Supplementary Submission
by the
Housing Industry Association
to the
Senate Economic References Committee
on

The Effectiveness of the Trade Practices Act in Protecting Small Business

Date: 16 October 2003

Table of Contents

1 Summary.

1.1 Background

The Dawson Report proposed that collective bargaining by small business be allowed when dealing with large businesses. While HIA has no quarrel with other recommendations of the Dawson Report, these recommendations would, if implemented, have a very significant unintended adverse effect on the housing industry and housing affordability in Australia. It could lead to a 30% increase in the cost of house building in Australia, without commensurate advantages to small businesses working in the housing industry.

1.2 HIA Proposals.

HIA now proposes that –

1. While HIA would still prefer that services be excluded from any amendment, if there is to be an amendment to the Trade Practices Act covering collective negotiation by small business about both goods and services, it should not be wider than is necessary to achieve the objectives of the change, that is, enhancing the ability of small business to negotiate with big business over business issues.
2. if such collective negotiation is to be permitted through a new Notification process, this process should not be allowed to be used in furtherance of different, inherently anti-competitive, industrial relations goals;
3. the TPA should contain detailed criteria on public benefit required to be shown in Notifications, including criteria on what is not to be taken to be a public benefit;
4. these criteria should specifically state that lessening of competition is itself a public detriment that needs to be offset in the Notification process by identifiable public benefits;
5. the criteria should also specifically state that industrial relations outcomes or motivation is not a public benefit;
6. in particular, any amendments to the TPA should not allow any new Notification process to be used for industry-wide pattern bargaining for industrial conditions by contractors, similar to what was found by the Cole Royal Commission to have occurred by unions in the building and construction industry; and
7. there should be no legislative restriction on who can be a bargaining agent in collective negotiations.

2 Introduction

2.1 HIA's Supplementary Submission

The Housing Industry Association has already made a submission to the Senate Economics References Committee, dated 22 August 2003.

As a result of discussions with the Government, ACCI and other industry groups, HIA wishes to put a supplementary submission to the Committee, enlarging on its views and suggesting further options to address the concerns raised by HIA in its August Submission.

2.1.1 HIA's Previous Proposals.

In its August Submission, HIA drew attention to the very serious industrial relations consequences of Recommendations 7.1 – 7.4 of the Dawson Report, which proposed collective bargaining by small business be allowed when dealing with large businesses. HIA said –

> "While HIA has no quarrel with other recommendations of the Dawson Report, these recommendations would, if implemented, have a very significant unintended adverse effect on the housing industry and housing affordability in Australia. It could lead to a 30% increase in the cost of house building in Australia, without commensurate advantages to small businesses working in the housing industry".

HIA asked the Senate Economics Reference Committee to recommend that:

1. "The benefits to competition of allowing collective bargaining by small business, while identifiable, are confined to a narrow area of goods acquisition by small businesses from large businesses, and outside that area are likely to significantly reduce competition and increase costs;
2. any amendment of the Trade Practices Act to permit collective bargaining by small business should therefore be as narrowly confined as possible, to remedy particular existing problems without creating new problems; and
3. in particular, any such amendment be confined to bargaining by small business in relation to the acquisition of goods from a large business."

2.2 Other Views

HIA has noted the view of other employer bodies, that the HIA proposal poses difficulties, of both a policy and practical nature. It has been argued that exemption of services would exclude many situations where collective bargaining will bring the greatest benefits, e.g. panel beaters, hoteliers, newsagents, etc. Furthermore it is said that goods and services are often commercially inter twined and not easily able to be separated.

HIA accepts the validity of those comments, but nevertheless affirms its strong belief that the Trade Practices Act should not be used in furtherance of inherently anti-competitive industrial relations goals.

Generally speaking, HIA supports efforts, such as that by the Fair Trading Coalition, to improve the protection afforded by the TPA to small business.

