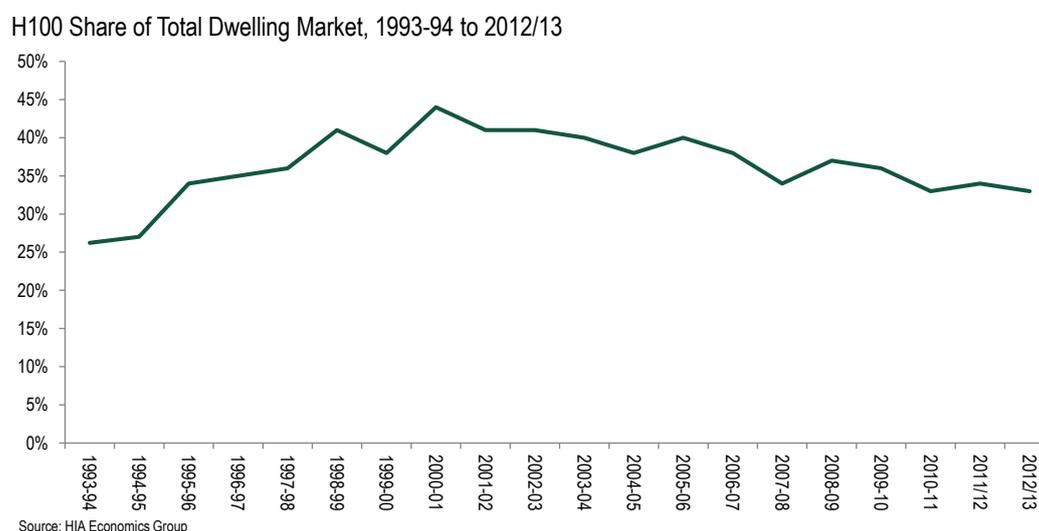
Additionally, the role of complementors was identified by Brandenburger as the 'sixth force' in an industry. Complementors are businesses that directly sell the products or services to the customers of a particular industry which are used in conjunction with that industry's output. In



the case of the housing industry, complementors include mortgage lenders, real estate agents, utilities providers, conveyance solicitors and home insurance providers. There are natural curbs on competition in the home building market due to heterogeneous nature of dwellings. Competition is most easily facilitated in the case of products which are homogenous, because comparison between the output of different suppliers much easier. Any uncompetitive pricing behaviour is readily identifiable.

No two dwellings are exactly the same, if only because their location differs. There is almost unlimited scope for variation in terms of size, setting, design and materials. Such a large amount of heterogeneity in the market is a natural impediment to competition in the industry.

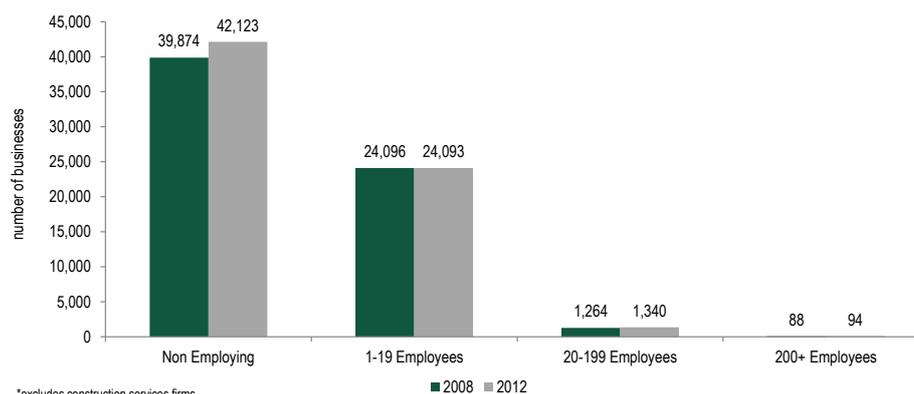
Despite this inherent structure, the evidence suggests that the Australian home building industry is highly competitive. Furthermore, the depth of competition seems to have intensified over recent years. The chart below illustrates the share of the total dwelling market accounted for by the industry's largest 100 home builders. It can be seen that the largest builders hold only about one third of the market, and that this share has been in fairly steady decline since the early 2000s decade when the largest builders had a market share of about 45 per cent.



The strong degree of competition in the housing industry can also be gauged through analysing the distribution of its firms by size. The vast majority of firms in building construction are sole trading operations with no employees. Such firms accounted for 62 per cent of the total, with small employers accounting for a further 35 per cent of the total. Large firms account for less than 2.1 per cent of the number of firms operating in building construction. The size structure of building construction firms is therefore very conducive to strong competition, with the vast majority of firms wielding little market power.

