



# Submission to the Senate Inquiry into Small Business and Employment

June 2002

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# 1 Introduction

## 1.1 Housing - a \$35 billion+ a year industry

Housing is the engine of the Australian economy. In 2000/01, Australians spent directly \$35 billion dollars on building new homes and renovating existing homes, equivalent to 3.5 per cent of GDP. Not only does the housing industry contribute more jobs and more to GDP than either the mining or agricultural industry, but also industry activity levels lead the economy out of and into recession.

Independent small businesses prevail in the housing industry. The flexibility and efficiency of the trade contracting system has made Australia's housing industry one of the most cost-effective and innovative industries in the world.

The efficiency of the housing industry is best illustrated by the cost comparison between commercial and domestic construction. Comparing the work of the same trades between commercial and residential construction, the residential building sector delivers cost savings of twenty to twenty five percent. On a typical home, this efficiency gain is equivalent to obtaining an additional bedroom and bathroom at no cost to the homebuyer or housing an extra 150,000 Australians.

## 1.2 Building Jobs & Small Businesses

The housing industry provides many Australians with the freedom to work for themselves. Small business proliferate in the housing industry. Indeed, one in five Australian small businesses operates in the housing industry. In addition, small business abounds in downstream industries that supply building products and fittings to the industry.

The industry offers easy entry and great opportunities for individual enterprises. More than ninety percent of the industry's companies are small businesses. All of these businesses provide jobs for almost 370,000 Australians. Moreover, on the basis of the industry's employment multiplier, for each on-site worker it employs, housing generates an off-site job in building-related industries.

## 1.3 Building Regions

The distribution of activity in the housing industry matches the distribution of population in Australia. It is one of the few industries where activity is not concentrated in a few major urban centres. Many of the industry's varied materials are locally produced. The localisation of the industry has been reinforced by the industry's extensive use of the trade contracting system. Australia's home builders work in the communities where they live.

Housing activity has a critical flow-on effect; every building job in rural and regional Australia creates a new job in local supply industries. This regional activity generates income and jobs in sectors such as financial services, retailing and sales and marketing. The industry's activities, as well as the activity it indirectly generates, are widely dispersed throughout Australia's regions.

## **1.4 Building Homes**

While capital expenditure on housing fluctuates, the proportion of income spent on housing remains fairly stable. Over the past 20 years, Australians have spent consistently around one in every five dollars of income on housing. As individual Australians' income levels rise, our housing expenditure tends to switch from rental to purchasing of a home.

Given the many individual, social and economic advantages of home ownership, governments have attempted to improve home ownership opportunities. The two critical factors that determine when an Australian can afford to purchase a home are income levels and housing prices. The housing industry has demonstrated its capacity to continually reduce housing costs and provide affordable homes, through home ownership, for more than 5 million Australian owner-occupiers.

Australians are fortunate enough to be able to purchase their new homes in one of Australia's most competitive markets. For example, over the past 10 years, while the typical new home has increased in size by 13% and the price index of housing materials has risen by some 20%, it could be expected that average house prices would have risen by at least 23%. In fact, fierce competition and innovation have seen the price of a typical project home rise by just 13%. The containment of almost half the increase in housing costs has been achieved despite the extra amenities like en-suites and walk-in-robos that have become increasingly popular over the last 10 years. The housing industry receives little recognition for this formidable ability to build larger and more comfortable homes without passing on increases in input costs.

Innovation, competition and productivity improvements have enabled Australia's housing industry to deliver more affordable homes. In the housing market, where a one-percent increase in price equates to thousands of consumers who can no longer afford a new home, affordability is the critical issue. The outstanding performance of the housing industry has helped Australians to stop paying rent and own their own home.

## **2 About HIA**

HIA is Australia's peak residential building industry organisation. HIA is a lobbying and service organisation, firmly focused on the needs of its members. HIA's mission is:

"To promote policies and provide services which enhance members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA is Australia's largest and only national building industry association, with a diverse membership comprising residential, commercial and industrial builders, building designers, developers, trade contractors, large and small product manufacturers, and professional services.

HIA is a strong advocate for private enterprise. In doing so, the Association supports and encourages:

- The right of trades people to contract freely with builders;
- HIA being independent so that it can represent members' interest without fear or favour;
- Industry self regulation;
- Affordable homes for Australians;
- Policy leadership and strength in a single united voice for the residential building and development industry; and
- A trading environment where members compete on fair and equitable terms.

HIA's membership structure mirrors the structure of the industry it represents. More than 90 per cent of HIA members are small businesses. These small firms, in particular, rely on HIA for advice and training to equip them to meet the challenges of the rapidly changing building market. To ensure that HIA remains accessible to members' local concerns, HIA maintains offices in every State and Territory.