3 HIA's Concerns Remain.

3.1 Problems of Contractor Collective Negotiation.

3.1.1 The TPA and Industrial Relations.

The Trade Practices Act, in s.51(2) makes it clear that it is not generally intended to operate in relation to -

"the remuneration, conditions of employment, hours of work or working conditions of employees"

When the TPA was framed in 1974, it was expressly intended as a matter of policy to operate parallel to the hitherto existing industrial relations system under the then ***Conciliation and Arbitration Act 1905,*** and to not prevent collective agreements between employees and employers about industrial matters under that Act or under State industrial laws. In the absence of s.51(2), "combinations of workmen" would have arguably been rendered illegal, as they had been before 1905.

The Dawson proposal would effectively extend this IR exemption to agreements between head contractors and subcontractors, thus effectively putting them into the same legal position under the Act as employees.

While the TPA applies to both goods and services, and to both supply and acquisition, HIA considers that it should not seek to supplement or cut across existing industrial laws governing collective bargaining over the supply of services by employees to employers. The Dawson Committee did not address this issue, but it is doubtful that the Dawson Committee intended to allow labour-only contractors to band together to achieve industrial objectives as if they were employees.

3.1.2 Problems of Overlap with the Industrial Relations System.

At present, contractors in the housing industry compete for work as a matter of choice and enjoy the substantial benefits of running their own businesses. They work flexibly and efficiently and produce work some 20 per cent less costly than in the union-dominated commercial sector (source - Econtech Report, 2002). They do not wish to work as employees and are better off than employees.

This Recommendation, if implemented, would effectively change them from small businesses to employees, and destroy the fabric of competitive independent contracting. It would remove the existing competition amongst businesses, and between the subcontracting system and the union Enterprise Bargaining Aagreement system. It would increase the cost of housing, and would risk delivering the housing industry into the hands of the CFMEU.

This would occur because contractors would have a strong economic incentive to join the CFMEU and have the union negotiate the best possible contract rates (and associated conditions such as RDOs) for them. In CFMEU hands, it would be a natural process for contractor rates to be negotiated as part of the State wide negotiation between MBA and CFMEU of EBA rates, which now occurs. The rates would tend to be aligned, and they would not be aligned downwards. EBA conditions would also flow on to housing contractors. The effect on housing affordability would be an increase in overall costs by at least 20% and probably more.

HIA considers that this problem should be addressed in any proposed amendments to the TPA. In particular, any amendments to the TPA should not allow any new Notification process to be used for industry-wide pattern bargaining for industrial conditions by contractors, similar to what was found by the Cole Royal Commission to have occurred by unions in the building and construction industry.

3.1.3 Past TPA Authorisations and Industrial Relations.

There is a current ability to seek Authorisation for collective agreements about the working conditions of contractors, and some unions have in the past sought Authorisation for collective agreements among contractors which supplement and reinforce their industrial agreements with employers. Such applications have had a mixed reception by both the ACCC and the Trade Practices Tribunal.

The most recent case was the ACT Concrete Carters in 1989, where both the TPC and the Tribunal refused Authorisation. The argument put by the applicant Transport Workers Union was that the agreement on rates for concrete carters would benefit industrial harmony, by eliminating competition between employees and contractors.

However, in the past such arguments have been accepted by the Tribunal and are noted as possible areas of public benefit by the ACCC in its current Authorisation Guidelines. In HIA's view, the restriction or removal of competition to achieve 'industrial harmony' is not a public benefit in its own right – it may be beneficial, but only if such harmony leads to improved outcomes for the public in general rather than the generation of monopoly rents.

So there is already evidence of the emergence of the very problem HIA has identified. A simplified Notification process will greatly facilitate this extension of protection under the Act for anti-competitive collective agreements about industrial relations matters covering both employees and contractors.

3.1.4 The Role of Industry Associations as Bargaining Agents.

Some industry/employer associations have proposed that the ability of persons to act as bargaining agents for small business persons be restricted to such associations. While not the rationale for such a restriction, it is said that this will help remove the process from the industrial relations arena. However, HIA considers that, for its part at least, both legal and practical reasons would prevent it from being able to act as a bargaining agent, on either side, in any negotiations arising under a Notification to the ACCC as proposed.