Number of building construction firms by size of firm

Source: ABS 81650, HIA Economics

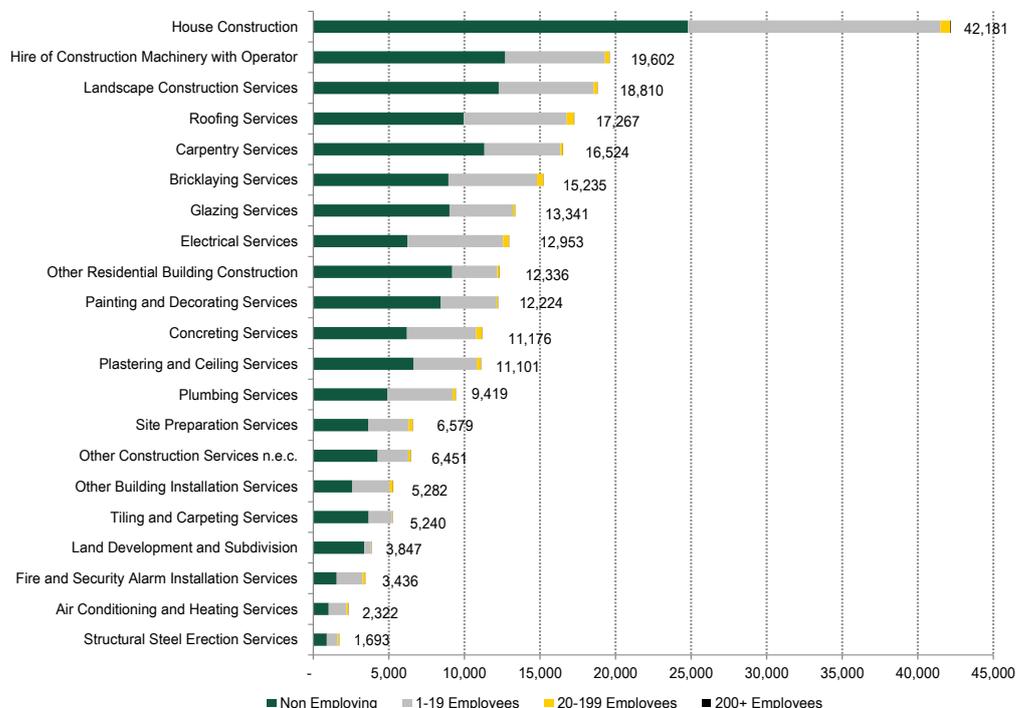




The predominance of sole traders and small businesses in residential construction is captured in the bar chart below which shows the structure of particular sub-categories of the industry. The highly competitive nature of the industry is evident, with a very large number of firms competing in the industry.

Estimated number of firms in the residential construction sector by industry sub-division, 2011/12

Source: ABS 8165, HIA Economics



Recall that the role of complementors represents a 'sixth force' in an industry's competitive structure. In the housing industry, the main complementors include:

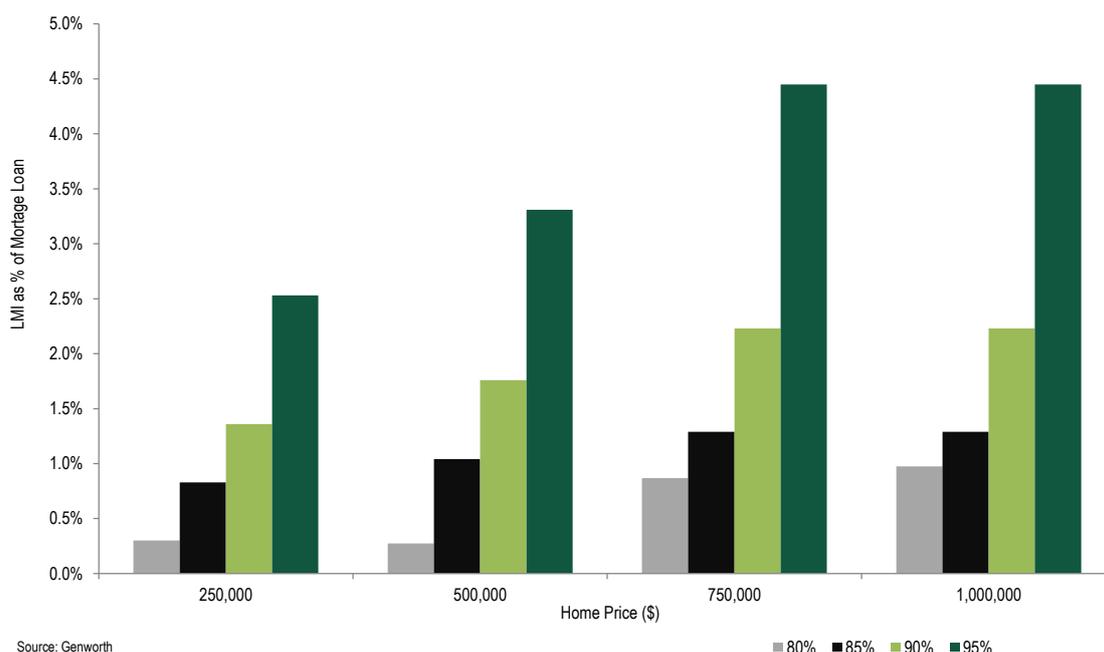
- Mortgage providers; and
- Housing-related insurance providers.

The competitive structure of complementors' industries matters because it indirectly affects the housing industry. Poor competitive conditions in a complementor industry will have adverse effects on the housing industry's customers, leading to poorer competitive outcomes in the housing industry itself.

As most home purchases are mortgage-financed, competitive issues in the **mortgage lending market** have adverse impacts on activity levels and costs in the home building industry. Australia's mortgage market is dominated by the big-four banks, which has 85 per cent share of both the owner occupier and investor mortgage market. The imperfect competitive conditions in the mortgage finance market were demonstrated by the fact that mortgage lenders failed to fully pass on the 225 basis point reduction in the RBA's official cash rate since November 2011.

Insurance providers are also important complementors to the housing industry. For example, home buyers purchasing at LVRs of higher than 80 per cent are obliged to take out Lenders Mortgage Insurance (LMI). LMI protects the lender in the event of the loss being incurred on the disposal of the underlying real estate in a default situation. With only one major provider of LMI in Australia, the competitive shortfall is substantial. The LMI premiums are substantial relative to the size of mortgage loans. This is as illustrated in the chart below.