HIA's service focus means that it builds relationships with members. This relationship with members is HIA's most valuable resource, providing the source of HIA's credibility and authority. Member's suggestions and involvement at all stages of policy development provides HIA activities with a sharp commercial focus.

HIA's member services include:

- Training and professional development;
- Business networking events;
- Market information through HIA's national Housing and regional Building News magazines, and annual AUSBUILD exhibition and regional trade events;
- Industrial relations, legal, technical, OH&S, and town planning advice;
- A wide range of contracts and documentation; and
- Insurance services.

HIA's membership reach, training resources and industry rapport mean that HIA plays a unique leadership role in the housing industry.

## 2.1 Context

HIA welcomes the opportunity to make a submission focusing on two of the Committee's terms of reference:

1. The effect of government regulation on employment in small business, specifically including the areas of workplace relations, taxation, superannuation, occupational health and safety, local government, planning and tenancy laws.
3. The extent to which the complexity and duplication of regulation by Commonwealth, state and territory governments inhibits growth or performance of the small business sector.

In respect to the first term of reference, HIA brings to the Committee's attention the need for more certainty for independent contractors through the application of a single definitive test of who is a contractor for all state and commonwealth legislation.

On the third term of reference HIA proposes federal leadership is needed in planning and development application and approval systems. This remains one of the few areas of microeconomic reform. The cost of inefficient, inconsistent planning and development systems has been estimated as an annual efficiency loss to the economy in the order of \$1.5billion.

Government policies across all pillars of Government affect the efficiency, job generation prospects and affordability of the final product of the residential construction industry. Lack of consistency prevents the effective operation of a single national market for homebuilding.

The housing industry's compliance burden is growing and with this, the revenue streams for governments.

## 2.2 Revenue to Governments from Housing

Example of Government Revenue sourced from a land and house package:

<b>Land</b>	<b>\$250,000</b>
Section 94 contributions	\$18,000
Stamp duty	\$ 9,000
Water Board headworks	\$15,000
Total for land	<u>\$42,000</u> (17%)
<b>House</b>	<b>\$175,000</b>
Council fees and charges	\$ 5,500
GST	\$17,500
Total for house	\$23,000 (13%)
Total revenue	<u>\$65,000</u> (15%)

Each year over \$15 billion dollars is returned to government from the housing industry.

At the Federal level, a vast range of policies impact on the industry, but without appropriate coordination or a whole of government approach. They include:

- Economic and taxation
- Competition Policy
- Immigration Program
- Environment
- Industry and Innovation
- Workplace Relations
- Public Housing and income support
- Education and training

The impact of the GST and the \$7000 first home owners grant was testimony to the impact of policies on jobs in the housing industry. In the December quarter of 2000 the housing industry suffered a loss of 50,000 jobs and 2 per cent was wiped off GDP.

In addition, state and local governments are increasingly determining, who can build, what can be built and where houses may be built. Through consumer protection, licensing, planning and building regulation, land release and infrastructure policy, development levies, stamp duties, affordable housing levies land taxes, the housing industry, and indeed the individual house, is highly regulated. These regulations often serve to make housing less affordable rather than any better. These cost, and related uncertainties, prohibit job growth, in particular the taking on of apprentices.

### **3 Issue - Definition of “Employee”, “Contractor” and “Worker” for**

#### *Terms of Reference*

*1. The effect of government regulation on employment in small business, specifically including the areas of workplace relations, taxation, superannuation, occupational health and safety, local government, planning and tenancy laws.*

#### **3.1 Various Purposes - Ambiguity of a worker’s legal status**

One of the problems, which the building and construction industry faces on a daily basis, is the dichotomy between the union view that all workers should be employees, and the desire of many workers to work as independent trade contractors.

Contractors in the housing industry are essentially small business persons working for themselves and do not wish to be treated as employees for any purpose, covered by the industrial relations system or to be members of unions. Rather than being protective, they see this IR system as intrusive and limiting their ability to earn. Likewise, contractors see unions as a barrier to their business success.

### 3.2 Current legal position

Why does this ambiguity as to a worker's status prevail? There are many different definitions of who is a contractor, under both State and Commonwealth legislation.

Whether a particular person is an employee or an independent contractor is a practical question, which arises every day in the ordinary course of business, but is one that no one can clearly and confidently answer.

There is a plethora of legislation, both State and Federal, using different and conflicting definitions of employees and contractors for particular purposes, while the common law tests are subjective, uncertain and for practical purposes unreliable. Only a court of law can definitely decide a person's legal status, and that decision can in the nature of things only be handed down well after the event.

The efforts to "deem" people to be employees by Act of Parliament, when they are not, adds further confusion and uncertainty to the common law. This legislative intervention is mainly an effort to maintain the effectiveness of particular legislation in pursuit of social policy goals, in the face of economic resistance.