Nor would HIA consider it appropriate for this part of the TPA to make any explicit direct link with Registered industrial organisations (which are in a formal sense unions of employers), with the implication that this is an employer-employee industrial process, which it is not. HIA is not an organisation registered under the ***Workplace Relations Act 1996*** or any State industrial law, but is a company limited by guarantee. HIA and its members seek to avoid the industrial arena. Other industry and trade associations are in the same position.

One of the problems with collective bargaining by subcontractors is that, of the existing representative bodies in the building and construction industry, only the unions would be free of conflicts of interest in representing such subcontractors. HIA, the Civil Contractors Association, and the various Master Builders, Master Plumbers and Master Painters Associations all have membership drawn from both head contractors and subcontractors, while the Australian Industry Group does not represent subcontractors. They would be

placed in an impossible position if they were asked to represent one group of members against another group.

It must be kept in mind that any collective contract rates negotiations between subcontractors and a head contractor are a zero-sum game, that is, a gain for one side can be made only at the expense of the other side. There is little if any opportunity for both sides to win, when, for example, the issue to be negotiated is the price the head contractor will pay per thousand for bricklaying.

And in an industry with narrow profit margins, the game is played for high stakes. Every $1 increase in the price is a dollar in the brickie's pocket that came directly out of the builder's profit margin. Collective bargaining is not painless. While claims and counterclaims may be the day-to-day stuff of bargaining, this to be effective must be backed up by the real threat of boycotts, strikes and lockouts. In these circumstances, if HIA staff were assisting one side against the other, they would be hopelessly tainted as untrustworthy for the future in the eyes of that other side. Nor would a member be happy to pay membership fees to an organisation which was actively involved in a bargaining process which cost them money.

Even if HIA sought to act as a referee rather than an advocate, inevitably, one group or the other would become dissatisfied with the progress or outcome of the negotiations, and by association HIA's conduct of them, and would resign and seek a new advocate for their cause. In fact, a referee's role would be just as thankless as that of an advocate for one side against the other. Subcontractors would naturally want to gain all they could through such bargaining, and would not be content unless they were represented as effectively as possible in the bargaining, by the best available advocate. Builders would naturally have the same outlook. The outcome would be to mirror the Industrial Relations Commission process, with partisan professional union and employer advocates, and HIA cast in the role of, but with none of the powers or protections of, the Industrial Commission.

The final possibility is for industry organisations to themselves recommend rates for the industry. This, however, is not collective bargaining, nor would it be lawful under what the Dawson Review proposes. Neither would there be any reason for the parties to the collective bargaining process to accept those recommended rates if they thought they could negotiate better ones.

Thus, in the housing industry at least, no existing (and probably no conceivable) industrially registered organisation of employers could effectively represent subcontractors in collective negotiations with head contractors.

It might be objected that, even if HIA cannot act as a bargaining agent, it could refer members to appropriate specialist independent HR and IR consultants. While this is true, it merely confirms the IR nature of the process. Furthermore, if non-employer association bargaining agents are allowed, there is nothing to stop unions setting up or endorsing their own 'friendly' unincorporated 'trade associations' or companies to provide these services, as they have already done in other areas such as OH&S.

For all these reasons, if collective negotiation by small business is to be permitted, HIA could not agree that any legislative restriction of who can be a bargaining agent would represent even a partial solution of the problems to which it has drawn attention above. In HIA's view, any attempt to legislatively restrict who can be a bargaining agent is likely to be a two edged sword, and ultimately will probably prove ineffective.

3.1.5 Administrative Problems in the Notification Process.

Even the most carefully drafted legislative provisions are useless if their enforcement is administratively impossible. The proposed Notification process for small business negotiations is likely to prove popular and will result in a significant administrative workload for the ACCC. In the nature of things, it will be some time after Notification before the ACCC will be able to assess any particular Notification, and in the meantime the conduct covered by the notification will be legal.