LMI as Proportion of Loan Value according to Home Price and LTV



Taxation policy also has a detrimental role in the housing industry. Independent research by the Centre for International Economics (CIE) found that new dwelling construction is the second-most heavily taxed of Australia's 27 economic sectors. The tax burden on the residential building industry is 31 per cent, compared with 24.4 per cent across the economy generally. Taxation accounts for 41 per cent of the cost of a new dwelling in Sydney and 38 per cent in Melbourne. The most inefficient tax is Stamp Duty. The CIE estimates that a \$500 million cut to this would produce a \$738 million benefit to consumers and up to \$51 million in benefits to producers.

Close similarities among offerings heighten the intensity of the competition, and hence the price sensitivity of the clients. The difficulties in differentiating between the offerings of construction firms coupled with other unique features of the construction industry, particularly, the method of price determination, the nature of the final product, the forms of the demand for the construction industry's final output, and the fragmented nature of the organisation of construction processes, fuel the intensity of the competition, particularly on the basis of price.

Whilst price competition is intense, competition may also occur on quality, degree of customisation and product innovation and on project scheduling and delivery time.

Consumer Protection for Domestic Building

Consumers in the building industry are, by and large, well informed and well protected.

Not only are there substantial consumer protection laws such as domestic building contract laws (see comments below), stated based licensing, and warranty insurance arrangements but the use of online technologies has rapidly increased consumer knowledge and power.

Although HIA understand the focus of this review is on competition policy, extensive industry specific consumer protection laws together with the overarching obligations under the Australian Consumer Law significantly impacts upon the delivery of goods and services in the housing industry.

There are sector-specific laws in most State and Territory jurisdictions dealing with home building contracts:



| | |
|-------------------|---|
| NSW | <i>The Home Building Act 1989</i> |
| Western Australia | <i>The Home Building Contracts Act 1992</i> |
| South Australia | <i>The Building Work Contractors Act 1995</i> |
| Victoria | <i>The Domestic Building Contracts Act 1999</i> |
| Queensland | <i>The Domestic Building Contracts Act 2000</i> |

The expressed intention of domestic building contract laws is to redress the perceived inequality in bargaining power between the home owner and builder. There are also a range of statutory provisions specifically regulating unfair terms and conditions in domestic building contracts.

As well as sector-specific domestic building contract laws, consumers are afforded a raft of protective measures when dealing with building contractors:

- In all state and territories, except Tasmania, builders must take compulsory home owners warranty insurance.
- Consumers have access to fast and low-cost dispute resolution systems for workmanship and contractual complaints.
- Consumers have protection in the form of contractor licensing, and building approval and certification regimes.

Notwithstanding the extraordinary high degree of regulation, the housing industry has been able to operate effectively and efficiently to build and deliver high quality new homes to the Australian economy. This is particularly because of the use of trade contractors who operate within a highly competitive, commercialised market.

Competition Issues and Subcontracting in the Building Industry

The majority of residential building projects are carried out using the subcontracting system; it is common for 80-90 per cent of the total work value being performed by subcontractors

Contracting is the key to affordability in the residential construction industry, which has special characteristics which lend itself to the use of contractors rather than use of employees.

The use of subcontracting in the residential building industry is mainly one of necessity.

There are around 25 to 30 different trades involved on-site in the building of a house.

The familiar ones are concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. In addition, there are contractors who peg out the site, backhoe operators, drainers, plasterboard fixers, plasterers, floor tilers, glaziers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer and Hills hoist installer.

The builder/main contractor usually cannot internally supply all of these trades, competencies and skills needed to complete a construction projects and therefore has to rely on third party subcontractors.

The working relationship between contracting firm and subcontractors is typically on a short term, project by project basis, although in the residential building industry it is not uncommon for subcontractors to be concurrently engaged on a number of projects.

The relationship between the building firm and the trade subcontractors begins during the estimating and bidding process, i.e. tendering stage. It ends when the final payment is made to the subcontractor.



On larger projects, during the tendering process, the main contractor invites tenders from a number of different special trade contractors. Tenders from the various subcontractors are evaluated according to a range of selection criteria such as price/cost, experience, financial situation and ability to deliver.

Technical expertise is a key factor in ability to deliver; the subcontractor must possess the required skills to carry out the subcontracted work.

In the end, price is the determining factor.

The subcontract system endures for a simple but obvious reason. It offers substantial advantages both to the builder, the contractor and end consumer:

- Subcontract prices are negotiated between builders and subcontractors before construction commences.
- Accurate budgeting is essential because the builder has by law to provide to the residential client a fixed price contract.
- Prices paid for subcontract work are not set by a small oligopoly of a few builders. The largest builder in Australia accounted for only 2.1 per cent of new homes commenced in 2012/13.
- The predominant prices are an outcome of prevailing demand for and the availability of skilled trades.
- Because housing demand conditions can vary sharply at the regional level, so too can prices for skilled labour.
- The emergence at times of wide differences in earnings achievable by contractors encourages them to move from regions of low activity to areas where the demand for skilled trades is strong.
- Home builders can adjust their workforce according to work in hand.
- In an industry where annual production requirements can swing by anywhere between 10 and 30 percent, smaller builders cannot absorb the administration and overheads of an employed workforce.
- By comparison with commercial building, little supervision of contractors is required.
- Subcontractors are highly self-motivated, which is reflected in their high productivity levels.
- The amount of income contractors earn depends on their ability and preparedness to work.
- They create substantial value to our economy supplying innovation, wealth creation and economic growth.
- They play a particularly important role in their willingness to take up new technologies, methods and materials, since they have a direct incentive to minimise construction costs.
- Contractors have the independence to arrange their own work program. The number of hours they work and the pace at which they work are of their choosing.
- Their future earnings depend on establishing a reputation for quality and reliability. Many trade contractors go on to establish their own home building business.
- The housing industry is characterised by harmonious industrial relations.
- Contractors don't get paid for delays so there is a strong incentive to get on with the job.
- According to the CSIRO, the level of unproductive time on housing sites is about 4 percent; for the unionised commercial building industry, the amount of unproductive time is 23 percent.