Even within the Commonwealth's own legislative area of competence, different definitions are used for the purposes of the Workplace Relations Act, Superannuation Guarantee legislation, ordinary PAYG Income Tax purposes, Alienation of Personal Services Income (APSI – see Div 84 of the **Income Tax Assessment Act 1997**), Australian Business Number (ABN), etc. HIA has been raising this problem with governments for many years, but the current legal situation in this important business area is most unsatisfactory.

The legislative position has deteriorated rather than improved in recent years. The Howard Government commissioned a report "*More Time for Business*" from the Bell Committee, which in 1997 recommended the adoption of a single definition of who is an employee.

While the Government accepted the Report in principle, no action followed. More recently, Queensland enacted (and NSW and Victoria recently debated) legislation enabling the State Industrial Commission to deem contractors to be employees where this is "appropriate". A clear and objective definition of who is an employee for Workcover purposes based on tax status has, at union urging, been abandoned in Queensland in favour of a return to the subjective definition used in other States, which has caused endless trouble.

The APSI tax legislation represents the latest attempt by the federal legislature to grapple with this issue, by adding another definition on top of existing tax



definitions. In summary, a person who is not a common law employee and who gains income from providing personal services will be required under tax law to pass a test to demonstrate that they are running a 'personal services business'. The most important test is the 'results' test, that is, does at least 75 per cent of the person's personal services income come from contracting to provide a result, do they supply all necessary tools and equipment, and are they liable to remedy any defective work.

There are also other tests. However, federal tax laws are themselves inconsistent, since a person may be a contractor who has an Australian Business Number, and is registered to collect GST, and yet attract a superannuation guarantee charge liability and be rejected as being a 'personal services business'.

If contracting is to survive in Australia as a legitimate and accepted way of working, and a freely chosen alternative to working as an employee, the distinction between contractors and employees must be clear and unambiguous. In this regard, HIA has been seeking support for the development of an agreed common position for all Australian governments on a clear and unambiguous legal status for contractors, based on the APSI legislation.

### 3.3 HIA's Policy

HIA's national policy supports the use for all purposes of the APSI test of who is a contractor, that is –

**“The current test set out in Division 84 (Alienation of Personal Services Income) of the Income Tax Assessment Act 1997 is the appropriate single national objective test of who should be treated as a trade contractor for the purposes of all relevant Commonwealth and State legislation.”**

HIA considers that it would be better if the current tax test was adopted for all purposes.

Ideally, the test would be taken only once, and a person could be confident of their status for all relevant purposes. Recently, the Western Australian Labor government announced that it would adopt a test for the purposes of its payroll tax legislation based on the APSI test. Regrettably, and in spite of HIA lobbying to the contrary, the WA test will not be quite the same as the test in Division 84, and a person could pass the ATO test but fail the WA test, or vice versa. This will not make matters any simpler for contractors.

One commonly used approach at the moment is for head contractors to require all subcontractors to be incorporated, as a condition of tender. Refusing to deal with unincorporated contractors helps protect head contractors from:

- Complex contract administration problems, in having to constantly monitor the status of subcontractors [under some legislation a subcontractor may be deemed an employee at an uncertain time after the commencement of the contract, depending on circumstances];

- Retrospective claims for Award entitlements [running into many thousands of dollars];
- Retrospective liability for Workers Compensation cover [and sometimes injury payouts];
- Liability to pay Superannuation Guarantee Levy and the cost of administration of contributions, including Choice of Fund legislation in some States;
- Liability to pay Long Service Leave contributions in some States; and
- Union industrial pressure and right of entry onto building sites. However, incorporation will have no legal effect in relation to Payroll Tax and Alienation of Personal Services Income legislation, and no practical effect against union pressure. Incorporation also involves the additional costs of maintaining the corporate entity. There needs to be acceptance by governments at all levels that business involves risk, and those who choose to go into business are risk takers. A better business and regulatory environment would be a system that encompasses:
  - Incorporation at the choice of the business person [for example where limited liability is desired] rather than being forced on the business person as the only avenue to resolve some legal uncertainties as to their status;
  - An objective, unambiguous test of a natural person's legal status;
  - protection for those who need it because they are employees and cannot control their risks;
  - freedom for those who choose to work as contractors; and
  - an ability for business people to effectively manage their own risk and affairs.

### **3.4 Recommendation**

HIA recommends that –

1. The Commonwealth government adopt the APSI test as a single objective, unambiguous test of a natural person's legal status as either an employee or an independent contractor, and State and Territory governments be encouraged to accept the results of this test for the purposes of their own employment, workers compensation, payroll tax and other relevant legislation.
2. The TPA be amended to ensure that any attempt by a party to coerce a person into changing their status is an offence.

