SUBMISSION BY THE

Housing Industry Association

to the

Competition Policy Review Panel

on the

Competition Policy Review – Draft Report

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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 findings and draft recommendations of the Harper Competition Policy Review.

HIA is pleased that the Panel has not recommended overwhelming changes to the current framework as for the most part the *Competition and Consumer Act 2010* (*CCA*) is generally working well.

HIA supports the Panel's view that market regulation should be as 'light touch' as possible, recognising that the costs of regulatory burdens and constraints must be offset against the expected benefits to consumers.

However, and as identified by HIA in its submissions to the Review dated 20 June 2014, the Panel has also recognised certain aspects of the *CCA* that could be improved.

HIA supports many of the recommendations of the Panel in this regard, in particular:

- The draft competition principles (Draft Recommendation 1) and the concept of competition policy being 'fit for purpose;
- The Panel's observations that current regulations relating to planning and zoning restrict competition and impede structural change and the recommendation that "All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making" (Draft Recommendation 10);
- The Recommendation that all Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed (Draft Recommendation 11);
- The need to undertake a more detailed review of competition in the gas market (pg 36);
- The conclusion that the current unconscionable conduct laws are working as intended and do not require amendment (pg 218);
- Extending the jurisdiction of secondary boycotts to state and territory courts (Draft Recommendation 32);
- Resolving the conflict between the anticompetitive provisions of the *CCA* and content of enterprise agreements approved under the *Fair Work Act* which restrict the engagement of contractors (Draft Recommendation 33).

HIA however does not support the proposed changes to section 46 and the misuse of market power provisions. The purpose of competition laws should be to foster and promote competition, not "pick winners" or protect competitors, be they big or small.

HIA also does not support any further watering down of the collective bargaining laws.

HIA submissions are focused on the following areas:

- Section 46 and introducing an "effects" test (Draft Recommendation 25);
- Secondary boycotts (Draft Recommendation 32);
- Trading Restrictions in Enterprise Agreement (Draft Recommendation 33);

- Proposed amendments to introduce great flexibility into the notification process for collective bargaining by small business (Draft Recommendation 50).

2 Section 46 and introducing an "effects" test (Draft Recommendation 25)

In HIA's submission, the nature and effect of robust competition is to drive out inefficient operators, whether large or small.

Accordingly, misuse of market power laws should be targeted at firms with substantial market power from misusing that power to stifle competition and innovation.

HIA notes that the Panel has recommended that Section 46 should be changed 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.*

A defence would only 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.*

Rather than merely considering competition on a competitor, some businesses would now need to consider the effects of their competitive behaviour on existing and/or prospective competitors in a market. This appears to be antithesis of competitive, profit seeking behaviour.

HIA understands this recommendation has the support of some small business associations.

HIA however opposes the recommendation.

If it were to be adopted, in HIA's view, the new provisions would be difficult to enforce without substantially interfering with and increasing regulation of the market.

The draft recommendation is also at odds with other recommendations articulated through the Report, such as the principle that the law should be simple, predictable and reliable.

The second limb of the defence is particularly problematic, as it requires a business to find or set out evidence of the "long term interests of consumer". This does not appear to be an objective test.

HIA also does not support the onus being shifted to the alleged offender to establish that its' conduct did not have an anti-competitive intention.

There is little case to change the ordinary rules of the presumption of innocence, which imposes on the prosecution the burden of proving the allegation, particularly if the displacement of this rule is merely to ease the evidentiary burden of the ACCC/ regulator.

3 Secondary boycotts (Draft Recommendation 32)

HIA notes that the Panel concluded that a sufficient case has not been made for changes to the secondary boycott provisions of the *CCA* but that timely and effective enforcement is necessary.

HIA supports this position and welcomes the Panel's recommendation to confer jurisdiction to hear secondary boycott disputes on state and territory courts, in addition to the Federal Court.

However, whilst the ACCC has recently commenced proceedings against the CFMEU for their 'black banning" of building products manufacturer Boral[1], HIA repeats its call for Fair Work Building and Construction (FWBC) to be given concurrent powers for matters that come under its jurisdiction.

The construction industry regulator would be able to give targeted and timely attention to such conduct in the future.

4 Trading Restrictions in Enterprise Agreement (Draft Recommendation 33)

HIA notes that the Panel has invited further submissions on the conflict between industrial conduct permitted under the Fair Work Act 2009 (*FW Act*) and the anticompetitive provisions of sections 45E and 45EA of the *CCA*.

Attempted restrictions on the use of subcontractors remains a source of significant industrial disruption in the construction industry.

Accordingly, HIA welcomes the Panel's observations that it appears to be lawful under the *FW Act* to make awards and register enterprise agreements that place anticompetitive restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

Whist some High Court authorities like *Ex Parte Cocks* (1968) 121 CLR 313, have found that clauses which prohibited work being contracted are not matters pertaining to the employment relationship, a number decisions of industrial relations tribunals including the former Australian Industrial Relations Commission (AIRC) and current Fair Work Commission have applied an incorrect and overly expansive interpretation of the concept of matters pertaining to the employment relationship.

HIA has particular concerns with a number of decisions since the *FW Act* was passed which have found enabled clauses that substantively restrict the engagement of contractors to be "permitted matters". The effect has been to enable the widespread use of pattern bargaining agreements that contains such clauses.[2]

[1] See https://www.accc.gov.au/media-release/accc-takes-court-action-against-the-cfmeu-alleging-secondary-boycott-and-undue-harassment-or-coercion

[2] For instance in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108, the following clause was approved. The employer must:

> *"only engage contractors and employees as contractors, to do work that would be covered by the Agreement if it was performed by the Employees, who apply wages and conditions that are no less favourable than that provided for in this Agreement".*

In HIA's submission, whilst amendments to the *FW Act* are required to render such clauses illegal and unenforceable, such matters should be removed in their entirety from the province of industrial relations jurisprudence.

Contractors are engaged via commercial law, not industrial relations law.

Accordingly it is equally important the *CCA* be amended to outlaw the practice of imposing any restrictions or limitations on the use of contractors through enterprise agreements or employment arrangements, even if those agreements arrangements are approved or sanctioned under the *FW Act*.

HIA supports relevant amendments being made to section 45E, 45EA and paragraph 51(2) in this regard.

5 Collective bargaining (Draft Recommendation 50)

HIA notes that the Panel has recommended that the *CCA* be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One such change would be to enable the composition of a group of businesses covered by a notification to be altered without the need for a fresh notification to be filed.

The "underutilisation" of the current exemptions, notification and authorisation provisions does not justify or warrant further weakening of the prohibitions on price fixing, cartels and other behaviour that substantially lessens competition.

As articulated in our earlier submissions dated 20 June 2014, HIA opposes collective bargaining by independent contractors and small business. Contractors and other small businesses are market actors for the purposes of the *CCA* and should subject to the same anti-competitive conduct provisions of the legislation as other parties.

Collective bargaining authorisations under the *CCA* arrangements:

- Are anticompetitive;
- Risk treating contractors as employees;
- Risk confusing the independent status of contractors;
- Threaten housing affordability; and
- Invite collectivism and interference in commercial and contracting arrangements.

Accordingly, HIA does not support this recommendation.