Consumers ultimately benefit from the competitive subcontracting environment.



The commercial building industry is characterised by:

- Very high levels of union membership and coverage (to a large extent, the building unions have a monopoly on the supply of labour);
- The use of pattern bargaining arrangements to fix industry wide rates; and
- A larger market share by the major construction firms many of whom are listed public companies and usually are the only companies well enough resourced to satisfy exhaustive Commonwealth and state government tendering requirements.

Since the introduction of the Fair Work Act, which removed the 'prohibited content' previously specified in Part 8, Divisions 7.1 and 7.2 of the *Workplace Relations Act Regulations 2006*, there has been a significant expansion of permitted matters that may be included in enterprise agreements.

The impact has been to significantly adversely impact competition in the industry.

Cases such as *Asurco Contracting Pty Ltd v Construction, Mining and Energy Union* (2009) 197 IR 365 (*Asurco*) and *Re ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014* [2011] FWA 6684 (*ADJ Contracting*) highlight the types of 'standard provisions' that construction unions can, and/or now do, seek to be included in industry wide pattern bargaining enterprise agreements. Under the pretext of 'job security' and 'consultation' these clauses restrict and discourage the use of contractors by a company to whom such a term in an enterprise agreement applies.

These provisions run contrary to basic 'enterprise' bargaining and competition law principles.

Specifically section 45 E of the CCE Act prohibits unlawful secondary boycotts and in this regard the EBA between *ADJ Contracting* and the union prohibits *ADJ Contracting* from engaging contractors unless they satisfied certain conditions.

HIA notes that in *ADJ Contracting*, various arguments were advanced to the Full Federal Court that such provisions were contrary to section 45E of the CCA Act.

The Full Bench of the Federal Court however held that enterprise agreements is not an 'arrangement or understanding' with a union for the purposes of the CCA Act.

Requiring that subcontractors be engaged on terms 'no less favourable' than the terms set out in a particular enterprise agreement, essentially enables an industrial relations instrument to set what would ordinarily be a commercial rate set in a competitively tendered market.

Accordingly not only must the *FW Act* must be amended to ensure that 'permitted matters' in enterprise agreements are prohibited from including or encompassing any restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement but as part of the review of the government's competition policy, amendments to sections 45E and 45EA of the CCA are required to ensure that enterprise agreements that restrict the engagement of contractors are in breach of these sections.



5 Regulatory Impediments to Competition

5.1 General Comments

Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?

There are a number of regulatory reform measures, HIA believe can be implemented to improve competition in the residential building industry:

Financial Services

Pending the outcome of the government's financial system inquiry that is currently underway, competition in financial services needs to be enhanced in terms of pricing, contestability and product range.

Skilled Migration

Skilled migration barriers, such as reductions in employment visa charges and associating red tape should be relaxed. A rolling five year net overseas migration program should be initiated to this end.

Overseas Building Products

Extension of building product standards to imports and the creation of a Building Product & Materials Register will ensure that all meet the minimum standards for safety and quality and also ensure that a level playing field applies in the building products market.

Adjacent Sectors

Competitive conditions in adjacent sectors have impacts on the residential construction sector. Accordingly, we view industrial relations practices in the commercial construction sector as being detrimental to competitive conditions in the residential construction industry. Stronger competition in the utilities markets would see the industry's cost base being reduced, for example through electricity and transport costs being reduced;

Competitive conditions in the labour markets supplying the residential construction industry have the potential to hurt the industry's ultimate consumer – the home buyer. The industry's ability to compete effectively would accordingly be enhanced by removing contractors from industrial law coverage and prohibiting contractors from collective bargaining. Emphasis also needs to be placed on skilling young people and supporting apprentices in the residential construction sector.

Research and Development

Innovation is a cornerstone of competitive markets. Accordingly, incentives for innovation in building product manufacturing should be strengthened by government.

Building Regulations

While regulation has an important role in protecting the consumer in certain markets, regulation also carries with it compliance costs which can be particularly severe for small business. Accordingly, Building Codes should have a minimum five year review period and the Housing Provisions (Volume Two) should be retained as a standalone document in the National Construction Code. A concerted attempt to reduce all Red Tape for building should also be progressed so as to reduce regulatory costs.

Land Supply

Competition thrives when market information is accessible and plentiful. A mandatory national reporting framework for land supply should be introduced, given its importance to the residential construction industry. Similarly, the approval process for residential land must be streamlined and made for transparent.



5.2 Barriers to Entry – Licensing

Are there occupational - based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

Entry into the building industry and construction trades is regulated in a number of areas, including through trade and business licensing. All states and territories require licenses for builders undertaking domestic or home building work. In turn, there are different levels of regulating occupations, including by regulating occupational standards, by prescribing skill and educational standards and by licensing businesses.

Licensing of the building trades has historically been justified on a number of grounds including:

- restricting entry into the market by imposing skill, education or probity requirements on practitioners;
- increasing consumer protection;
- protecting 'public health, safety and morals';
- improving the information asymmetry for consumers by purporting to attest to the quality of the licensed person; and
- being used to enforce rules of industry behaviour.

Not all jurisdictions licence both commercial and residential builders and amongst those that do, there is a wide variation in the way licences are graded or classified. From a consumer protection point of view, the grading of licences assists market choice by indicating the most appropriately qualified builders for their needs.