## 4 Planning and Development Reform

*Terms of Reference 3. The extent to which the complexity and duplication of regulation by Commonwealth, state and territory governments inhibits growth or performance of the small business sector.*

### 4.1 Background

The processes that govern the supply and zoning of land and the associated systems of development approval have become increasingly more complex and fragmented across the country.

When compared to the predictability and structured flexibility of the Building Code of Australia (BCA), the various state planning systems are unanimously considered to be overly complicated and in need of reform. Our planning systems are cumbersome, uncoordinated and largely ineffective in meeting today's housing demands. Despite this, state and local governments are increasingly inclined to introduce planning legislation and policies that override or, at the very least, confuse the standards established in the BCA.

The existence of eight markedly different systems, compounded by numerous local council variations, is a significant deterrent to business operations and investment decisions nationally, and in direct contradiction to the principles of national competition policy that promote the development of a highly efficient, globally competitive economy.

There is no justifiable reason why our planning systems, that are so disparate that they even lack common definitions, should not be unified.

If business is to operate successfully in Australia, red tape and bureaucratic differences need to be slashed. The current plethora of development assessment systems creates numerous impediments to the efficient operation of the property and development industry and creates significant barriers to investment in other industry sectors.

The residential home building industry is extremely concerned at the state of our nation's planning systems. The industry is most anxious about the impacts of the systems' complexity on the affordability of new housing and the debilitating effect of process uncertainty on new development potential. The need for wide-sweeping planning reform is now urgent.

Notwithstanding the detailed scrutiny applied to the assessment of development proposals under our planning systems, there is a growing dissatisfaction with planning outcomes, whether this be in the built form of new developments or neighbourhoods, or in the contribution of process to amenity and local character.

HIA's planning blueprint – *Better Living Environments* (copy attached) – demonstrates that with focussed commitment, good development and regulatory outcomes are possible. It does this by highlighting and discussing a series of best-practice case studies from across the nation.

The major objectives of *Better Living Environments* are to:

- lift the profile of current planning inadequacies and accelerate the pace of constructive reform;
- identify and promote best development and regulatory practice; and
- deliver a more responsive and cost-effective planning system.

*Better Living Environments* poses the simple notion that, for the benefit of the community generally, all stakeholders have a responsibility to manage planning to deliver predictable, affordable and flexible solutions that enhance the quality of our residential and working environments.

*Better Living Environments* confirms that HIA is committed to pursuing development strategies that meet the nation's housing needs, expand home ownership opportunities and help build livable neighbourhoods and communities.

The successful implementation of *Better Living Environments* will result in:

- More certainty for both business and the community about how developments will be assessed;
- Fewer delays and disputes in the determination of development proposals; and
- More affordable housing and development.

## 4.2 Recommendations

The Development Assessment Forum (DAF) was founded in 1998 following the Prime Minister's parliamentary statement of March 1997 titled 'More Time For Business'. DAF was formed primarily to initiate the harmonisation of planning systems throughout Australia.

DAF, unfortunately, is slow in its deliberations and, without substantial and ongoing federal funding and commitment, likely to be politically ineffective.

HIA calls on the federal government to urgently consider the following actions to accelerate the pace of planning reform. HIA recommends:

- The Federal Government place planning and development reform firmly on the agenda of COAG.
- The \$1billion in federal grants provided annually to local government be tied to the achievement of key performance information, including implementation of more consistent and streamlined planning and development approval systems
- The Federal Government commission the Productivity Commission to undertake an independent review of Planning and Development approval systems. The review will identify the costs to business and the economy of the continuation of poor and inconsistent planning and building approval practices and also research examples of better practices that may be adopted across Australia.
- Commit to the completion of current and proposed DAF projects and establish firm immediate-short term timeframes for the states' implementation of DAF's recommendations.
- Establish an infrastructure funding program linked to urban and regional growth management that supports the residential and employment needs of our population.
- Commit to a continual benchmark program that binds all levels of government to ongoing and consistent planning practice improvements. Require state governments to deliver "state of planning reform" reports, demonstrating best practice achievements, to qualify for *Better Living Environments* project funding.
- Confirm the role of the Building Code of Australia as the pre-eminent regulation governing the construction of residential buildings in Australia.
- Commence a scoping study that examines the potential for the BCA to incorporate environmental and societal construction standards.
- Through DAF, provide federal government support of HIA's GreenSmart initiative to foster a best practice industry response to the delivery of environmentally responsible housing.

- Commit to review the Commonwealth's Environment Protection and Biodiversity Conservation (EP&BC) Act to the extent that it duplicates or complicates current state laws and processes and/or pursue the engagement of approval bilaterals with state governments for those matters where appropriate state legislation exists.
- Commit to the development of a national program to support regional planning forums, with industry representation, based on a whole-of-government approach.