Given the desirability for the TPA to not interfere in pure industrial matters, there is a need for some legislative condition precedent to the Notification process which will filter out these industrial matters right at the start. Otherwise, such matters will be among the many agreements Notified, and by the time the ACCC gets around to assessing them, the IR deals will have been done and outcomes agreed. Disallowance by the ACCC at this stage will be too late – union industrial muscle will suffice to ensure that the agreed outcomes are observed across the industry.

4 HIA's Proposals

4.1 HIA's Original Proposals.

HIA does not resile from the proposition that collective bargaining by small business has the potential to significantly lessen competition in some industries, and that lessening of competition is itself a public detriment that needs to be offset by identifiable public benefits.

HIA would still prefer that services be excluded from any amendment. However, if there is to be an amendment covering both goods and services, it should not be wider than necessary to achieve the objectives of the change.

4.2 HIA's Additional Proposals.

4.2.1 Operation of Notification Provisions.

HIA considers that any amendments should be simple and easily understood, with clear legislated criteria about public benefit, supported by rapid administrative processes, including ACCC guidelines giving practical examples of how the statutory criteria may or may not be satisfied.

HIA notes that the Dawson Report did not identify just what test the ACCC would be applying in giving effect to its Recommendations 7.1-7.4, but HIA believes that Notifications should be disallowed by the ACCC if the claimed public benefits cannot be substantiated, or can be obtainable in other ways that do not involve restricting competition.

4.2.2 Restriction of Bargaining to Non-Industrial Matters.

One possible solution to the problem of overlap with the IR system is to include in the TPA some detailed criteria, both positive and negative, on public benefit for Notifications. Such criteria could specifically state that industrial relations outcomes or motivation is not a public benefit.

The exposure draft Building and Construction Industry Improvement Bill 2003 contains an example of a definition of 'industrially motivated' conduct, in s.71, (for the purposes of prohibiting it in s.72). The relevant provisions are -

> *"71.....*
> ***industrially-motivated*** means motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:
> (a) supporting or advancing claims against an employer in respect of the employment of employees of that employer;
> (b) supporting or advancing claims by an employer in respect of the employment of employees of that employer;
> (c) advancing industrial objectives;
> (d) disrupting the performance of work.
> The employer referred to in paragraphs (a) and (b) need not be the employer whose employees do the work to which the action relates."

The adoption of a negative criteria in similar terms to 'industrially motivated conduct' could be very effective in filtering out those collective negotiation agreements which are industrially driven, anti-competitive and should not in principle be allowed. That is, a Notified agreement will prima facie be taken to be not in the public interest if it is *industrially motivated* as defined. This will allow the ACCC to weed out such Notifications at a very early stage. If the parties wish to persist with the Notification process, the onus will be on them to demonstrate public benefit before the ACCC or Tribunal before the Notification can become effective.

4.2.3 Other Public Benefit Criteria.

In previous cases the Commission and the Tribunal have recognised the following as public benefits:

- fostering business efficiency, especially when this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
- growth in export markets;
- development of import replacements;
- economic development, for example of natural resources through encouraging exploration, research and capital investment;
- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;

- improvement in the quality and safety of goods and services and expansion of consumer choice; and
- supply of better information to consumers and business to permit informed choices in their dealings.

Once again, if disallowed by the ACCC, it should be for the applicant to demonstrate, on balance, that these public benefits are likely to be obtained by the agreement and cannot reasonably be obtained through other, legal means.

5 Summary

HIA considers that the Dawson Committee Recommendations 7.1 – 7.4 were not fully thought through as regards their industrial relations implications. The possible consequences to the housing industry, and housing affordability in Australia, could be severe. This alone would justify a very careful consideration of the possible effect of any amendments to the Trade Practices Act.

The modifications which HIA seeks would go far to address the industry's concerns in this regard. HIA considers that its proposals would do no harm to, and could enhance, the policy objectives behind these Dawson recommendations.

Housing Industry Association Ltd

16 October 2003.