HIA supports licensing for builders undertaking domestic building work, trade contractors undertaking high risk work relating to electrical, plumbing and gas fitting work and trade contractors engaged (contracting) directly with consumers (subject to a monetary threshold). However, whilst there are benefits in licensing, licensing also constrains the market's ability to provide services.

By restricting entry, license holders maintain an entrenched market position thus reducing competition. Higher barriers to entry create a cost advantage for incumbent licence holders allowing them to collect economic 'rents'. Administrative and compliance costs associated with licensing also add to the direct burden on licensees which are then passed on to consumers through higher prices.

HIA notes the recent NSW IPART review considered the competition impacts of licensing identifying that a licensing regime may restrict competition in a number of ways such as to limit:

- the number or range of suppliers
- the ability of suppliers to compete
- the incentive of suppliers to compete
- the choices and information available to customers

Accordingly, the need for licensing of any particular trade activity should be assessed against the risk involved. If licensing is justified according to risk, an important task is to identify those risks that require regulation.



Where there is a high monetary threshold for licensing, a greater range of building work will not require a licence. This might have the consequence of increasing competition amongst non-licensed practitioners at the lower-end of the market, which in turn could have potential to expose consumers to increased risk from unlicensed builders.

However, removing compliance costs for the lower end of the market will result in lower costs, greater choice for consumers and more targeted regulation where it matters the most. In this regard, HIA supports the current principles of best practice regulation that are incorporated in the current National Competition Policy. These principles require that regulation (such as licensing) should not restrict competition unless it can be demonstrated that:

- the benefits of doing so outweigh the costs, and
- the objectives of the regulation can only be achieved by restricting competition.

National Licensing?

National licensing was intended to harmonise licensing regulation between states and territories for a number of specific occupations. However at the COAG meeting in December 2013, it was decided not to pursue the proposed National Occupational Licensing Scheme (NOLS) reform.

Whilst increased trade mobility was an admirable goal, the reality was that the vast majority of construction businesses – builders and tradespeople alike - do not work across state borders and have little desire or intention to do so.

For those building businesses that solely operate within their own jurisdictional boundaries, there is little to no tangible benefit in having national consistency unless it is accompanied with better quality regulation.

In this regard it became of whether an outcome of better regulation was actually achievable through national licensing process as each state government resisted efforts to eliminate unnecessary regulation, red tape and the administrative burden on licensing business.

HIA understand states governments will now investigate approaches that would increase labour mobility and deliver net benefits for businesses and governments. States will develop alternative options for minimising licensing impediments to improving labour mobility such as more enhanced mutual recognition through the Council for the Australian Federation (CAF). HIA supports this approach and the return to a more competitive model of federalism.

5.3 Planning Restrictions

Are there planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

Approval of Single Dwellings

In respect of planning restrictions, the key issue that has affected the housing industry for many years has been the increasing shift to require a planning approval for a single dwelling house on land zoned for residential development.

Local government continues to use the planning system as a means to ‘pull in’ the construction of single dwellings, requiring them to have two approvals – planning and building – as a means of limiting the ability of private building professionals to undertake building certification.



A single dwelling house on residentially zoned land should be considered an ‘as of right’ development and when designed in accordance with a clear set of standards should not require planning approval. Effectively the planning and zoning system needs to facilitate an approach of one house, one approval, and enable this to be competitively delivered by either council or the private market.

In instances where a compelling argument can be made that certain single dwellings should obtain a planning approval, then this should be a competitive pathway, with private planning certification permitted to compete with local government to provide such assessments.

Certification in Planning

Certification in planning is a process that enables suitably qualified persons to determine compliance of a matter with regulatory controls or standards.

Certification of a planning application means that in the opinion of a qualified professional, the application, being the design of the building or structure or use, meets certain standards or requirements as set out in a planning scheme.

Whilst there is wide scope for the private sector to assist with all aspects of the planning process, authorities are reluctant to introduce it as a valid part of the planning process.

However, the introduction of ‘code assess’ measures by many state governments has led to a more objective approach to many simple applications.

It is this area of planning which could logically lend itself to the further introduction of full certification in planning – due to the simple nature of the applications with technical assessment measures.

Certification in planning could be easily integrated into applications for routine items that still require planning permission (fences, single dwellings and so forth) leaving authorities better placed to deal with applications that require more detailed assessment and strategic consideration.

Suitable models of planning certification for introduction could include but not be limited to:

1. **Pre Lodgement Certification** – whereby a private sector planner would sign off on certain essential key elements of the planning application such as that the application complies with the planning scheme requirements is complete and that affected parties have notified.
2. **Certification to Report Stage** – whereby a private sector planner undertakes pre-lodgement certification and adds the notification procedure and undertakes to make a formal assessment and drafting of a report to Council officers or Council.
3. **Full Certification Process** – whereby a private sector planner undertakes the full planning process including full report writing and being empowered to make a decision and simply lodge the determined application (similar to the manner in which building certification occurs) with the local authority. Items which are able to be “code assessed” are ideal for a full certification process.

All jurisdictions should ensure certification in planning is available for any items, including engineering works, requiring planning approval that are able or required to be code assessed. That is, any matter that is able to be code assessed by a Responsible Authority should also be eligible for a suitably qualified planning or building professional to sign off on the application and issue the appropriate planning permission.



Land Development

In relation to land development and creating a competitive market for land release, it is vital that governments maintain an adequate supply of land for housing in Australia's major cities and regional centres.

Many state governments have introduced policies designed to curb urban sprawl which has seen an increase in medium density dwellings and apartments. But adequate long term land supplies for infill and Greenfield housing should be an essential element of every state government policy.

Urban Growth Boundaries (UGBs) are also a key strategy employed by state governments to manage urban growth. However the result of applying UGBs is generally that existing landowners and government, as a land owner, either withholds or controls the supply of land to the private development market.

The primary function of government in managing land supply should be:

- streamlining the planning process,
- providing key infrastructure to facilitate residential growth and
- ensuring adequate land supply to meet growing demands for new housing.

The development and implementation of metropolitan strategies in consultation with industry is supported to provide certainty of land supply. However Government strategies should be long term to create certainty of land supply and facilitate an appropriate mix of allotments in a range of locations at an affordable cost.

Metropolitan strategies must identify a rolling minimum 15-25 year forward land supply to meet long term demand. Within this long term strategy land supply, government should ensure adequate zoned or designated and serviceable land to meet medium term demand (e.g. 10 years supply). And within the medium term land supply, government should work with industry to ensure adequate land with development approval to meet short term demand is available (e.g. 5 years).

Land development agencies also need to be limited in their ability to override the planning system and apply additional layers of planning and building controls in an effort to achieve 'best practice' outcomes. This approach avoids the scrutiny that comes through the regulatory framework and when used, places an unrealistic burden on the design and construction cost of new land and housing projects, ultimately at the expense of new home buyers.

As part of this, the State government's role in developing land should also be limited to supplying housing which is affordable or which meets the needs of disadvantaged within the community or requires a facilitation role for complex redevelopment projects. The state should not be an active competing player in the general supply of land and housing to the market, in competition with private development.



6 Competition Laws and Responses to Other Issues

6.1 Secondary Boycotts

Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?

Apart from the use of enterprise bargaining agreements, a long standing issue for the building industry has been the ability of construction unions to shut down building sites and prevent delivery of building products (such as cement) and disrupting concrete pours.

In recent years in particular, building materials supplier, Boral and its customers have been targeted by the CFMEU at great cost to Boral and the industry as a whole. Boral's legal proceedings against the CFMEU have been publicly reported and are currently the subject of court proceedings.¹

Section 45D of the Competition and Consumer Act 2010 provides:

- (1) *In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:*
- (a) *that hinders or prevents:*
- (i) *a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or*
 - (ii) *a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and*
- (b) *that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.*

In June 2009 further legislation was made as a result of the Dawson Committee recommendations.

Unfortunately there has been little effective policing of these provisions in the building industry by the ACCC; the law is quite clear, it requires effective enforcement.

Mirroring recommendations 181 and 182 of the Cole Royal Commission, where there is an industrial relations motivation for the secondary boycott HIA support moves to have a reinstated ABCC having sufficient powers to investigate and prosecute breaches of section 45D in the building industry.

6.2 Collective Bargaining by Small Business

Do the authorisation and notification provisions of the CCA operate effectively, and do they work to further the objectives of the CCA?

How accessible is the collective bargaining process for small businesses, and can they can use it without requiring substantial legal assistance or advice?

The CCA currently prohibits price fixing, cartels and other behaviour that substantially lessens competition. An exercise in collective power by a group of independent contractors, such as an agreement to withhold their labour supply to a specific target in support of a bargaining claim will constitute an anti-competitive collective boycott and will breach the legislation.

¹ See for instance Mike Kane, 2014 "How a rogue union is damaging our business". Sydney Morning Herald accessed at <http://www.theage.com.au/comment/how-a-rogue-union-is-damaging-our-business-20140209-329sf.html#ixzz34y0Jlv3J>



In order to be able to use collective bargaining and obtain immunity from liability, 'approval' is required from the ACCC through the authorisation and notification process.

HIA notes that since the inception of the *Trade Practices Act* in 1974 small businesses have been able to have their arrangements authorised on the grounds that public benefits flowing from the arrangements outweigh any anti-competitive detriment.

In 2007, via changes to the notification process to further assist small businesses, the burden of proof of establishing the benefits and detriments of the conduct shifted away from the parties seeking to collectively bargain and onto the ACCC. It also provided applicants with automatic immunity in the absence of objection by the ACCC.

HIA opposes any further watering down of the authorisation or notification processes for small businesses collective bargaining.

Firstly, traditionally collective bargaining has only been lawful when exercised by employees in the context of the industrial relations system via trade unions. Allowing collective bargaining between businesses imposes an industrial relations process on what ought to be a competitive, market based outcome.

The inclusion of generous exemptions for small business in the CCA assumes that small businesses are employee-like in character, in that they may individually lack bargaining power and should seek to join together and bargain collectively in the way employees can through their exemption from the CCA's competition provisions.

The major flaw in this approach is that it effectively changes personal services contractors, who compete to supply their own skill and labour, from small businesses into a type of employee.

If trade contractors in the residential construction industry were to be able to routinely collectively bargain, the housing industry would turn into an analogue of the commercial building industry. This would impact on housing affordability.

Further if contractors in the building and construction industry are allowed to bargain collectively as to the price for which they will supply their labour, in the same way as employees do, logically and in practice they will adopt the same collective bargaining structures as employees do – a trade union – who will seek to extend enterprise bargaining rates and conditions onto independent contractors.

At an economic level, the arguments in favour of enabling collective bargaining are similarly flawed. Collusive conduct and collective bargaining generate greater economic costs, increasing the potential for anti-competitive coordination between members of the bargaining group and creating competitive distortions that favour the bargaining group.

Collective bargaining also has implications for those businesses that are not part of the bargaining group but compete against the members of the bargaining group. These competitor businesses may be harmed by the activities of the bargaining group.

This is inconsistent with the notions of competitive independent contracting and significantly blurs the distinction between independent contracting and the union EBA system.

Of concern, whilst the 2007 legislation expressly provided that a notice for an application for an authorisation which is given by a trade union, a trade union officer or a person acting on the direction of a trade union will not be a valid notice, the ACCC has since confirmed that these provisions do not restrict the ability of unions to assist in the preparation of a collective bargaining agreement notification or restrict their participation in the negotiation process.



In recent years, the CFMEU has attempted to be an agent for earthmoving contractors and owner drivers in Queensland seeking to 'collectively' set rates. Against HIA opposition to the application, the ACCC approved the authorisation application.

The CCA requires amendment to remove the capacity of trade unions to act as agent in the collective bargaining processes.

6.3 Unconscionable Conduct

Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?

HIA considers that current provisions in the Australian Consumer Law provide strong protections for small and medium businesses.

Whilst statutory unconscionability had been historically difficult to prove, recent amendments to the legislation together with an expanding jurisprudence enhance the capacity of small businesses to rely on these protections.

The Australian Consumer Law equally applies the unconscionability provisions to both business to consumer and business to business transactions, providing:

21 **Unconscionable conduct in connection with goods or services**

- (1) *A person must not, in trade or commerce, in connection with:*
- (a) *the supply or possible supply of goods or services to a person (other than a listed public company); or*
 - (b) *the acquisition or possible acquisition of goods or services from a person (other than a listed public company);*
- engage in conduct that is, in all the circumstances, unconscionable.*
- ...
- (4) *It is the intention of the Parliament that:*
- (a) *this section is not limited by the unwritten law relating to unconscionable conduct; and*
 - (b) *this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and*
 - (c) *in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:*
 - (i) *the terms of the contract; and*
 - (ii) *the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.*

According to Justice Finn, the listed indicators of statutory unconscionability that expressly refer to substantively unconscionable outcomes as heading 'in the direction of proscribing unfair dealing and unfair trading', especially 'unfair dealing in relational contracts'.

HIA notes that at the time when this section was introduced into parliament, it was said that it was designed to protect small business, such as franchisees or small shopkeepers in large shopping malls when dealing with big business. A number of factors are listed as to what may amount to unconscionable conduct:

- the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;



- the requirements of any applicable industry code (for example, the code applying to franchise contracts);
- the extent to which the supplier unreasonably failed to disclose to the business consumer;
- any intended conduct of the supplier that might affect the interests of the business consumer;
- any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;
- whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
- the extent to which the supplier and the business consumer acted in good faith.

Last year in the Lux case ² in a significant development in the law, the Full Federal Court confirmed that unconscionable conduct should be given a broad interpretation.

The case involved an ACCC prosecution against door to door vacuum salespersons. In upholding the ACCC's the Full Bench provided important clarity regarding the scope and operation of the unconscionable conduct provisions finding that conduct that is 'unconscionable' or 'against conscience' is a test of the norms and standards of today rather than moral judgment.

The implication of this decision is that it may not be necessary to show that the conduct revealed a high degree of moral turpitude or moral tainting to prove unconscionability, elements that have been notoriously difficult to prove.

Unconscionability must be applied and understood in context. This significantly assists businesses seeking to rely on these protections.

In the same week as the Lux decision was handed down, the Federal Court in a case involving a business-to-business claim of unconscionable conduct granted an interlocutory injunction where there was a termination of a large commercial contract which, it was argued, amounted to unconscionable conduct, pursuant to clause 21 of Schedule 2 of the Australian Consumer Law.³

HIA notes that the ACCC has recently instituted proceedings in the Federal Court of Australia against Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd alleging that Coles engaged in unconscionable conduct as part of its Active Retail Collaboration (ARC) program, in contravention of the ACL.

Given the recent case law and current development it is clear that the current unconscionability provisions are working well to protect the interests of small business. Any further extension of these protections risks destabilising markets through the inherent uncertainty they create in commercial relationships.

² ACCC v Lux Distributors Pty Ltd [2013] FCA FC 90

³ One Pty Limited v Telstra Corporation Limited [2013] FCA 23 the Federal Court (Justice Pagone).



6.4 Other Small Business Issues

Are there other measures that would support small and medium sized business participation in markets?

There are obvious tensions between small businesses and large businesses. Many of these tensions are a natural occurrence of market capitalism.

The primary role of the CCA is to protection competition in Australia. An effective competition policy will lead to a market environment that upon which goods and services are profitably brought to the market at the lowest price.

It is not government's role to artificially determine a level playing field amongst market participants depending on firm size or resources.

Accordingly, HIA does not accept that additional measures, increased regulation or additional powers to the ACCC are appropriate.

Although this issue is subject to a separate review⁴, HIA particularly opposes the proposal to extend the current unfair contract laws to business-to-business transactions.

To ensure the efficient operation of the market for all businesses operating in the residential construction industry, as a general principle parties should be free to contract and agree upon their own terms and conditions, including the terms and conditions of payment.

Further, the current unfair contract laws are based on the consumer protection model.

Business owners are not 'consumers'. Businesses are more aware of their legal rights, understand the consequences of entering into contracts and are generally more sophisticated than consumers. It is inappropriate to regulate businesses via a consumer orientated law.

Unfair contract laws will impose further unnecessary and inappropriate costs on the residential building industry, risk undermining long standing contractual relationships between builders, contractors and suppliers and are not supported by HIA.

6.5 Competition and Energy Security

Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?

After coal and oil, natural gas is the third most important energy source for Australian manufacturing. Over the years, for both environmental reasons and because of the strong requirements for process heat, manufacturer of certain building supplies have switched to natural gas.

Australia has abundant resources of natural gas, in particular located in north-west Western Australia. Australia currently exports more than two and half times its domestic consumption of gas resources to off-shore markets. This means that there should be adequate resources of natural gas in Australia for many years at the current rate of usage.

Recently however energy security, and in particular access to a reliable supply of conventional (natural) gas has emerged as major concern for Australian manufactures,

⁴ *Unfair Contract Terms Consultation Paper, The Australian Government the Treasury, May 2014.*



including manufacturers of building products and supplies. The related issues of retail and wholesale gas prices have already impacted on production costs. LNG projects require heavy capital investment prior to any cash flow generation from sales and consequently for investment security natural gas projects generally require forward sales contracts.

This has caused a significant distortion of the market with a shift towards exports over domestic supply.

For instance, LNG export plants in Queensland are forward-buying as much gas as they can for export, which has removed around 80 per cent of the eastern market's natural gas from the domestic supply. Remaining domestic gas is then re-priced as if it was being sold in the Asian market under export parity pricing.

HIA is aware that a large number of manufactures cannot secure supply contracts past 2016 which is impacting on investment on domestic manufacturing and forcing such investment offshore.

Whilst HIA acknowledges that increased prices do not automatically mean the market has failed or that intervention is necessary and that gas users need to adjust to prices being set in a more dynamic and higher cost environment, the usual arguments against Government taking 'interventionist' and 'protectionist' action in this case must be mitigated high economic value for gas for domestic use.

It is in the national interest that confidence in the adequacy of future domestic gas supplies at competitive prices ought not to be undermined by an disproportionate emphasis on exports at the expense of domestic supply.

7 Summary of Recommendations

At an economy wide level Australia's current competition policy settings are generally sound.

However the use enterprise agreements to impose onerous restrictions on the engagement of independent contractors in the building industry is not only anticompetitive and counterproductive but risks deleteriously impacting upon the ability of industry to delivery affordable housing to the Australian public.

Urgent reforms are required to both the *Fair Work Act* and the *Competition and Consumer Act*.

Of additional concern is the trend towards new laws and regulations designed to "protect" small businesses from competition, such as proposed unfair contract laws applying to business to business transactions.

It remains vital for the functioning of the market that business relationship are able to be formed in an environment that provides certainty and respects the bargain struck between two commercial participants.

Intruding in commercial contracting fundamentally undermines the concepts of sanctity of contract (that parties accept and are bound by the terms of a contract) and freedom of contract (that parties are free to bargain among themselves without unnecessary government regulation).

Such reforms risk causing uncertainty to building contracts, subcontracts and supply arrangements and offend the Government's free market principles.



Below is a summary of HIA's recommendations:

Industrial Relations and Subcontracting

Competitive conditions in the labour markets supplying the residential construction industry have the potential to hurt the industry's ultimate consumer – the home buyer. The industry's ability to compete effectively would accordingly be enhanced by removing contractors from industrial law coverage and prohibiting contractors from collective bargaining. Emphasis also needs to be placed on skilling young people and supporting apprentices in the residential construction sector.

Planning and Land Supply

The planning and zoning system needs to facilitate a simpler 'one-stop-shop' approval and certification process, and enable this to be competitively delivered by either council or the private market.

The state should not be an active competing player in the general supply of land and housing to the market, in competition with private development.

Secondary Boycotts

A reinstated ABCC requires sufficient powers to investigate and prosecute breaches of section 45D in the building industry.

Collective Bargaining

The CCA requires amendment to remove the capacity of trade unions to act as agent in the collective bargaining processes.

Otherwise no further changes should be made to further water down the authorisation or notification processes for small businesses seeking to collectively bargain.

Small Business

Existing unconscionable conduct laws already provide protection for exploitation of the 'special' disadvantage of small business parties in commercial relationships

The introduction of unfair contract laws or further extensions of unconscionability provisions are neither desirable or necessary.

Financial Services

Competition in financial services, both mortgage lending and lenders mortgage insurance, need to be enhanced in terms of pricing, contestability and product range.

Skilled Migration

There needs to be a relaxation of skilled migration barriers, such as reductions in employment visa charges and associating red tape. A rolling five year net overseas migration programme should be initiated to this end.

Building Products Compliance

Overseas manufacturers of building products are not currently subject to the same level of building product compliance required of domestic manufacturers.



The Government should extend building product standards that apply to domestic manufacturers and supplies to imported building products to ensure a level playing field under which all meet the minimum standards for safety and quality. HIA recommends the creation of a building products supply register.

Adjacent Markets

Competitive conditions in adjacent sectors have impacts on the residential construction sector. Accordingly, HIA views industrial relations practices in the commercial construction sector as being detrimental to competitive conditions in the residential construction industry. Stronger competition in the utilities markets would see the industry's cost base being reduced, for example through electricity and transport costs being reduced.

Research and Development

Innovation is a cornerstone of competitive markets. Accordingly, incentives for innovation in building product manufacturing should be strengthened by government.

Building Regulations

While regulation has an important role in protecting the consumer in certain markets, regulation also carries with it compliance costs which can be particularly severe for small business. Accordingly, Building Codes should have a minimum five year review period and the Housing Provisions (Volume Two) should be retained as a standalone document in the National Construction Code. A concerted attempt to reduce all Red Tape for building should also be progressed so as to reduce regulatory costs.

Competition in Energy Markets

Competition arrangements in domestic energy markets, in particular the gas market, need to be reviewed to ensure that Australian manufacturing industry has access to adequate supplies at competitive prices.